

National Inquiry into Sexual Harassment in the Workplace

Submission by the Australian Council of Trade Unions to the
Australian Human Rights Commission

28 February 2019

D No. 190/2018

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Introduction

The Australian Council of Trade Unions (**ACTU**) thanks the Sex Discrimination Commissioner (**SDC**) for this timely and important inquiry and for the opportunity to make a submission.

Sexual harassment is a workplace issue and should be properly addressed by our workplace laws. The ACTU has long been calling for stronger and more effective measures to prevent, address and redress all forms of violence, harassment, discrimination and bullying at work.¹ Workers who are sexually harassed need access to fair, effective and efficient complaints mechanisms, as well as the power to act collectively through their unions to create safe and healthy work environments free of harassment and violence.

Almost 10,000 people responded to the ACTU's 'sexual harassment in the workplace' survey between 18 September and 30 November 2018, showing just how important this issue is to working people. Two in three women and one in three men told us they have been subjected to one or more forms of sexual harassment at work. Only a quarter of people who were harassed made a formal complaint, less than half reported the incident and 40% told no one at all, because workers do not believe that our current rules will deliver them justice. Sexual harassment at work is core union business and forms a key aspect of our ongoing campaign to Change the Rules for working people.

Serious reforms are needed to address the conditions which allow sexual harassment to occur, as well as ensuring that the legal system is responsive and effective for complainants. It is crucial that regulatory responses acknowledge that sexual harassment is symptom of gender inequality at work, a form of sex discrimination, a type of gender-based violence and a 'psychosocial' health and safety risk - it forms part of a spectrum of behaviours and risks and cannot be addressed in isolation.

This submission focuses on the causes of sexual harassment at work, the current federal legal framework, the drivers of workplace sexual harassment, workplace characteristics and practices that increase the risk of sexual harassment, the current federal legal framework and recommendations to address sexual harassment in Australian workplaces.

A number of ACTU affiliates have made separate submissions to the Inquiry. The ACTU supports and endorses the content of those submissions. The ACTU has also joined with over 100 organisations to submit a Joint Statement to the Inquiry setting out 5 priority areas for reform (**Attachment A**).

¹ See for example, [ACTU Submission](#) to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act* (2008)

We would be happy to provide further information about any aspect of this submission on request, including further details of the case studies.

Terms of Reference

On 19 June 2018, the SDC announced that the Australian Human Rights Commission (**AHRC**) would be commencing a national inquiry into sexual harassment in the workplace (**the Inquiry**). The SDC has indicated that the Inquiry will:

- Consider the economic impact of sexual harassment;
- Consider the drivers of sexual harassment;
- Consider the adequacy of the existing legal framework to prevent sexual harassment;
- Identify examples of existing good practice;
- Make recommendations for change.

The Inquiry will review and report on:

- *a national survey of the prevalence, nature and reporting of sexual harassment in Australian workplaces, by sector*
- *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*
- *the use of technology and social media to identify both alleged victims and perpetrators of workplace-related sexual harassment*
- *the drivers of workplace sexual harassment, including whether 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*
- *some workplace characteristics and practices are more likely to increase the risk of sexual harassment*
- *the current legal framework with respect to sexual harassment*
- *existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally 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*
- *recommendations to address sexual harassment in Australian workplaces.*

Executive Summary

Australia's current regulatory framework fails to incentivise employers to create harassment-free workplaces. Instead, our laws place the burden of addressing harassment almost entirely on the individual. The *Sex Discrimination Act 1984 (SDA)* aims to eliminate sexual harassment and promote equality, yet it simply establishes a complaint process that relies on individuals coming forward and reporting harassment. There is no meaningful requirement on employers to implement effective, proactive measures to prevent sexual harassment in the workplace, and no enforcement or compliance mechanism. The complaints process is costly, time consuming and risky. Many individuals do not complain at all for fear of victimisation or other reasons. The *Fair Work Act 2009 (FW Act)* does not specifically proscribe sexual harassment in the workplace, and violence and harassment is not adequately addressed by employers or regulators as a Workplace Health and Safety (**WHS**) issue.

It is clear that there is no quick fix for the problem of violence and harassment at work. As noted by the International Labour Organisation's (**ILO**) Meeting of Experts on Violence and Harassment in the World of Work², 'an integrated approach' is required, involving stronger anti-discrimination laws, workplace laws and WHS laws, as well as non-regulatory measures such as increased expertise and capacity in responsible regulators, and high-profile education campaigns.

The ACTU considers that the following reforms should be priorities for any government seriously committed to tackling sexual harassment at work:

- *Workers who are sexually harassed should have a clear right of action in the national industrial tribunal which focuses on the merits of the case rather than narrow legal technicalities. Sexual harassment and other forms of discrimination should be explicitly prohibited by the FW Act, and the Fair Work Commission (FWC) should be empowered to resolve, by conciliation or arbitration if necessary, sexual harassment and discrimination disputes. Unions and other interested parties should have an effective capacity to bring representative complaints on behalf of a worker or workers. The ACTU supports significantly strengthened powers for the FWC in relation to gender equality more broadly, including the establishment of a Gender Equality Panel within the FWC.*
- *A new WHS Regulation and Code of Practice should be developed in consultation with social partners and experts on all psychosocial hazards, including sexual harassment. The new Regulation and Code must address the current problematic definition of 'bullying' in*

² [International Labour Office, Conditions of Work and Equality Department, Final Report of the Meeting of Experts on Violence against Women and Men in the World of Work 3–6 October 2016 \(2016\) MEVWM/2016/7, 36](#)

workplace law and WHS law, and the confused messages in WHS guidance material about the relationship between harassment, violence, discrimination and bullying at work. The definitions of ‘notifiable incident’, ‘serious injury or illness’ and ‘dangerous incident’ should be reconsidered and redrafted to require reporting in relation to psychosocial hazards, including sexual harassment. Australia’s national approach to WHS compliance and enforcement in relation to psychosocial hazards, including sexual harassment, needs an urgent review. Unions should have the right to prosecute for breaches of WHS laws.

- *The SDA should be strengthened, including by empowering and resourcing the SDC to conduct own motion inquiries into particular sectors, industries or workplaces, authorising courts to award exemplary and punitive damages for breaches of the SDA, and extending the time-limit for sexual harassment complaints under the SDA. A new ‘positive duty’ on employers should be considered.*
- *The Australian Government should actively support the development of, ratify, and fully implement a new ILO Convention supplemented by a Recommendation preventing violence and harassment in the world of work, including supporting broad and flexible definitions of ‘workplace’, ‘worker’ and ‘violence and harassment’.*

What is sexual harassment?

There is no internationally agreed definition of ‘sexual harassment’, although there is a significant amount of common ground in terms of the elements of the offence and the scope of behaviour covered. It is accepted that sexual harassment is a form of sex discrimination³ and gender-based violence,⁴ and that it comprises a range of unacceptable physical, verbal and non-verbal conduct, from criminal behaviour, such as rape and sexual assault, to conduct which can be a common part of day-to-day workplace interactions, such as jokes and physical contact. A worker may be sexually harassed by a manager, a colleague, or a customer, client or other third party.⁵ While men can experience sexual harassment (from both women and men⁶), and women can be perpetrators of

³ See for example *O’Callaghan v. Loder* [1983] 3 N.S.W.L.R. 89; ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

⁴ UN Declaration on the Elimination of Violence Against Women, Article 2; UN Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 35 on gender-based violence against women

⁵ International Labour Organization, ‘Background paper for discussion at the Meeting of Experts on Violence against Women and Men in the World of Work (3–6 October 2016)’ Geneva 2016

⁶ For an example of male on male harassment in the hairdressing industry see: *Kordas v Ruba & Jo Pty Ltd t/a Aztec Hair & Beauty* [2017] NSWCATAD 156 (25 May 2017)

sexual harassment (against both men and women), women are significantly more likely to experience sexual harassment than men, and perpetrators are disproportionately men.⁷

While the public discussion often focuses on 'sex scandals' and inappropriate behaviour by individuals, workplace sexual harassment is in reality a much more complex phenomenon.⁸ Experts have explained that sexual harassment is, 'an expression of workplace sexism, not sexuality or sexual desire. It is a way for dominant men to label women (and non-stereotypical men) as inferior and validate an idealised masculine work status and identity.'⁹ Sexual harassment is closely linked with gender equality at work more broadly, and is often accompanied by non-sexual, sex-based discrimination and harassment, such as patronising treatment, physical assaults or hostile behaviour.¹⁰

Case Study from ACTU Survey

An older female academic told us about her experience of inappropriate, sexualised comments from a male colleague at work. The employee complained to her manager and the male colleague was warned to stop the behaviour. The male colleague then proceeded to sabotage the employee's work over a two-year period, including reporting her for breaches of policy and procedure that had not occurred, and locking her out of databases.

In response to the #MeToo movement, a group of US employment discrimination lawyers released a statement succinctly explaining the connection between sexual harassment and broader patterns of gender inequality and discrimination at work:

Contrary to popular perceptions, harassment is not always sexual in nature; it assumes a variety of nonsexual forms, as discussed below. Nor is it usually perpetrated by bosses or power brokers: Coworkers, customers, and even subordinates all engage in sex-based harassment. In addition, harassment is not always a male-to-female phenomenon. Men harass other men who don't conform to prescribed images of who "real men" are supposed to be. Gay, lesbian, bisexual, transgender, and other people who defy traditional gender norms are subject to high rates of harassment, including physical assault. Black women and other women of color are especially vulnerable to harassment.

⁷ See for example Paula McDonald, 'Workplace Sexual Harassment 30 Years on: A Review of the Literature' (2012) 14(1) *International Journal of Management Reviews*, 1-17

⁸ Paula McDonald and Sara Charlesworth, 'Framing sexual harassment through media representations' (2013) 37 *Women's Studies International Forum* 95-103

⁹ Vicki Shultz, 'Reconceptualizing Sexual Harassment, Again' (2018) 22 *Yale Law Journal Forum* 22-66

¹⁰ For example, in *W v Abrob Pty Ltd t/a Schoonens' Computer Services & Simon Schoonens* [1996] HREOCA 11, the respondent repeatedly spoke about women (including his wife and the 18 year old complainant) in sexist and abusive terms, before ultimately sexually assaulting the complainant.

In all these scenarios, the bottom line is that harassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality. Harassment provides a way for some men to monopolize prized work roles and to maintain a superior masculine position and sense of self. Women, too, sometimes act to uphold their relative positions. Even where unwanted sexual misconduct occurs, it is typically a telltale sign of broader patterns of discrimination and inequality at work such as sex segregation and gender stereotyping...¹¹

[footnotes omitted]

Case Studies from ACTU Survey

An older gay male kindergarten teacher told us he was harassed by a homophobic female manager. He complained but no action was taken. He was eventually moved to a different classroom.

An older female public service employee told us she was harassed by a female supervisor who made sexualised comments about her appearance, as well as mocking her on the grounds of her disability and religion. The supervisor was demoted following an investigation.

The prevalence of sexual harassment in Australian workplaces

The evidence over many years has been consistent: sexual harassment is both prevalent and grossly under-reported, in Australia and internationally. As a recent UK House of Commons Report observed: *'throughout the world of work, in spite of the law, sexual harassment is an everyday, common occurrence.'*¹²

In 1994, the Australian Law Reform Commission noted that:

Sexual harassment has been recognised as an important obstacle to women's equal participation in employment. It is now unlawful under federal, State and Territory laws. Nonetheless, from the significant number of complaints made under the SDA about harassment and the findings of recent research, it is clearly still a major problem in the workplace.¹³

¹¹ Vicki Schultz, 'Open Statement on Sexual Harassment from Employment Discrimination Law Scholars' (2018) 17 *Stanford Law Review Online* 17-48, 19

¹² Women and Equalities Committee, UK House of Commons, *Sexual harassment in the workplace*, Fifth Report of Session 2017-19 (2018)

¹³ Australian Law Reform Commission, 'Equality Before the Law: Justice for Women', Report No. 69 (1994) Part 1, [2.17]

Not much has changed. AHRC has released four reports between 2003 and 2018 on the prevalence, nature and reporting of sexual harassment in Australia.¹⁴ The most recent report estimates that 71% of Australians have been sexually harassed at some point in their lifetimes: that is more than four in five (85%) women and one in two men (56%) over the age of 15. Almost one quarter (23%) of women have experienced actual or attempted rape or sexual assault at some point in their lifetimes and nearly one third (31%) of women have experienced unwelcome requests or pressure for sex or other sexual acts.¹⁵

On 11 December 2018, the ACTU released the results of its 'sexual harassment in the workplace' survey. Over 9,600 people from a range of industries responded; 68% of them female. More than half of all respondents (54.8%) had experienced sexual harassment at their most recent workplace or at a previous workplace, and 64% had witnessed sexual harassment at their most recent workplace or at a previous workplace.¹⁶

The data suggests that sexual harassment may in fact be increasing in prevalence in Australia. For example, the 2018 AHRC Report finds that in the last five years, one in three people - almost two in five women (39%) and just over one in four men (26%) - have experienced sexual harassment in the workplace: 'a marked increase' in the prevalence rate recorded by previous AHRC surveys.¹⁷ The ABS Personal Safety Survey 2016 (PSS) indicates that between 2012 and 2016 there was a significant increase in the proportion of people who experienced sexual harassment in the 12 months prior to the survey compared with the 2012 PSS: for example the proportion of women who experienced sexual harassment in the 12 months prior to the survey increased from 15% in 2012 to 17% in 2016.¹⁸ Occupational violence and abuse is also increasing: Safe Work Australia statistics show that the number of claims due to being assaulted by a person or persons has more than doubled since 2000-01.¹⁹ It is not clear whether these numbers are due to an increase in violence and harassment at work, or a greater awareness of rights (due to movements such as #MeToo and other awareness-raising campaigns), or a combination of factors.

Either way, the data paints a clear picture of a persistent and pervasive problem.

¹⁴ Australian Human Rights Commission, 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces' (2018); Australian Human Rights Commission, 'Working without fear: Results of the Sexual Harassment National Telephone Survey' (2012); Australian Human Rights Commission, 'Sexual harassment: Serious business: Results of the 2008 Sexual Harassment National Telephone Survey' (2008); Human Rights and Equal Opportunity Commission, 'Sexual Harassment - A Bad Business' (2002).

¹⁵ Australian Human Rights Commission, 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces' (2018) 7-8

¹⁶ [ACTU, 'Sexual Harassment in Australian Workplaces: Survey results' \(Report 2018\)](#)

¹⁷ Above, n 15, 6

¹⁸ Australian Bureau of Statistics (ABS) 'Personal Safety Survey', Australia, Cat 4906.0 (May 2016)

¹⁹ [Safe Work Australia 'Australia Workers Compensation Statistics 2015-16' \(Report 2018\)](#), 35

Under-reporting

The evidence consistently suggests that the majority of sexual harassment incidents are never formally reported. As has been observed:

...despite significant efforts over many years by researchers, senior managers and HR practitioners to identify and implement effective grievance-handling mechanisms, targets of sexual harassment rarely make formal complaints through internal organizational processes or to external agencies.²⁰

The 2018 AHRC Report finds that only 17% made a formal report or complaint about the harassment in the last 5 years, compared with 20% in 2012 survey. Almost one in five people who made a formal report or complaint reported that they were 'labelled as a troublemaker', or ostracised, victimised or resigned.²¹ The ACTU survey shows that only 27% of those who had experienced sexual harassment ever made a formal complaint, and just over 40% told no one at all. The two most common reasons given for this were a fear of negative consequences (55%) and a lack of faith in the complaint process (50%). More than a quarter of those who did complain reported less favourable treatment by their employer, including being forced to leave or resign, being bullied, or having their hours or shifts reduced. Of the 27% of people who did complain, 56% were 'not at all satisfied' with the outcome, 43% said their complaint was ignored or not taken seriously, and 45% said there were no consequences for the harasser.²² Recent independent reviews of the Australian Federal Police and

Case Studies from ACTU Survey

A male worker in the construction industry told us he has witnessed sexual harassment of female co-workers by a supervisor over many years. The male worker would like the behaviour to stop but believes there is no point complaining, as he would not be supported by senior management and he is concerned that there would be negative consequences for the women involved.

A female public service worker told us she was sexually harassed and sexually assaulted by a former team leader over a period of months. When she reported it to her Director, she was told to get over it as she had 'no evidence'. The employee was transferred to a new building but no action was taken against the perpetrator, whom the employee still sees every day in her work capacity. As a result of the sexual harassment, the employee has suffered anxiety, depression and suicidal thoughts and has used up all of her personal leave.

²⁰ Paula McDonald et al, 'Developing a framework of effective prevention and response strategies in workplace sexual harassment' (2015) *Asia Pacific Journal of Human Resources* Vol 53, 41-58, 42.

²¹ Above, n 15, 9

²² Above, n 16, 3

the Victorian Police found overwhelming evidence of ‘significant’ and ‘serious and chronic’ under-reporting of sex discrimination and sexual harassment.²³

The evidence paints the clear picture that the majority of people who experience (or witness) sexual harassment in the workplace do not feel that it is safe or useful to make a formal complaint, demonstrating the need for new approaches.

High risk sectors and workers

While no workplace is immune, union campaigns and other inquiries have highlighted that certain sectors and certain workers are particularly at risk or face unique challenges, for example:

- A recent survey conducted by ‘Hospo Voice’ (United Voice’s online union for hospitality workers) as part of the ‘Respect is the Rule’ campaign found that 89% of hospitality workers who responded have been sexually harassed at work, and 19% have been sexually assaulted.²⁴
- In 2017, as part the ‘Sexual Harassment in the Spotlight’ campaign, the Media Entertainment and Arts Alliance (**MEAA**) conducted a survey of sexual harassment, criminal misconduct and bullying in the Australian live performance industry. At least 40% of the 1,124 respondents had experienced sexual harassment, often on multiple occasions, yet almost a quarter did not make a complaint because they feared it would have repercussions for their career. Three quarters of respondents said they had not been made aware of any company policy on harassment.²⁵
- In 2016-17, as part of the ‘No one deserves a serve’ campaign, the Shop, Distributive and Allied Employees Association (**SDA**) conducted an online survey about abuse and violence experienced by retail and fast food workers at work. Of the approximately 6000 respondents (75% of whom were female) over 85% had experienced abuse from customers, including 12% experiencing abuse of a sexual nature. Following the close of the survey, the SDA hosted a series of industry roundtables including employers and regulators to tackle the issue.²⁶
- Frontline healthcare workers have very high rates of exposure to occupational violence and aggression. For example, an Australian study found that that 88% of nurses surveyed in

²³ Elizabeth Broderick ‘Cultural Change: Gender Diversity and Inclusion in the Australian Federal Police’ (Report, Australian Federal Police, 2016) 94; Victorian Human Rights and Equal Opportunity Commission, ‘Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police’ (Phase One Report, Victoria Police, 2015) 70.

²⁴ <https://www.respectistherule.org.au/about>

²⁵ <https://www.meaa.org/campaigns/sexual-harassment-in-the-spotlight/>

²⁶ <https://www.sdaq.asn.au/news/no-one-deserves-a-serve-sda-launches-major-national-campaign-to-stop-abuse-of-retail-and-fast-food-workers-this-christmas/>; see also 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

psychiatric facilities had experienced verbal or physical assault.²⁷ The issue appears to be worsening, with the New South Wales Nurses and Midwives Association reporting a 31% increase in calls for support around violence and aggression in 2016 compared to the 12 months prior.²⁸ Figures from WorkSafe Victoria show that up to 95% of Victorian healthcare workers have experienced verbal or physical assault.²⁹

- A recent Transport Workers Union (**TWU**) survey of cabin crew working for major airlines including Qantas, Virgin, Jetstar, Tigerair and Alliance Airlines found that 65% have been sexually harassed at work, with over half indicating that it had happened repeatedly. Of these, almost 70% said they did not report incidents, 56% did not believe they would be handled appropriately and 39% worried they would make the situation worse. 84% of those who reported an incident said they were not satisfied with how it was handled. Almost 80% said they do not think their company is doing enough to prevent sexual harassment.³⁰
- A Flight Attendants' Association of Australia (**FAAA**) survey of International and Domestic Cabin Crew members found that 43% of respondents had experienced sexual harassment or bullying in the workplace. Of those, only 34% reported the incident, 66% reported that they were not comfortable discussing the incident with their Manager, 76% responded that they did not feel supported by their employer and 62% indicated that they did not report for fear of reprisal, reputation damage or peer pressure. Of those who did not report their incident, 77% of respondents indicated that they would have reported the incident if there was a special area for these types of complaints outside of their normal management.
- A 2018 survey of women in STEM professions by Professionals Australia found that 26.8% of respondents had been sexually harassed at work. Of these, only 15.0% sought advice on dealing with the matter, 46.7% took no action at all and 12.7 per cent left their workplace altogether. Of those that had been sexually harassed at work, a large majority (79.1%) said they had experienced harassment in the early stage of their career; 42.9% in the mid-stage of their career and 8.0% at a senior level.³¹
- A 2015 survey of women in the maritime industry by the Maritime Workers Union (**MUA**) found that 58.08% of women had experienced harassment at work, the majority from workmates or supervisors. Only 26.87% made a formal complaint, while 40.31% took no action at all.
- A 2016 report commissioned by the Australian Federal Police and conducted by former Sex Discrimination Commissioner Elizabeth Broderick found that the incidence of sexual

²⁷ Delaney, J., Cleary, M., Jordan, R. & Horsfall, J. (2001). An Exploratory Investigation into the Nursing Management of Aggression in Acute Psychiatric Settings. *Journal of Psychiatric and Mental Health Nursing*, 8(1), 77-84.

²⁸ NSW Nurses and Midwives' Association, Submission to 2018 Review of Model WHS Laws, April 2018, p 28

²⁹ <https://prod.wsvdigital.com.au/sites/default/files/2018-06/ISBN-Occupational-violence-and-aggression-against-healthcare-workers-brochure-2017-06-03.pdf>

³⁰ <http://www.twu.com.au/Cabin-Crew-Sexual-Harassment-Survey-Results/>

³¹ <http://www.professionalsaustralia.org.au/professional-women/blog/new-report-shows-gap-diversity-policy-practice-major-obstacle-gender-equity-stem/>

harassment within the agency is twice the all-industry average: almost one in two female members and 20% of males have experienced it in the past five years.³²

- A 2015 report by the Royal Australian College of Surgeon's expert advisory group found that nearly half (49%) of all fellows, trainees and international medical graduates in Australia and New Zealand reported being subjected to discrimination, bullying or sexual harassment in recent years.³³
- An Australian Education Union (AEU) survey from 2018 found that one in four women and one in five men have experienced sexual harassment in a public education institution. Two in three people have either directly experienced sexual harassment, or have witnessed or managed someone who has been harassed. The majority (63%) of respondents who have experienced sexual harassment did not report it. Of those who did report it, 78% said the matter was not resolved to their satisfaction.

The drivers of workplace sexual harassment

Manifestations of gender inequality in the workplace, such as the gender pay gap, occupational and industrial segregation and the underrepresentation of women in leadership roles are major causes of sexual harassment.

Gender inequality in Australian workplaces

Australia's labour market is characterised by significant gender-based inequalities. It is highly gender segregated³⁴ and Australia is one of the most unequal countries in the world with respect to men's and women's sharing of unpaid domestic and care work.³⁵ Research shows that harassment is more prevalent where women work in traditionally male-dominated jobs or settings:³⁶

Women's absence from some jobs and predominance in others fosters gender stereotypes like "men are leaders" and "women aren't tough enough to lead," or "men are breadwinners" and "women put their families first"—ideas that make the underlying segregation and inequality seem natural when they are not. These stereotypes foster harassment, encouraging men to view and treat women as "different" and second class. By harassing

³² <https://cdn.workplaceexpress.com.au/files/2016/23.%20Broderick-Report-2016-1.pdf>

³³ <https://www.surgeons.org/media/22086656/EAG-Report-to-RACS-FINAL-28-September-2015-.pdf>

³⁴ Senate Finance and Public Administration References Committee, Parliament of Australia, *Gender segregation in the workplace and its impact on women's economic equality* (2017) 1-96

³⁵ Natalie Skinner and Barbara Pocock, 'The persistent challenge: living, working and caring in Australia in 2014' (The Australian Work and Life Index, University of South Australia, Centre for Work + Life, 2014) 5

³⁶ Berdahl & Raver, *supra* note 4, at 647-48 (collecting studies); Jennifer L. Berdahl, *The Sexual Harassment of Uppity Women*, 92 J. APPLIED PSYCHOL. 425, 427 (2007) (same); James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 302-03, 313-14 (1998) (same); McLaughlin et al., *supra* note 4, at 627-28 (same).

women who dare to enter traditionally male jobs and roles, or imposing sexist demands that remind women they are still women in a man's world, men can shore up their masculine status and sense of masculine superiority at work. Harassment in turn reinforces the original segregation and stereotypes by driving women away and confirming ideas that they can't cut it or don't belong. Supervisors and organizational leaders often fail to respond or look the other way, completing the cycle. Segregation not only affects male jobs: Women who work in traditionally female jobs are often at increased risk of harassment and exploitation, too, especially where the jobs require displaying heterosexual sex appeal or performing other stereotypically female roles. Men who work in female dominated industries and jobs also are sometimes harassed or treated differently by their supervisors or coworkers because of their sex.³⁷ [footnotes omitted]

Case Study from ACTU Survey

A female worker in a male-dominated, blue collar industry told us that she was sexual harassed by a much older colleague and a supervisor while she was an apprentice electrician, including receiving inappropriate comments about her clothing and obscene picture messages, and one of the perpetrators entering her house without consent. The worker told us she did not complain because she 'didn't want to get anyone into trouble'.

The complainant is now a qualified electrician and completing a traineeship in engineering. She remains in same workplace but with a supportive team.

A recent study of the experiences of women miners shows a clear correlation between organisational sexism (e.g. fewer opportunities for promotion and training) and experiences of interpersonal sexism (e.g. exposure to sexist comments). The study also highlights links between organisational and interpersonal sexism and poor mental health and low job satisfaction.³⁸

The overall national gender pay gap is 14.6%, based on a comparison of average full-time weekly ordinary time earnings. It is important to note that this measure only includes base earnings, not

³⁷ Shultz, V, Open Statement on Sexual Harassment From Employment Discrimination Law Scholars, Stanford Law Review, Vol. 71, No. 17, 2018 at p 23

³⁸ Mark Rubin, Stefania Paolini, Emina Subašić, Anna Giacomini, A confirmatory study of the relations between workplace sexism, sense of belonging, mental health, and job satisfaction among women in male-dominated industries, <https://onlinelibrary.wiley.com/doi/abs/10.1111/jasp.12577>

overtime or other bonuses, and does not reflect the fact that women work fewer hours overall.³⁹ When actual hours worked are calculated (factoring in career disruptions due primarily to women's disproportionate responsibility for unpaid caring and domestic work) the gap increases: in May 2018, average weekly total cash earnings was \$1,525.40 for male employees and \$1,053.30 for female employees, a difference of \$472.1 per week.⁴⁰ In May 2018, full-time male employees had average weekly total cash earnings of \$1,810.90, compared with \$1,515.60 for full-time female employees.⁴¹ This measure includes overtime and other bonuses, and shows that even when women do work full-time, they earn less than men.

Reflecting the undervaluation of work in female-dominated industries, women's pay rates for equivalent work are 10% lower than men's. The more men in an industry, the higher the pay. For every 10 per cent increase in the ratio of men to women in an industry, the average wage increases by 1.9%.⁴² Due to the proportionate relationship between income and retirement savings, women's superannuation balances are 47% lower than men's.⁴³ Legislative and industrial frameworks continue to perpetuate outdated norms and discriminatory practices. These issues are interconnected and compounding.⁴⁴

This means that regulatory responses aimed at addressing gender inequality at work more broadly (such as access to family friendly working arrangements, paid family and domestic violence leave, paid parental leave and fairer superannuation) are crucial to addressing the underlying causes of sexual harassment. Unfortunately, many laws, institutions and processes established in the 1980s and 1990s to address gender inequality at work, such as the Office for Women, the Equal Opportunity for Women in the Workplace Agency (now the Workplace Gender Equality Agency) and the Women's Budget Statement have either been abolished entirely or had their funding and powers significantly reduced.

Young people, LGBTIQ people, people with disability and Aboriginal and Torres Strait Islander people are particularly vulnerable to harassment. For example, an estimated 38% of women aged 18-24 years and 25% of women aged 25-34 years had experienced sexual harassment in the 12 months prior to the PSS.⁴⁵ In January and February 2018, Unions ACT conducted a detailed survey of over 200 young workers aged between 15 to 25. Half of all respondents were women. More women than men were employed on a casual or insecure basis. Of the women respondents, 23.2% had been

³⁹ <https://www.wgea.gov.au/topics/gender-pay-gap/national-gender-pay-gap>

⁴⁰ ABS 6306.0 - Employee Earnings and Hours, Australia, May 2018

⁴¹ Ibid

⁴² [KPMG, *She's Price\(d\)less, The Economics of the Gender Pay Gap, October 2016*](#), p 11

⁴³ Hetherington & Smith, 'Not So Super, For Women', July 2017, 6

⁴⁴ [Bluett-Boyd, N. *Change the Rules for Working Women, 2018*](#)

⁴⁵ [Australian Bureau of Statistics. 4906.0 - Personal Safety, Australia, 2016](#)

bullied or harassed at work by a co-worker and 27.4% by their supervisor or employer in the past 12 months. Overall, women were more likely to experience discrimination and unlawful working conditions, but less likely to speak up for fear of losing their job.⁴⁶

Case Study from ACTU Survey

A young female bartender was sexual harassed by her manager, including being followed home and hugged and kissed without her consent. The worker felt she had no other option but to leave her job to avoid the behaviour. The worker told us she had also experienced sexual harassment at a previous workplace.

Workplace characteristics and practices more likely to increase the risk of sexual harassment

Insecure work

The nature of employment has changed dramatically since the SDA commenced in 1984. Over decades, the neoliberal agenda has seriously undermined minimum employment standards for workers. Women workers are disproportionately affected. Despite strong and sustained levels of economic growth, inequality is rising. Collective agreement coverage is declining, and more workers are reliant on award rates and conditions. The traditional employment relationship is being undermined and circumvented by business models that include labour hire, sham contracting, franchising, wage theft and the expanding gig economy. Over 40% of the Australian workforce is now employed in some form of precarious or insecure employment; the third highest rate in the OECD.⁴⁷ Women are overrepresented among industries and occupations that are award reliant, low paid and casualised.⁴⁸ Of the 2.3 million Australian workers reliant on minimum wages or awards, 61.8% are women,⁴⁹ and 23% of female workers are in 'non-standard' forms of employment.⁵⁰ While women's workforce participation has increased over past decades, this often consists of insecure or poorer quality employment: 75 per cent of award-covered women are employed on a casual (51 per cent) or

⁴⁶ [UnionsACT, 'Sick of it': What young women feel about wage-theft, harassment & casualised work: Report into young working womens' experiences in ACT workplaces, 2018](#)

⁴⁷ [ACTU, Australia's Insecure Work Crisis: Fixing it for the Future, 21 May 2018, 5; Report of the Independent Inquiry into Insecure Work in Australia, Lives on Hold: Unlocking the Potential of the Australian Workforce, 16 May 2012](#)

⁴⁸ *Annual Wage Review 2016-17* [2017] FWCFB 3500 at [55], [78], [99]

⁴⁹ ABS 2017, Employee Earnings and Hours, Cat. 6306.

⁵⁰ [Hetherington & Smith, Not So Super, For Women, July 2017](#) at p 12

part-time (24 per cent) basis, by contrast 52% of award-covered male employees are employed on a full-time basis.⁵¹

Casual employment is found across all industries, but particularly in industries such as retail and hospitality, in which the majority of employees are women. Evidence shows that these workers are more likely to be injured at work for a range of reasons, including inadequate training and induction, fear of reprisals for speaking out about safety concerns, lack of access to participation and consultation processes, lack of regulatory oversight, poor supervision, inadequate access to effective safety systems and exposure to frequent restructures and down-sizing.⁵² There are additional challenges for workers in the gig economy, homecare workers⁵³ and workers under temporary visa arrangements.⁵⁴ The recent Victorian Government inquiry into the Labour Hire Industry and Insecure Work found that workers in labour-hire, franchise, contracting and other precarious forms of employment are routinely denied basic employment rights.⁵⁵ The Inquiry heard evidence of abuse, violence, sexual harassment, excessive working hours, work in extreme heat with limited drinks breaks, untreated medical conditions, no access to workers compensation and other gross workplace health and safety breaches in relation to labour-hire workers in the horticulture, meat and cleaning industries in Victoria, including workers participating in the Government's Seasonal Worker Program.

Our legal framework has not kept up with these developments, leaving many workers without basic statutory protections which are essential to preventing sexual harassment at work. Submissions made by a number of our affiliates contain cases studies detailing the impact of this on workers.

Case Study from ACTU Survey

An older homecare worker told us that she was sexually harassed, assaulted and propositioned by a client over a period of years. Despite reporting the issue to two coordinators, nothing was done. Management 'covered up' the complaint and blamed the worker instead. The worker told us she did not make an external complaint because she was too embarrassed.

⁵¹ ABS EEH Survey, May 2014; Data Cube No 63060D005_201405, Table 2 (all percentages calculated by author).

⁵² See for example Richard Johnstone and Michael Quinlan, 'The OHS regulatory challenges posed by agency workers: evidence from Australia' (2006) 28:3 *Employee Relations* 273.

⁵³ Michael Quinlan, Phillip Bohle and Olivia Rawlings-Way, 'Health and safety of homecare workers engaged by temporary employment agencies' (2015) 57:1 *Journal of Industrial Relations* 94, 95.

⁵⁴ The Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016

⁵⁵ [Victorian Inquiry into the Labour Hire Industry and Insecure Work Final Report, August 2016](#) at Chapter 4 and pp 124-146; M Quinlan and P Bohle (2008), Under pressure, out of control or home alone? Reviewing research and policy debates on the OHS effects of outsourcing and home-based work, *International Journal of Health Services*, 38*3), 489-525.

The current legal framework

International Instruments

Australia has a responsibility to prevent sexual harassment and other forms of gendered violence and discrimination under a number of international instruments.⁵⁶

In particular, the Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**), ratified by Australia in July 1983, imposes obligations on states to eliminate discrimination against women. Article 1 defines 'discrimination against women' as follows:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Significantly, CEDAW requires States not only to protect individual women against discrimination, but to bring about structural change. This means it is not enough for States to simply ensure formal equality.⁵⁷

ILO Convention on Violence and Harassment in the World of Work

Although there are a number of International Labour Organisation (**ILO**) instruments dealing with the elimination of sex discrimination in employment,⁵⁸ the terms 'violence', 'harassment' and 'sexual harassment' are mentioned explicitly only in relation to certain groups of workers, and each instrument contains differing levels of detail in terms of the scope and nature of the obligations

⁵⁶ Australia also has obligations under Article 26 of the International Covenant on Civil and Political Rights (**ICCPR**), which provides that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. This provision also requires that the law prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on the grounds of sex (among other grounds). Article 3 of the International Covenant on Economic and Social Rights (**ICESCR**) requires States to undertake to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights.

⁵⁷ For example, Article 5(2) requires States parties to take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. See also: Simone Cusak 'Discrimination Against Women: Combating its compounded and systemic forms' (2009) *Alternative Law Journal*, 86-91, 87.

⁵⁸ In particular: Discrimination in respect of Employment and Occupation (No. 111); Equal Remuneration for Men and Women Workers for Work of Equal Value (No. 100); Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (No. 156)

imposed.⁵⁹ ILO WHS instruments do not explicitly mention violence or harassment, but require certain measures to protect both the physical and mental health of workers.⁶⁰

This lack of consistency led a tripartite 'Meeting of Experts' convened by the ILO Governing Body to conclude in 2016 that current international labour standards:

... do not define violence and harassment, do not provide guidance on how to address its various manifestations and do not cover all workers. They also lack an integrated approach that is essential to addressing violence and harassment in the world of work effectively.⁶¹

In order to address this gap, the ILO has commenced a process to set a new international standard on violence and harassment (including sexual harassment) in the world of work.⁶² The first discussion took place at the International Labour Conference in June 2018. While there was agreement to adopt a binding Convention supported by a Recommendation on violence and harassment, there was disagreement between employer and worker representatives and governments on the content of such a standard. While there is broad agreement that a proactive risk-management framework is the appropriate set of obligations to place on employers and governments, the definitions of 'the world of work', 'worker' and 'employer' (and therefore the scope of the

⁵⁹ For example, Article 20(3) of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) provides that Governments should adopt measures to ensure that workers from indigenous peoples are not subject to working conditions hazardous to their health and that they enjoy protection against sexual harassment. Article 5 of the Domestic Workers Convention, 2011 (No. 189) requires measures to be taken to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence. Paragraph 7 of the Domestic Workers Recommendation, 2011 (No. 201) provides that '[m]embers should consider establishing mechanisms to protect domestic workers from abuse, harassment and violence' including accessible complaint mechanisms to report cases; ensuring that all complaints are investigated and prosecuted, as appropriate; and establishing programmes for the relocation and rehabilitation of domestic workers, including the provision of temporary accommodation and health care. Paragraph 21(a) calls on members to consider establishing a hotline for migrant domestic workers and raising employers' awareness of their obligations by providing information on good practices.

⁶⁰ Article 3(e) of the Occupational Safety and Health Convention, 1981 (No. 155), defines 'health' in relation to work, and includes the physical and mental elements affecting health which are directly related to safety and hygiene at work. Under Articles 4 and 5, States parties are required to put in place a national occupational safety and health policy which includes training, protection from reprisals for complaints and the adaptation of working time and work organisation to the physical and mental capacity of the worker. Under Article 13, a worker may remove herself from a work situation which presents an imminent and serious danger to her life or health. Paragraph 3(e) of the Occupational Safety and Health Recommendation, 1981 (No. 164) provides that measures should be taken in pursuance of the national policy on occupational safety, occupational health and the working environment for the 'prevention of harmful physical or mental stress due to conditions of work'. The ILO 'list of occupational diseases' based on the List of Occupational Diseases Recommendation, 2002 (No. 194), was updated in 2010 and now covers mental and behavioural disorders, including PTSD. Article 1(a)(i) of the Occupational Health Services Convention, 1985 (No. 161) calls for the establishment and maintenance of a safe and healthy working environment which will facilitate 'optimal physical and mental health' in relation to work.

⁶¹ International Labour Office, Conditions of Work and Equality Department, Final Report of the Meeting of Experts on Violence against Women and Men in the World of Work 3–6 October 2016 (2016) MEVWM/2016/7, 42

⁶² Minutes of the 325th Session of the Governing Body of the International Labour Office, 325th sess, GB.325/PV, 10

obligations in the Convention) remain contested.⁶³ It is likely that the issue of scope will be central to the second and final discussion in June 2019.⁶⁴

The current proposed text defines the term ‘violence and harassment’ in the world of work as:

...a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.⁶⁵

‘Gender-based violence and harassment’ is defined as:

...violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.⁶⁶

The term ‘worker’ is broadly defined to cover:

...persons in all sectors, both in the formal and informal economy, and whether in urban or rural areas, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, laid-off and suspended workers, volunteers, jobseekers and job applicants’.⁶⁷

The ‘world of work’ covers:

...situations occurring in the course of, linked with or arising out of work’, including in ‘the workplace, including public and private spaces where they are a place of work; in places where the worker is paid, takes a rest break or a meal, or uses sanitary and washing facilities; when commuting to and from work; during work-related trips or travel, training, events or social activities; through work-related communications enabled by information and communication technologies; and in employer-provided accommodation’.⁶⁸

The ACTU strongly supports the current scope of definitions. A single definition of violence and harassment is crucial in order to capture the full range of behaviours that should be proscribed by the Convention and Recommendation. It is vital that the definition confirms that both ‘violence’ and ‘harassment’ not only include physical assaults, but also unacceptable psychological and/or sexual behaviours. Broad definitions of ‘worker’ and ‘workplace’ are crucial to ensure that workers in non-traditional work arrangements and relationships are protected by the new standard.

⁶³ Provisional Record No. 8B, 107th Session, Fifth item on the agenda: Violence and harassment against women and men in the world of work: Reports of the Standard-Setting Committee on Violence and Harassment in the World of Work: Summary of proceedings (10 October 2018)

⁶⁴ International Labour Office, *Ending violence and harassment in the world of work* (Report V (1) 108th Session, 2019)

⁶⁵ Ibid, Proposed Texts, Article 1(a)

⁶⁶ Ibid, Proposed Texts Article 1(b)

⁶⁷ Ibid, Proposed Texts Article 1(c)

⁶⁸ Ibid, Proposed Texts Article 2

If the text proposed so far remains intact, the new Convention (once adopted and ratified) will require States to adopt *'an inclusive, integrated and gender-responsive approach'* for the elimination of violence and harassment in the world of work, including prohibition of violence and harassment in laws and regulations, establishing and strengthening enforcement and monitoring mechanisms, providing for sanctions, ensuring access to appropriate and effective remedies, and ensuring effective inspection and investigation of violence and harassment through labour inspectorates or other competent bodies.⁶⁹ Significantly, the new ILO Convention will require States to place a positive duty on employers. Under the current proposed texts, States will be obligated to pass laws requiring employers *'to take steps, so far as is reasonably practicable'*, to prevent violence and harassment, including identifying hazards and assessing the risks of violence and harassment (with the participation of workers and their representatives) and taking measures to prevent and control them.⁷⁰

The new ILO standard on violence and harassment will recommend that national bodies responsible for occupational safety and health have a mandate covering violence and harassment in the world of work; and that States develop, implement and disseminate *'model codes of practice, workplace policies and risk assessment tools, either general or sector specific, for all forms of violence and harassment, taking into account the specific situations of disproportionately affected workers'*. It will also recommend that workers have the right to remove themselves from a work situation which they have reasonable justification to believe presents an imminent and serious danger to life or health due to violence and harassment, and ensure that labour inspectorates and other relevant authorities are empowered to deal with violence and harassment, including by issuing orders requiring measures with immediate executory force, and orders to stop work in cases of an imminent danger to life or health. The new standard will recommend that States ensure that labour inspectors and other competent authorities undergo *'gender-responsive training'* with a view to identifying and addressing violence and harassment, psychosocial hazards and risks, gender-based violence, and discrimination against particular groups of workers.⁷¹

If adopted in its current form and widely ratified, the instrument has strong potential to require governments and employers to take serious proactive action to prevent violence and harassment at work.

The ACTU calls on the Australian Government to commit to support the development of, ratify and fully implement the new ILO Convention on Violence and Harassment at Work, including maintaining broad and inclusive definitions of 'work', 'worker' and 'violence and harassment'.

⁶⁹ Ibid, Proposed Texts, Article 4(2)

⁷⁰ Ibid, Proposed Article 9

⁷¹ Ibid, Proposed Recommendation 19

Sex Discrimination Act 1984

Australian anti-discrimination laws

The *Sex Discrimination Act 1984 (Cth)* (**SDA**) was introduced to give effect to Australia's obligations under CEDAW. Unlike the *Racial Discrimination Act 1975*, which has general provisions proscribing racial discrimination as unlawful (s 9) and providing for a right to equality before the law (s 10), the SDA sets out 'specified types of discrimination, on specified grounds,⁷² in specified areas, and subject to specified exceptions'.⁷³ The States and Territories have similar (although not identical) provisions.⁷⁴

The vast majority of sex discrimination complaints relate to employment, and a significant proportion relate to sexual harassment. This has remained unchanged since the SDA commenced in 1984. In 2016-17, 78% of complaints under the SDA were about employment and the second most common ground was sexual harassment (24%).⁷⁵

Australia (along with a number of other jurisdictions⁷⁶) has adopted a definition of sexual harassment which includes both objective and subjective elements; namely that the conduct must in fact be unwelcome to its recipient; as well as 'objectively' unreasonable. It is contained in s 28A of the SDA:

28A Meaning of sexual harassment

(1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if: (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- (c) any disability of the person harassed;

⁷² At the time of writing this paper, those grounds are: sex (s 5), sexual orientation (defined in section 4(1), and see section 5A), gender identity (defined in section 4(1), and see section 5B), intersex status (defined in section 4(1), and see section 5C), marital or relationship status (defined in section 4(1), and see section 6), pregnancy or potential pregnancy ('potential pregnancy' is defined in section 4B, and see section 7), breastfeeding (see section 7AA), and family responsibilities (defined in section 4A, and see section 7A).

⁷³ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992) Chapter 10, 223-224

⁷⁴ An analysis of these laws is beyond the scope of this paper: Australian Capital Territory – Discrimination Act 1991; New South Wales – Anti-Discrimination Act 1977; Northern Territory – Anti-Discrimination Act 1996; Queensland – Anti-Discrimination Act 1991; South Australia – Equal Opportunity Act 1984; Tasmania – Anti-Discrimination Act 1998; Victoria – Equal Opportunity Act 2010; Western Australia – Equal Opportunity Act 1984

⁷⁵ Australian Human Rights Commission '2016-17 Complaint statistics' (2017)

⁷⁶ Including the United States: see Title VII Civil Rights Act 1964 42 USC 2000e (1988); Equal Employment Opportunity Commission Guidelines on Sexual Harassment (1991) 29 CFR 1604.11

(d) any other relevant circumstance.

(2) In this section: conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

The SDA makes sexual harassment unlawful in a number of areas of public life, including employment and partnerships. The coverage of the section extends beyond the traditional employment relationship to include contract workers, job seekers and other 'workplace participants'.⁷⁷

Unlawful discrimination and sexual harassment are not criminal offences under the SDA. However, it is an offence to communicate particulars of a sexual harassment complaint (s 92) or to victimise a person for making, proposing to make, or participating in, a complaint to AHRC (s 94(1)).

Complaints process

A worker who has experienced sexual harassment at work may first raise a grievance with their employer, assuming that workplace complaints processes are both in place and properly implemented – which is by no means the norm.⁷⁸ If these processes are unsuccessful or unsuitable, the worker may lodge a formal complaint of sexual harassment with AHRC within 6 months of the last incident of harassment. AHRC is then required to inquire into, and attempt to conciliate, the complaint.⁷⁹ In the federal jurisdiction, if conciliation fails, the worker may commence proceedings in the Federal Court or Federal Circuit Court.

⁷⁷ 28B Employment, partnerships etc.

(1) It is unlawful for a person to sexually harass:

(a) an employee of the person
(b) a person who is seeking to become an employee of the person.

(2) It is unlawful for an employee to sexually harass a fellow employee or a person who is seeking employment with the same employer.

(3) It is unlawful for a person to sexually harass:

(a) a commission agent or contract worker of the person; or
(b) a person who is seeking to become a commission agent or contract worker of the person.

(4) It is unlawful for a commission agent or contract worker to sexually harass a fellow commission agent or fellow contract worker.

(5) It is unlawful for a partner in a partnership to sexually harass another partner, or a person who is seeking to become a partner, in the same partnership.

(6) It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons.

(7) In this section:

place includes a ship, aircraft or vehicle.

workplace means a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.

workplace participant means any of the following:

(a) an employer or employee;
(b) a commission agent or contract worker;
(c) a partner in a partnership.

⁷⁸ Deirdre McCann 'Sexual harassment at work: National and international responses' (International Labour Office, 2005) 44

⁷⁹ Australian Human Rights Commission Act 1986, s11(aa)

Conduct of a sexual nature

The question of whether conduct is of a 'sexual nature' is an objective one. Courts have interpreted the term broadly in all Australian jurisdictions. For example, exposure to sexually explicit material and sexually suggestive jokes has been held to constitute conduct of a sexual nature.⁸⁰ As is the case with other discrimination provisions, the intention of the perpetrator is not relevant. For example, in *Cooke v Plauen Holdings Pty Ltd*, the applicant complained that her supervisor sat too close to her, asked her to model for him and invited her to his home for coffee. The Court held that:

Mr Ong was probably socially clumsy, even socially inept. He may not have intended his comments and questions to be sexual in nature but I do not think that that matters. The comments and questions can objectively be regarded as sexual in nature, they were deliberate and the applicant was the target.⁸¹

In recognition of the close relationship between sexual harassment and sex-based discrimination, conduct that does not on its own amount to conduct of a sexual nature may do so if it forms part of a broader pattern of inappropriate sexual conduct.⁸² It is well accepted that a one-off incident can amount to sexual harassment, as well as on-going behaviour.⁸³

Unwelcome conduct

The question of whether conduct is 'unwelcome' is a subjective test.⁸⁴ In *Aldridge v Booth* it was held that conduct is unwelcome if it is 'not solicited or invited by the employee, and the employee regarded the conduct as undesirable or offensive.'⁸⁵ The conduct should therefore be viewed from the perspective of the applicant. However, the test has not always been applied in this way by the courts. For example, in *Elliott v Nanda*, the applicant alleged that she was sexually harassed by the director of the medical centre where she worked. The applicant was a teenager and the director a middle-aged medical practitioner. While some of the director's more egregious physical conduct was found to be sexual harassment (e.g. fondling the applicant's breast, patting her on the bottom, trying to kiss her, massaging her shoulders and brushing against her breasts), sexual comments made by the director were not held to be unwelcome. His Honour held:

...the applicant bears the onus of establishing that the conduct was unwelcome and I entertained sufficient doubt that *it would have been apparent to the respondent* that these general discussions were unwelcome

⁸⁰ *Bennett v Everitt* (1988) EOC 92-244; *Kiel v Weeks* (1989) EOC 92-245; *Horne v Press Clough Joint Venture* (1994) EOC 92-556; *Hopper v Mt Isa Mines* (1997) EOC 92-879; *Doyle v Riley* (1995) EOC 92-748; *Bebbington v Dove* (1993) EOC 92-543; *Hawkins v Malnet Pty Ltd* (1995) EOC 92-767; *G v R & Department of Health and Community Services* [1993] HREOCA 20; *Djokic v Sinclair* (1994) EOC 92-643; *Hill v Water Resources Commission* (1985) EOC 92-127; *Freestone v Kozma* (1989) EOC 92-249.

⁸¹ [2001] FMCA 91, [26].

⁸² *Shiels v James* [2000] FMCA 2, [72]

⁸³ *Hall v Sheiban* (1989) 20 FCR 217 [40]

⁸⁴ Australian Human Rights Commission, 'Federal Discrimination Law' (2016) 138-142

⁸⁵ (1988) 80 ALR 1, 5, cited with approval in *Hall v Sheiban* (1989) 20 FCR 217, 247 (Wilcox J)

(particularly given that the applicant did not complain about the discussions at the time and participated in general discussions the respondent had with his friends about topics of current interest) to find, affirmatively, that this conduct was unwelcome'.⁸⁶

(emphasis added)

As noted by the Australian Human Rights Commission, 'this statement of the test appears to introduce an objective element, contrary to the weight of authority.'⁸⁷ The applicant's response to the conduct may be relevant for the purposes of determining whether or not the conduct was in fact unwelcome to the applicant. For example, in *Daley v Barrington* a comment of a sexual nature was found not to be unwelcome because the applicant's response to it was 'friendly' and included putting an arm around the respondent. While the court in this case found that a reasonable person would have been offended, humiliated or intimidated by the comment in question, it was not sexual harassment because it was not found to be unwelcome to the applicant.⁸⁸ On the other hand, an applicant's willing participation in, or even initiation and/or encouragement of, certain sexual conduct does not mean that other conduct directed at the applicant cannot be found to constitute sexual harassment where it is found to be unwelcome, because 'everyone [is] entitled to draw a line somewhere'.⁸⁹

The reasonable person

Determining whether a 'reasonable person' would have anticipated that the person harassed would be offended, humiliated or intimidated requires an objective assessment. Context is highly relevant in cases of sexual harassment – conduct that might be innocuous in one set of circumstances may be intimidating and highly inappropriate in another. In relation to a complaint about a respondent putting an arm around a co-worker, the Queensland Anti-Discrimination Tribunal held:

Whether an action is compassionate or reprehensible will depend on the overall context in every case. The context here is that the action was not one between friends of long standing: it was an action by a middle-aged male employer to a young female who had only worked in the office for two weeks.⁹⁰

In 2008, a Senate Committee Inquiry into the SDA (**SDA Inquiry 2008**) heard from stakeholders that the 'reasonable person' test was too narrow and onerous, because the SDA at the time required a complainant to prove that the harasser would have anticipated that the complainant actually *would*

⁸⁶ (2001) 111 FCR 240, 277 [108]

⁸⁷ *Ibid* at 141

⁸⁸ *Daley v Barrington* [2003] FMCA 93, [34]

⁸⁹ *Horman v Distribution Group* [2001] FMCA 52, [64].

⁹⁰ *Smith v Hehir and Financial Advisors Aust Pty Ltd* [2001] QADT 11

be offended by their conduct.⁹¹ Such concerns echo longstanding critiques by feminist scholars about the use of the reasonable person test more generally, on the basis of its 'questionable claim to universal objectivity'.⁹² There has been a substantial amount of literature dedicated to the argument that the notion is an inherently gendered concept which fails to consider women's experiences.⁹³

In an attempt to address concerns about the reasonable person test, in 2011 the definition of sexual harassment was amended to require that a harasser only need have anticipated the 'possibility' that the complainant would be offended, and the list at s 28(1A) of the SDA was inserted to direct a court to consider the target's personal characteristics and relationship to the harasser when applying the reasonable person test.⁹⁴ While the list is a useful way of directing the court's attention to relevant matters, it cannot stop individual decision-makers (frequently men) failing to comprehend the purpose of anti-discrimination laws and continuing to bring gendered assumptions about how a 'reasonable person' in the position of an applicant should have responded. In a notorious example, Justice Einfeld found that any 'sensible women' should not have been offended by questions about her sex life by a male co-worker during her job interview, and sexualized comments and the lowering of the zip on her uniform while at work.⁹⁵ This decision was overturned on appeal, but it is illustrative of the problem.

Vicarious liability

At common law, an employer will be vicariously liable for acts committed by an employee in the course of their employment, to the extent that the employee is acting within the scope of their authority and performing duties or acts incidental to the performance of those duties. This includes acts committed while carrying out an authorised act in an unauthorised way. However, an employer will not be vicariously liable for acts committed by an employee outside the scope of their employment, while 'on a frolic of his own'.⁹⁶ It follows that the more egregious an act of discrimination or harassment, the less likely it would be that the employer would be liable, rendering the common law incapable of responding effectively to workplace sexual harassment.⁹⁷ The SDA attempts to address this through s 106(1), under which an employer or principal will be vicariously liable for an unlawful act committed by their employee/agent, where the unlawful act is 'in connection with' the

⁹¹ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) 63, [5.70]-[5.72]

⁹² Fiona Pace 'Concepts of Reasonableness in Sexual Harassment Legislation: Did Queensland Get It Right?' (2003) *Queensland University of Technology Law & Justice Journal* 189-209, 191

⁹³ See for example: W Parker, 'The Reasonable Person: A Gendered Concept?' (1993) 23 *Victoria University of Wellington Law Review* 105; and M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990)

⁹⁴ Explanatory Memorandum, *Sex and Age Discrimination Legislation Amendment Bill 2010*, [72]

⁹⁵ *Hall, Oliver and Reid v Sheiban* (1988) EOC 92-227

⁹⁶ *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 733-4, discussed in *NSW v Lepore* (2003) 212 CLR 511, 535-6, 614

⁹⁷ *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402, [65]

person's employment or duties as an agent. Section 106(2) goes on to excuse the employer or principal from liability if they 'took all reasonable steps to prevent the employee or agent from doing the act'.⁹⁸⁹⁹

Consistent with the remedial purpose of the legislation, decisions in the Australian federal jurisdiction have taken a broad approach to the required connection with employment.¹⁰⁰ For example, in *Lee v Smith* an employer was held vicariously liable when an employee raped a fellow employee at a private residence following a social dinner party.¹⁰¹ The question of whether or not an employer has taken reasonable steps is considered on a case by case basis, and varies according to, for example, the size of the business and the nature of its human resources capacity.¹⁰²

While the vicarious liability provisions in anti-discrimination laws are intended to encourage organisations to proactively address unlawful discrimination and harassment in order to avoid liability, they have not had this effect in practice. The fact that vicarious liability provisions operate as a defence once a claim has already been brought means that they are limited in their capacity to incentivise employers to take proactive, preventative action against sexual harassment. Generally, employers simply need to have reasonably well-communicated policies, complaint-handling processes and warnings given to employees about the consequences of offending conduct.¹⁰³ They are not necessarily required to take additional proactive steps to reduce sexual harassment in their workplace or change workplace cultures. In *Waligama v Toyota Motor Corporation Australia Ltd*, the Victorian Civil and Administrative Tribunal held that the 'criterion of what is "reasonable" is not very high or very exacting'.¹⁰⁴ Despite the low bar, some employers are still not clearing it. In a recent case in Queensland for example, a hotel was found variously liable for a sexual assault committed by a male caretaker against a female hotel worker in her employer-provided hotel room. The Tribunal

⁹⁸ In some State jurisdictions (for example, NSW), the test is different, and employers are only vicariously liable if they express or impliedly 'authorise' the unlawful act; a test that is very difficult to meet in cases of sexual harassment
⁹⁹ 106 Vicarious liability etc.

(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or

(b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

¹⁰⁰ Brook Hely 'Open All Hours: The Reach of Vicarious Liability in Off Duty Sexual Harassment Complaints' (2008) Vol 36 *Federal Law Review* 173-208

¹⁰¹ [2007] FMCA 59

¹⁰² Anita Mackay, 'Recent Developments in Sexual Harassment Law: Towards a New Model' (2009) Vol 14 No 2 *Deakin Law Review* 189-217

¹⁰³ See for example *McAlister v SEQ Aboriginal Corporation for Legal Services* [2002] FMCA 109; *Cooper v Western Area Local Health Network* [2012] NSWADT 39

¹⁰⁴ *Waligama v Toyota Motor Corporation Australia Ltd* (Anti Discrimination) [2007] VCAT 1318, 98

ordered the hotel to pay over \$300,000 in damages, holding that ‘at the very least’ the hotel should have had an anti-discrimination policy and an education program for its workers.¹⁰⁵

As noted in HREOC’s submission to the 2008 SDA Inquiry, while an employer may avoid liability for a claim by taking reasonable steps, an employer’s failure to take reasonable steps is not actionable per se.¹⁰⁶ As a consequence, there is no effective mechanism to examine whether or not Australian employers are taking steps to create harassment-free workplaces, and if not, to require them to do so.

International evidence paints a similar picture of the inadequate incentive provided by vicarious liability provisions. The UK Equality Act contains similar vicarious liability provisions to the SDA. Despite the requirements these laws place on employers to take reasonable steps to prevent sexual harassment, a survey conducted by the UK Equality and Human Rights Commission in 2017 found ‘inconsistent’ and inadequate practice among employers: policies purporting to cover sexual harassment often made ‘minimal’ reference to it, and only a ‘small minority’ of employers had clear policies, codes of conduct, and strategies for communication and monitoring.¹⁰⁷

Shortcomings of the anti-discrimination model

When the SDA commenced on 1 August 1984, it prohibited discrimination on the grounds of sex, marital status or pregnancy in all areas of employment, education and services, and outlawed sexual harassment in the workplace for the first time in Australia. The passage of the SDA was highly controversial. The politics surrounding it have been described by those closely involved as ‘explosive’.¹⁰⁸ As a result, several significant amendments were made to the Act before it was passed and the level of ambition was wound back. There is no doubt that the passing of the SDA was an extremely significant achievement. It required the repeal of a number of sex-specific laws (including WHS laws) that had been perpetuating gender inequality,¹⁰⁹ it has assisted many individual women to seek redress against sex discrimination and sexual harassment at work and it has been successful in addressing some of the more overt forms of direct discrimination. However, in the face of continuing high prevalence and low reporting rates it is difficult not to conclude that the SDA is failing to effectively prevent sexual harassment or to promote equality between men and women. The SDA has

¹⁰⁵ *STU v JKL (Qld) Pty Ltd & Ors* [2016] QCAT 505, 76

¹⁰⁶ Human Rights and Equal Opportunity Commission, Submission No 69 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) HREOC Submission to SDA Inquiry 2008, 36

¹⁰⁷ Equality and Human Rights Commission ‘Turning the Tables: Ending Sexual Harassment at Work’ (2017), 9

¹⁰⁸ Susan Ryan, ‘The ‘Ryan Juggernaut’ Rolls On’ (2004) Vol 27 No 3 *University of New South Wales Law Journal* 828

¹⁰⁹ Claire Williams, ‘Women and Occupational Health and Safety: From Narratives of Danger to Invisibility’ (1997) No. 73 *Labour History* 30-52, 44

been the subject of three major inquiries since it commenced.¹¹⁰ While some very important recommendations for improvement have been accepted and implemented,¹¹¹ recommendations for substantive change to the regime have not been. Criticism focuses on ‘the inherent limitations of the individual complaints system as well as the practical difficulties involved in pursuing complaints’,¹¹² and the lack of adequate enforcement mechanisms.

Positive duties

The SDA was first reviewed by the House of Representatives Standing Committee on Legal and Constitutional Affairs in 1992. In a submission to that Inquiry, Dr Rosemary Hunter suggested that the SDA should be amended to proscribe discrimination in the exercise of any human rights or fundamental freedoms:

Despite the fact that CEDAW is rooted in an international jurisprudence concerning human rights and fundamental freedoms, the Sex Discrimination Act does not create or confer a positive, substantive right to equality or freedom from discrimination. Instead, it confers merely procedural rights on persons who may perceive themselves as ‘victims’ of another’s action which the Act defines as unlawful.

Dr Hunter goes on to argue that this approach tends to ‘produce an undue focus on jurisdictional and definitional issues, while obscuring the basic harms which the law is supposed to alleviate.’¹¹³

The Australian Law Reform Commission reflected similar concerns in 1994, suggesting that the SDA is ‘unable to address the systemic nature of discrimination’, noting its limited understanding of equality, its failure to create positive rights, the failure of lawyers and members of the judiciary to fully understand the principles behind anti-discrimination legislation and growing ‘legalism’ in the resolution of anti-discrimination matters.¹¹⁴

On 26 June 2008, the Senate referred an inquiry into the effectiveness of the SDA to the Standing Committee on Legal and Constitutional Affairs. Experts and other stakeholders reiterated their

¹¹⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992); Australian Law Reform Commission, ‘Equality Before the Law: Justice for Women’, Report No. 69 (1994); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008)

¹¹¹ Including a recommendation by the SDA Inquiry 2008 to amend the SDA to ensure that it protects workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment.

¹¹² Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) 69, [6.1]

¹¹³ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992), Chapter 10, 223-224

¹¹⁴ Australian Law Reform Commission, *Equality before the Law: Justice for Women* Report 69 (1994) Part 1, [3.10]

concerns that the SDA's model of enforcement through individual complaints is incapable of addressing systemic discrimination.¹¹⁵ The overall finding of the SDA Inquiry 2008 was that the SDA:

... has had an impact on the most overt forms of sex discrimination but has been less successful in addressing systemic discrimination. 'Systemic discrimination' refers to policies, practices or patterns of behaviour, which are absorbed into the institutions and structure of society, that create or perpetuate disadvantage for a particular group.¹¹⁶

The SDA Inquiry 2008 made a number of recommendations for change, covering the definition of sexual harassment, the scope of coverage of the SDA, complaints processes, exemptions, and the powers of AHRC (then HREOC). Significantly, the SDA Inquiry 2008 recommended that consideration be given to the inclusion of a general prohibition against sex discrimination and sexual harassment in any area of public life¹¹⁷ (recommendation 8); a reverse onus of proof for discrimination and sexual harassment claims (recommendation 22); expansion of the powers of HREOC to conduct formal inquiries (recommendation 29); empowering HREOC to commence legal action for breaches of the SDA without the need for an individual complaint (recommendation 38); amending the SDA to provide for 'positive duties' for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment and promote gender equality (recommendation 40); and a complete rethink of the mechanisms for promoting equality and enforcing anti-discrimination laws (recommendation 43).¹¹⁸

The Inquiry noted that the 'positive duties under the *Equality Act 2006 (UK)* may provide a useful model which could be adopted and applied either to public sector organisations or to both the public and private sector.'¹¹⁹

Following a 6 month inquiry, the UK House of Commons Women and Equalities Committee on Sexual Harassment in the Workplace recently found that the burden of holding harassers and employers to account rests too heavily with the individual, and recommended putting the onus on employers and

¹¹⁵ See for example: Belinda Smith, Submission No 12 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, 5-6, 9-10.

¹¹⁶ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) 47

¹¹⁷ Equivalent to s 9 of the Racial Discrimination Act 1975

¹¹⁸ Recommendation 43 reads: The committee recommends that HREOC conduct a public inquiry to examine the merits of replacing the existing federal anti-discrimination acts with a single Equality Act. The inquiry should report by 2011 and should also consider:

- what additional grounds of discrimination, such as sexual orientation or gender identity, should be prohibited under Commonwealth law;
- whether the model for enforcement of anti-discrimination laws should be changed; and
- what additional mechanisms Commonwealth law should adopt in order to most effectively promote equality.

¹¹⁹ SDA Inquiry 2008 p 163

regulators to prevent sexual harassment in the workplace, because ‘employers and regulators have ignored their responsibilities for too long’:¹²⁰

31. We agree with the Equality and Human Rights Commission (EHRC) that the burden of holding perpetrators and employers to account on workplace sexual harassment is too great to be shouldered by individuals alone. Employers must have greater and clearer responsibilities for protecting workers from sexual harassment.

32. We support the recommendation of the Equality and Human Rights Commission that the Government should place a mandatory duty on employers to protect workers from harassment and victimisation in the workplace. Breach of the duty should be an unlawful act enforceable by the Commission and carrying substantial financial penalties. The duty should be supported by a statutory code of practice on sexual harassment and harassment at work which sets out what employers need to do to meet the duty.

The Sex Discrimination Act should be amended to strengthen the Australian Human Rights Commission’s ability to effectively address systemic issues of sexual harassment. In particular, the Sex Discrimination Commissioner should be empowered (and resourced) to conduct own motion inquiries into particular sectors, industries or workplaces, and to compel attendance and require production of information and documents for the purposes of such inquiries. Stakeholders should be consulted on options for amending the SDA to include a new ‘positive’ duty on employers to protect employees from harassment and discrimination at work, with appropriate powers for such a duty to be effectively enforced.

Complaints processes

The SDA complaints process has been described as ‘onerous, too legalistic and too formal.’¹²¹ As in most employment disputes, a significant power imbalance exists. The playing field is not level. As stakeholders have noted, individuals wanting to pursue sexual harassment complaints must navigate a complex and technical area of law (often without legal representation) and compete with well-resourced, well-informed and experienced respondents.¹²² A decade ago, Professor Thornton pointed out that this imbalance has ‘skewed’ the interpretation of the SDA against the interests of complainants, because it has resulted in a focus on the technical requirements of the legislation rather than the substance and merits of cases.¹²³

Even when the legal avenue is successfully pursued, ‘compensation awards for breaches of anti-discrimination legislation, including for sexual harassment, have consistently been low, with little

¹²⁰ Women and Equalities Committee, UK House of Commons, Sexual harassment in the workplace, Fifth Report of Session 2017-19 (2018)

¹²¹ Sara Charlesworth, Submission No 39 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act* (2008) 7

¹²² Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) [6.4]

¹²³ Standing Committee on Legal and Constitutional Affairs *Inquiry into the effectiveness of the Sex Discrimination Act*, Committee Hansard, 11 September 2008, p. 43.

overall deterrent effect.’¹²⁴ The case of *Richardson v Oracle Corporation Australia Pty Ltd*¹²⁵ (‘Oracle’) is widely recognised to have changed the landscape in relation to sexual harassment damages. On appeal, the court increased the general damages awarded from \$18,000 to \$100,000, and added an additional \$30 000 for economic loss. However, when compared with other jurisdictions such as defamation, the damages are still relatively modest. In Oracle, the complainant was subjected to repeated comments, slurs and sexual advances by a co-worker over many months, some of which occurred in front of clients and colleagues. By way of comparison, in 2015 the Federal Court awarded former Treasurer Joe Hockey \$200,000 in damages for hurt feelings arising from a poster headline and tweets reading ‘Treasurer for sale’.¹²⁶

In some jurisdictions, statutory caps on damages operate as an absolute and unjustified bar to complainants achieving justice.¹²⁷ Costs follow the event in the Federal Circuit Court and the Federal Court, so unsuccessful complainants also risk having to pay the respondent’s costs. In addition, civil penalties are not available, there is no capacity for a court to award punitive or exemplary damages and there is no ability to apply for an injunction to restrain harassment.

While a ‘representative complaint’ can be lodged by a representative body or a trade union on behalf of one or more persons aggrieved by an alleged act of unlawful discrimination if certain conditions are met,¹²⁸ these bodies cannot commence legal proceedings on behalf of the aggrieved person.¹²⁹ A number of reports have recommended that representative bodies such as advocacy groups, human rights organisations and trade unions should be able to bring actions in the federal courts in order to improve the capacity of the SDA to address systemic discrimination and harassment.¹³⁰ For these and other reasons, sexual harassment complaints are often settled out of court. Conciliation has, on the whole, resulted in modest outcomes for complainants.¹³¹

¹²⁴ Therese MacDermott ‘Reassessing Sexual Harassment: It’s Time’ (2015) Vol 40 *Alternative Law Journal* 157
¹²⁵ [2014] FCAFC 82

¹²⁶ Louise Hall and Michaela Whitbourn, ‘Treasurer Joe Hockey awarded \$200,000 in defamation case against Fairfax Media’, *The Sydney Morning Herald*, 15 July 2015 <<https://www.smh.com.au/politics/federal/hockey-awarded-200000-in-defamation-case-against-fairfax-media-20150630-gi1axg.html>>

¹²⁷ Caps on damages exist in NSW, Tasmania, Western Australia and the Northern Territory.

¹²⁸ Under s 46P(2)(c) of the Australian Human Rights Commission Act 1986 (AHRC Act)

¹²⁹ AHRC Act, s 46PO(1)

¹³⁰ Attorney-General’s Department, ‘Consolidation of Anti-Discrimination Laws’ (Discussion Paper, Australian Government, 2011) 48

¹³¹ Paula McDonald and Sara Charlesworth ‘Settlement outcomes in sexual harassment complaints’ (2013) Vol 24, *Australasian Dispute Resolution Journal*, 25

The evidence is clear - even reporting an incident of sexual harassment is not considered an option for many, let alone pursuing a lengthy, costly, technically complex and risky legal process to conclusion.

Case Study from ACTU Survey

A female worker in a large bank told us she was sexually assaulted by her manager. The worker complained but was not believed and was adversely treated following the complaint in a number of ways, including a reduction of her hours, not have expenses reimbursed and ultimately not having her contract renewed. The worker has not worked since. The worker is pursuing a complaint through the courts under the SDA, but is extremely concerned about the financial impact of the process. She has been advised that costs to run the matter (approximately \$150,000) would outweigh any compensation she is likely to be awarded, and she has been advised of the risk of having to pay the employer's costs.

The ACTU recommends urgent reform of the complaints process in the Sex Discrimination Act in consultation with stakeholders, including significantly increased time-limits, improving the process for representative complaints, removing statutory caps on damages in state-based legislation and authorising courts to award exemplary and punitive damages.

Fair Work Act 2009

In its current form, the FW Act does not effectively ensure gender equality, or protect workers against sexual harassment.

As outlined, at a general level, the FW Act has failed to keep pace with changing working arrangements. The rights of workers to act collectively and seek representation from their unions in order to negotiate safe and healthy workplaces have been seriously undermined. Workers in non-standard and precarious work routinely 'fall through' the minimum employment safety net. The shortcomings of the current industrial system simultaneously *increase* the risk of sexual harassment occurring and *reduce* the capacity of workers to speak up and take action (individually or collectively) to address it. There is an urgent need for new workplace rules which cover all workers – including those in current and emerging forms of work – and enable workers to bargain for secure jobs, fair wage increases and improved conditions, and that provide access to independent arbitration, protect the right to strike and union representation, and provide simplified and effective enforcement mechanisms to protect working rights.

Stronger and fairer bargaining laws will enable employees to close the gender pay gap and act collectively to create safe, healthy and secure work environments free of harassment and violence. It is essential that workers can bargain at different levels, including for agreements across a sector, or

agreements that secure jobs, pay and conditions in a supply chain for example. The ability to bargain at all levels is very important to combat violence and harassment. At the enterprise level, employers and employees can agree on policies and practices to better identify hazards and risks at an individual workplace. At the industry level, bargaining can also deal with important sector-wide issues that impact on violence and harassment, for example staffing levels in aged care, or policies supporting women in construction or other male-dominated industries.

Australian industrial laws must embed a serious commitment to gender equality. Gender equality is currently recognised only *indirectly* as an objective of the FW Act, through the requirement in s 3(a) to consider Australia's international labour obligations, and it is only the concept of 'equal pay for work of equal or comparable value' (just one aspect of gender inequality, and also a concept that has been narrowly interpreted by courts and tribunals¹³²) which is to be merely 'taken into account' by the FWC when performing its functions in relation to awards and minimum wage setting. Some of the limitations of the current industrial framework when it comes to gender equality are demonstrated by the Full Bench decision in relation to paid family and domestic violence leave. In that case, the Full Bench said, "*We accept that family and domestic violence is a gendered phenomenon, in that it predominately affects women. But s.134(1)(e) is concerned with the provision of equal remuneration in particular, not the impact of an award term on women generally. The consideration in s.134(1)(e) is not relevant in the present context.*" This was a missed opportunity. The FWC should have been required to consider the positive impact that an entitlement such as paid family and domestic violence leave would have on gender equality in the workplace more broadly.

General Protections and Discrimination

Part 3-1 of the FW Act sets out a series of general protections of workplace rights, including freedom of association, involvement in lawful industrial activities and protection from discrimination. Section 351 prohibits an employer from taking 'adverse action' against an employee (or a prospective employee) 'because of' a protected attribute, including sex.¹³³ Pursuant to s 342(1), an employer takes 'adverse action' against an employee if the employer dismisses or otherwise 'injures' the employee in her employment, or 'discriminates' between the employee and other employees.

¹³² The pursuit of Equal Remuneration Orders (FW Act, s 302-306) has proved to be an extremely costly, time-consuming, highly adversarial and overwhelmingly ineffective process. This is demonstrated by the recent decision of the Fair Work Commission to dismiss an application by the Australian Education Union and United Voice for equal pay for the children's services and early childhood education industry. In that case, the Liberal Federal government and employer groups argued – and the Fair Work Commission agreed – that unions should identify 'male comparators', despite the fact that there has been no such requirement in the Fair Work Act since 2009. This decision fails to recognise the systemic undervaluing of women's work and limits the potential of a gender undervaluation approach in future equal remuneration cases. The case also demonstrates that not only is there a need for new legislative provisions, but also that they be understood, supported and appropriately implemented by key institutional actors, such as the Federal Government and the Fair Work Commission.

¹³³ Section 772 makes it unlawful to termination an employee's employment on certain grounds, including sex.

Sexual harassment is not explicitly proscribed by the FW Act. While the FWC can handle a dispute about adverse action on the grounds of sex, it is unlikely that this extends to sexual harassment disputes.¹³⁴ A worker may have a claim under s 340 if they are victimised for making a *complaint* about sexual harassment,¹³⁵ but no right of action arises from the sexual harassment itself. There are a number of other problems with the general protections provisions which make them unsuitable for addressing sexual harassment or discrimination at work in their current form.

The general protections provisions consolidated (and in some respects expanded) protections that were already contained in the *Workplace Relations Act 1996* (WR Act) and its predecessors. The discrimination provisions in s 351 were intended to 'broadly cover' paragraph 659(2)(f) of the former WR Act, which made it unlawful to *dismiss* an employee for discriminatory reasons, and extend the protection to prohibit *any* adverse action on discriminatory grounds. The general protections were intended to be 'streamlined and simple' provisions ensuring 'fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment'.¹³⁶ However, the provisions have not lived up to their promise, largely because of narrow, overly technical interpretations of various aspects of the provisions by the courts. The provisions are in practice extremely limited in their ability to protect workers' rights or prevent discrimination.

Most notably, in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 an employee who was a manager and a union delegate was suspended for sending an email to union members stating that several members had advised him they had been asked to produce fraudulent documents for an audit being conducted for the purposes of re-accreditation. The employee was suspended and asked to show cause why he should not be disciplined. The employer claimed that the reason for the suspension was not that the email constituted lawful industrial activity, but that it was inappropriate for a manager to send an email of that nature. The case initially succeeded but ultimately failed in the High Court. The High Court said that the fact that the employer led credible evidence that the HR Manager believed that her decision was unrelated to the employee's lawful industry activity was sufficient for the employer to defeat the case. This

¹³⁴ *Wroughton v Catholic Education Office Diocese of Parramatta* (2015) 255 IR 284 [2015] FCA 1236, [51]-[64]

¹³⁵ See *Shea v TRUenergy Services Pty Ltd* (no. 6) [2014] FCA 271 in which the applicant alleged that sexual harassment complaints about a colleague were the real reason she was made redundant – the application was dismissed. There are also a number of instances in which the Fair Work Commission considers an applicant's request for an extension of time to make a general protections complaint involving a complaint of sexual harassment: see for example: *Guhl v Dredging International Australia Pty Ltd (t/as Dredging International Australia)* [2014] FWC 7057 in which the applicant alleged that she was adversely treated after making a complaint of sexual harassment and was granted an extension of time in which to make a general protections complaint; see also *Lewis v Hitachi Construction Machinery (Aust) Pty Ltd* [2018] FWC 596, in which an applicant who alleged that he was terminated because he made a complaint of sexual harassment was granted an extension of time in which to make a general protections complaint; and *Danielle Smith v Argosy Agricultural Group Pty Ltd T/A Sydney Polo Club* [2016] FWC 8297 and *Leon Wallis v Wuchopperen Health Service Limited* in which the applicants were not granted extensions.

¹³⁶ Explanatory Memorandum, *Fair Work Bill 2008*, [1424]

interpretation significantly limits the ability of the general protections to meaningfully protect workers' rights and prevent discrimination.

In addition, the term 'discrimination' is not defined by the FW Act, and courts have interpreted it narrowly, finding that it should be given its ordinary meaning and should not be interpreted by reference to anti-discrimination statutes. Problematically, courts have required employees to prove that the employer *intended* to or *consciously* treated them less favourably.¹³⁷ This presents a significant obstacle to a successful claim of discrimination. In addition, s 352(2)(a) provides that action authorised by a State or Territory anti-discrimination law will not constitute adverse action under subclause 351(1).

It is also not clear whether an employee would (without overly technical arguments) be able to show that employer who had failed to take steps to prevent sexual harassment (from a colleague or customer for example) had 'injured' the employee in their employment. Similarly, it may be unnecessarily difficult for an employee to show that the employer had discriminated against them (meaning, in the context of this part of the current provisions, that the employer had treated them differently from other employees) in failing to protect them from sexual harassment.

In keeping with the general reduction in powers of the national industrial tribunal, the general protections provisions (like most other rights in the FW Act) can only be enforced by the courts; arbitration in the FWC can only occur by agreement.

In addition, the vicarious liability provisions under s 793 of the FW Act reflect the common law test and are therefore unsuited to sexual harassment and discrimination matters, for the same reasons discussed above.

One of the strengths of the provisions is that s 361 reverses the onus of proof, requiring courts to assume that the reason for the adverse action is as alleged, unless the respondent proves otherwise.

Despite shortcomings with the drafting and interpretation of the current provisions, the FW Act provides an appropriate framework for addressing work-related sexual harassment. The ACTU agrees with commentators¹³⁸ who have noted that the industrial jurisdiction, if used effectively, and with appropriate modifications, clearly has the capacity to effectively address discrimination and sexual harassment at work because of its accessibility and strong enforcement mechanisms compared with anti-discrimination laws. Such amendments should be progressed as a matter of priority.

¹³⁷ Dominique Allen, 'Adverse Effects: Can the Fair Work Act Address Workplace Discrimination for Employees with a Disability?' (2018) Vol 41 No 3 *University of New South Wales Law Journal* 12-15

¹³⁸ *Ibid*, 3

Stop Bullying

The inclusion of Stop Bullying Provisions in the FW Act was a welcome and long overdue reform. However, as with the general protections provisions, while there are some positive aspects of the Stop Bullying provisions, there are a number of limitations which make them unsuitable for addressing sexual harassment or discrimination at work in their current form.

Since 1 January 2014, a worker who 'reasonably believes' that they have been bullied at work can apply to the FWC for an order.¹³⁹ The FWC must deal with the matter within 14 days of the application. The provisions do not create an 'offence' of bullying in the workplace; instead they define 'workplace bullying' and authorise the FWC to make orders to prevent the worker from being bullied. The FWC can inform itself as appropriate, including requesting documents from the employer, and may refer a matter to a WHS regulator where it considers this necessary and appropriate.

The provisions were introduced¹⁴⁰ to give effect to the Government's response to a Senate Inquiry into workplace bullying,¹⁴¹ announced in May 2012 in response to community concern about the death of Brodie Panlock, a young hospitality worker who was relentlessly bullied by a group of male colleagues before taking her own life.¹⁴² Brodie's employer and colleagues were prosecuted under the Victorian *Occupational Health and Safety Act 2004*, convicted and fined.¹⁴³ Following her death, Brodie's parents lobbied for legal changes to the laws regarding workplace bullying.¹⁴⁴

The Committee spent some time considering the application of Australia's WHS regime to workplace bullying matters, noting the 'desirability of viewing it as first and foremost a WHS issue because of the risks it poses to health and safety',¹⁴⁵ but observing that WHS laws do not give 'any avenue to personally seek resolution outside of the workplace' other than a complaint to the WHS regulator.¹⁴⁶

The Committee noted comments by Safe Work South Australia that while South Australia's pre-harmonised WHS laws had a workplace bullying complaint process,¹⁴⁷ it was limited because the Commission could not decide whether or not bullying had occurred or impose a penalty, and workers

¹³⁹ Part 6-4B of the *Fair Work Act 2009*

¹⁴⁰ See the *Fair Work Amendment Bill 2013*

¹⁴¹ Australian Government, Response to the report *Workplace Bullying "We just want it to stop"*, February 2013

¹⁴² <https://www.abc.net.au/news/2010-02-08/suicide-waitress-driven-to-the-edge-and-pushed/323884>

¹⁴³ WorkSafe Victoria, 'Business, Director, Three Workers Convicted And Fined For Bullying', 9 February

¹⁴⁴ In addition to the Stop Bullying provisions, an amendment was made to the Victorian Crimes Act 1958 making serious bullying an offence punishable by a maximum penalty of 10 years' imprisonment, known as 'Brodie's Law'.

¹⁴⁵ House of Representatives Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: We just want it to stop* (2012) 189, [6.122]

¹⁴⁶ *Ibid*, 34, [2.16]

¹⁴⁷ Section 55A of the *Occupational Health, Safety and Welfare Act 1986* (SA) allowed a dispute to be referred to the Industrial Relations Commission for conciliation or mediation.

who had left the workplace could not complain.¹⁴⁸ The Committee ultimately recommended the implementation of ‘arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process.’¹⁴⁹ In making its recommendation, the Committee emphasised that WHS regulators should not perceive individual remedies as a replacement for penalties enforceable under WHS and criminal legislation.¹⁵⁰

At the time of the Stop Bullying Inquiry, governments, unions and industry groups were collaborating to develop a nationally consistent WHS Model Code of Practice on workplace bullying. The Senate Committee recommended that the Commonwealth Government (through Safe Work Australia) ‘urgently’ progress the draft Code, and that Safe Work Australia work with all jurisdictions to adopt and ‘actively promote and implement’ the Code once finalised. The Committee also recommended that the Commonwealth Government (through Safe Work Australia) seek to develop and implement model WHS Regulations on managing the risks of workplace bullying as set out in the draft Code. However, none of these recommendations were ultimately implemented. No new regulation was developed and the draft Code was downgraded to a non-binding guidance document.

The Stop Bullying provisions ultimately adopted are subject to a number of limitations which make them unsuitable to address sexual harassment at work. The Commission cannot impose any penalty or award any compensation, and the process is not available if the worker has left the workplace – similar to the SA provisions which were the subject of criticism in the Stop Bullying Inquiry. The provisions also define ‘bullied at work’ as ‘repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety’.¹⁵¹ This definition creates a number of barriers for workers seeking to access the provisions to stop sexual harassment.

Firstly, workers in workplaces that are not constitutionally covered businesses (and members of the Australian Defence Force) are not protected. Secondly, conduct must be repeated - in order to be able to access the Stop Bullying regime, a person who had been sexually harassed would have to wait for a second incident to occur, no matter how serious the first incident was. Thirdly, while the phrase ‘at work’ applies to any time the worker performs work, regardless of location or the time of day, it is unclear whether it would cover situations where a worker accesses social media when not performing work and is harassed by a colleague, despite the connection with work.¹⁵² Fourthly, the ‘reasonable management action’ exclusion is problematic and has frequently been used to preclude liability for psychological injury sustained in the course of employment under workers’ compensation laws. All

¹⁴⁸ House of Representatives Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: We just want it to stop* (2012) [6.105]-[6.106]

¹⁴⁹ *Ibid*, Recommendation 23

¹⁵⁰ *Ibid*, [6.127]

¹⁵¹ Fair Work Act 2009 ss 789FD(1) and (2). NB this definition was the same as the one in the draft Code of Practice that was being developed at the time

¹⁵² *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2014] FWCFB 9227, [54]-[56]

actions that ‘effectively direct and control the way work is carried out’ are covered by the term ‘management action’ in the Stop Bullying provisions.¹⁵³ Although an action may on its face meet the definition of ‘management action’, the way in which it is carried out may be intimidating and inappropriate in the context. While this exclusion is unlikely to affect overtly sexual conduct (which will never constitute management action, reasonable or otherwise), unwelcome sexual conduct is often accompanied by non-sexual harassing and bullying behaviours, as noted earlier.

Additionally, for the FWC to be able to make stop bullying orders, the worker must show not only that she has been bullied at work by an individual or a group of individuals, but that there is also a risk that the worker will *continue* to be bullied at work by that same individual or group of individuals. The worker must also prove that the bullying exposes them to the chance of ‘injury or loss’, as well as that their belief that they are being bullied at work is objectively reasonable.¹⁵⁴

In the circumstances, it is unsurprising that very few Stop Bullying orders have been made in relation to conduct constituting sexual harassment.¹⁵⁵

The requirement on the Commission to deal with applications urgently (within 14 days) is a positive aspect of the provisions, as is the use of the broad and flexible definitions of ‘worker’ and ‘workplace’ from the Model Workplace Health and Safety Act.

FW Act Reform - Recommendation

The FW Act should be amended to give unequivocal recognition of the right to gender equality, and legislative direction that gender equality is to be promoted by the FWC in all its functions, including in relation to awards, enterprise agreements, dispute settlement and minimum wages. The pay equity provisions of the FW Act should also be strengthened, including by allowing cases to proceed without a ‘male comparator’. The FW Act must equip the FWC with broad discretion and powers to make any orders it sees fit to remedy gender inequality, and require the FWC to be proactive in using these powers. These powers and functions should be exercised by a specialist Gender Equality Panel, supported by a properly resourced Gender Equality Research Unit.

The ACTU strongly recommends that the FW Act be amended to include a new explicit protection against sexual harassment (and all forms of discrimination at work). The FW Act should provide a

¹⁵³ Re Ms SB [2014] FWC 2104, 48

¹⁵⁴ Ibid, 45.

¹⁵⁵ One of the only examples is *Roberts v VIEW Launceston Pty Ltd* [2015] FWC 6556, in which one of the substantiated allegations was that inappropriate comments about a possible same-sex relationship were made to the applicant that caused embarrassment to her. Other allegations related to unreasonable and belittling behaviour, but not of a sexual nature. The pattern of behaviour by the perpetrators (a husband and wife) was found to constitute workplace bullying constituting a risk to health and safety, and (due to the small workplace and lack of submissions on the form of orders) the matter was referred to a conference to determine the appropriate orders.

complaints mechanism that is quick, simple and free. Complainants should have at least six years to bring proceedings. The protections should apply to all workers, regardless of contractual status. It should be made clear that workers are protected from actions or failures to act by labour hire firms or other third-party actors. The provisions should cover sexual harassment by third-parties, as well as co-workers and managers. Both current and former workers should be able to access the Commission. Unions should have standing to bring disputes on behalf of a member or members.

The FWC should be expressly empowered to hear sexual harassment and discrimination disputes whether the cause of action arises under the FW Act, the Sex Discrimination Act, or other federal anti-discrimination statutes, where they relate to employment.¹⁵⁶

The FW Act should allow the FWC to resolve disputes by conciliation and, if necessary, arbitration. The FWC should have broad powers to make a range of orders, including compensation, reinstatement and orders preventing or requiring future conduct, including requiring employers to take proactive steps to prevent harassment. The FWC should be required to deal with urgent applications promptly, for example, within 14 days as per the Stop Bullying provisions. Breach of the FWC's orders should attract civil penalties. Matters which are unable to be resolved through the FWC process would be able to be progressed through the courts in a similar way to current general protections matters. Courts should have the power to issue injunctions, penalties and order compensation or make other remedial orders, such as reinstatement or orders that conduct cease.

Consistent with anti-discrimination laws, the test for discrimination or sexual harassment should not require proof of intent by the respondent. Employers should not be able to avoid liability simply by giving subjective evidence about their state of mind at the time of the decision. Courts should be required to examine all the evidence and circumstance to determine the real reason for the employer's conduct, whether conscious or unconscious. The exemptions for actions lawful under State and Territory laws at s351(2)(a) and (c) of the Act should be removed. The reverse onus of proof should remain. There should be no need to identify a comparator as there is under anti-discrimination laws. There should be no 'reasonable person' test for sexual harassment. The definition of sexual harassment should be along the following lines:

Sexual harassment is unwelcome conduct of a sexual nature which makes a person feel offended, humiliated and/or intimidated. It includes situations where a person is asked to engage in sexual activity as a condition of that person's employment, as well as situations which create an environment which is hostile, intimidating or humiliating for the recipient.

¹⁵⁶ The Australian Human Rights Commission should retain its complaints function. Complainants should be able to choose which jurisdiction to pursue their complaint in.

Sexual harassment can involve one or more incidents, and actions constituting harassment may be physical, verbal and/or non-verbal.

Workplace Health and Safety Laws

Women face some unique physical and psychological hazards at work. While some of these unique hazards relate to biological differences (notably pregnancy), most relate to the health impacts of gender roles and the life experience associated with being female.¹⁵⁷ As noted earlier, women often work in sectors characterised by irregular hours, job insecurity and fewer chances of promotion, and bear the dual burden of both paid work and unpaid domestic work. The International Labour Organization has noted that:

'Most women have few choices as to where they can work. They end up doing work that can be heavy, dirty, monotonous, low paid and which involves long hours of work with no access to health services. This is particularly the case of those working in the informal sector where women represent a great proportion.'¹⁵⁸

Women are more likely to experience discrimination, sexual harassment, intimidation, mobbing, and psychological harassment.¹⁵⁹ These risks are exacerbated because many women work in service sectors, such as retail, aged-care and hospitality, which involve direct contact with customers.¹⁶⁰

While Australian employers already do have a 'positive duty' to eliminate or minimise the risk of sexual harassment at work, in the form of their obligation to provide a safe workplace under WHS legislation, this is not being effectively implemented in practice.

Australia's 'Model WHS Laws'

In Australia, WHS regulation is the responsibility of the States and Territories. Up until 2011, there was a significant degree of difference between the various regimes. In 2009-10, Model WHS Laws were developed by Safe Work Australia, a tripartite Commonwealth agency, following an extensive independent review process by a National Occupational Health and Safety Panel (**National OHS Panel**).¹⁶¹ The Model WHS Laws consist of the *Model Work Health and Safety Act 2011*, the *Model*

¹⁵⁷ Karen Messing and Pirooska Ostlin, 'Gender equality, work and health: a review of the evidence' (World Health Organisation, Department of Gender, Women and Health, 2006)

¹⁵⁸ Valentina Forastieri, 'Women Workers and Gender Issues on Occupational Health and Safety', (Information Note OH/9903/01, International Labour Office, SafeWork) 4

¹⁵⁹ International Labour Office, '10 Keys for Gender Sensitive OSH Practice – Guidelines for Gender Mainstreaming in Occupational Safety and Health' (Working Paper, SafeWork, 2013); Izaskun Larrieta-Rubín de Celis et al, 'Women's occupational health and safety management: An issue for corporate social responsibility' *Safety Science* (2017) 91, 61–70.

¹⁶⁰ European Agency for Safety and Health at Work, 'New risks and trends in the safety and health of women at work' (2014)

¹⁶¹ National Review Panel, 'National Review Into Model Occupational Health and Safety Laws' (Australian Government, First Report, October 2008); National Review Panel, 'National Review Into Model Occupational Health and Safety Laws' (Australian Government, Second Report, January 2009)

Work Health and Safety Regulations 2011, and a number of Model Codes of Practice. To date, all jurisdictions except for Victoria and Western Australia have now implemented the Model Laws.¹⁶² Each jurisdiction has a regulatory agency responsible for enforcing the laws.

The key change for most jurisdictions under the Model Laws is the way the Model WHS Act deals with the changing nature of work. Crucially, it no longer relies on the traditional employment relationship as the source of duties of care. Instead of an 'employer', a 'person conducting a business or undertaking' (PCBU) is the primary duty holder. A much broader definition of 'worker' has been adopted, covering volunteers, contractors and others. In recognition of the growth of complex labour market structures such as supply chains and labour hire arrangements, multiple duty holders must meet their duties to the extent of their influence and control; and consult with other duty holders where their obligations overlap. Another key change was the introduction of a positive duty on company officers to proactively ensure the PCBU is meeting their WHS obligations.

Australian WHS laws are based on the 'Robens' model of regulation, which is characterised by a single statute containing broad, general duties encompassing all health and safety risks at work, supported by detailed regulations mandating risk controls in relation to specific hazards. Regulations are supported by Codes of Practice, which are not legally binding but admissible in court as evidence of reasonably practicable measures in a given circumstance. Non-binding guidance material is also developed by regulators to assist duty-holders. Under the Robens model, regulators are empowered to issue administrative sanctions (such as improvement and prohibition notices) and to prosecute for breaches. Crucially, the Robens model involves a systematic, risk management approach to eliminating or reducing health and safety risks at the workplace-level, which is developed and implemented through cooperation, participation and consultation between workers, management and the regulator (referred to by Robens as 'self-regulation').¹⁶³

Psychosocial hazards

Sexual harassment (along with other forms of bullying, harassment, discrimination and violence) is a 'psychosocial hazard', i.e. a risk to health and safety arising from psychological, social and/or organisational aspects of the work environment. The changing nature of work presents significant psychosocial risks, including excessive working hours, job insecurity, lack of autonomy, lack of industrial voice and organisational restructuring, as well as violence and harassment.¹⁶⁴ Psychosocial

¹⁶² Western Australia is currently drafting a new Work Health and Safety Bill based on the model WHS Act: Government of Western Australia 'Modernising work health and safety laws in WA' (30 June 2018)

¹⁶³ A 1972 UK report resulted in widespread reform of WHS laws: Lord Robens 'Report of the Committee on Safety and Health at Work' (1972)

¹⁶⁴ See for example Michael Quinlan, 'Organisational restructuring/downsizing, OHS regulation and worker health and wellbeing' (2007) *International Journal of Law and Psychiatry* Vol 30, 385–399

risks may cause physical and/or mental harm and are increasingly recognised as a serious challenge to health and safety at work.¹⁶⁵

The Stop Bullying Inquiry recommended an annual update of trends in workers' compensation data relating to psychosocial health and safety generally, and workplace bullying specifically. In response, Safe Work Australia now produces an annual 'Statement on Psychosocial Health and Safety and Bullying in Australian Workplaces'. SWA's latest report shows that while mental stress claims overall have fallen between 2002-03 and 2015-16, the rate for harassment and/or bullying claims has increased over the period, although has been trending downwards from a peak in 2010-11.¹⁶⁶ For the reasons outlined below (and as noted by SWA) these figures are an 'approximate measure of the psychosocial health and safety status of Australian workplaces over time and should be interpreted with caution'. This is primarily because the data presented in these statements are drawn only from *accepted workers' compensation claims* caused by a psychosocial stressor (such as harassment or bullying, occupational violence or unreasonable work pressure) that has caused an injury or disease. Such claims are known as 'mental stress claims'. Mental stress claims data includes a subcategory for harassment and/or bullying, defined as 'repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety'. Claims due to sexual or racial harassment do not form a subcategory and so are not analysed by SWA data. Mental stress claims data is the only data available to assess the nature and prevalence of psychosocial stressors in Australian workplaces, and it is subject to some serious limitations. It only captures accepted claims, and as discussed below, the workers compensation regime fails to respond adequately to sexual harassment incidents, meaning that many workers injured by sexual harassment are not successful in their workers compensation claims, or do not claim workers compensation at all. The definition of 'bullying' as *repeated* behaviour is also problematic, as discussed above.

What is clear from the SWA data is that while mental stress claims only make up a small proportion of claims, the time lost and cost associated with them are 'significantly higher' compared to other types of workers' compensation claims. Other interesting statistics to note include the fact that by far the largest category of mental stress claims relate to occupational violence, harassment and/or bullying at work, and the frequency rate of claims for harassment and/or bullying made by female employees is almost three times higher than males.¹⁶⁷

The prevention of mental health conditions has been identified as one of six national priorities by the *Australian Work Health and Safety Strategy 2012-2022*, due in part to the cost and complexity of

¹⁶⁵ See for example European Agency for Safety and Health at Work, 'Expert forecast on emerging psychosocial risks related to occupational safety and health' (2007)

¹⁶⁶ Safe Work Australia, *Psychosocial health and safety and bullying in Australian workplaces: Indicators from accepted workers' compensation claims*, Annual statement, 4th edition, 2017, 1

¹⁶⁷ *Ibid*, 2

mental stress claims. Despite some progress, there is a long way to go before the prevention of psychosocial risks, including sexual harassment, is effectively operationalised by WHS regimes. There are different regulatory approaches to the management of psychosocial risks internationally. Australia and other jurisdictions take the approach of 'establishing broad duties and obligations in laws that apply to health and safety at work, which embrace psychosocial factors but without explicitly naming them.'¹⁶⁸

Prior to the introduction of the model WHS laws, only Victoria's health and safety laws defined health to include psychological health, and no jurisdiction included explicit regulations on psychological health. An important reform introduced by the Model WHS Act was the inclusion of 'psychological health' in the definition of 'health' (s 4). This means that the primary duty of a PCBU (s 19) is to ensure, so far as is reasonably practicable, that workers and other persons are not exposed to risks to psychological health and safety arising from the work carried out by the business or undertaking. A PCBU is obliged to, relevantly, maintain a 'work environment without risks to health and safety' (s 19(3)(a)), maintain 'safe systems of work' (s 19(3)(c)), provide access to 'adequate facilities for the welfare of workers' (s 19(3)(d)), and provide 'any information, training, instruction or supervision' necessary to protect workers from risks to their health and safety (s 19(3)(f)). Workers and other persons at a workplace must take reasonable care that their behaviour does not adversely affect the health and safety of others (ss 28(b) and 29(b)), which clearly includes not engaging in sexually harassing behaviour towards colleagues or others.

It is clear that the general duties in Australia's Model Laws are broad enough to cover psychosocial hazards, including sexual harassment. However, there is currently no WHS Regulation specifically dealing with the management of psychosocial hazards.¹⁶⁹ This problem is compounded because as it currently stands, the detailed requirements for managing risks to health and safety that are set out in Part 3.1 of the Regulations, including the duty to implement risk control measures (s 36 of the Regulations), technically apply only to the risks explicitly set out in the Regulations, not all workplace risks.

There is no Code of Practice dealing with psychosocial hazards either. There is a Code of Practice for the management of risks generally,¹⁷⁰ which lists 'psychosocial hazards' as an example of a common type of hazard that needs to be identified. Sexual harassment is not explicitly mentioned, but 'excessive time pressure, bullying, violence and work-related fatigue' are listed as examples of psychosocial hazards which may cause psychological or physical injury or illness. A 'hazard' (p 11) is

¹⁶⁸ Elizabeth Bluff 'The Regulation and Governance of Psychosocial Risks at Work: A Comparative Analysis Across Countries' (Part 3. Society, safety & health, Global Collaborative Research, 2016) 113-168, 117

¹⁶⁹ The Model WHS Act confers regulation-making powers in relation to a number of matters, including exposure to psychological hazards: Model WHS Act, Section 276 and Schedule 3.

¹⁷⁰ Safe Work Australia, 'How to manage work health and safety risks' (Code of Practice, 25 May 2018)

explained as a 'situation or thing that has the potential to harm a person. Hazards at work may include: noisy machinery, a moving forklift, chemicals, electricity, working at heights, a repetitive job, bullying and violence at the workplace.' The Code states (p 10) that the risk management process outlined in the Code should be applied to both physical and psychological risks. For further guidance specific to psychological risks, the Code links to two separate non-binding national guidelines: *Work-related psychological health and safety: A systematic approach to meeting your duties* (published 14 June 2018) and *Guide for preventing and responding to workplace bullying* (published 31 August 2016).

The 14 June guide confirms that employers are 'required to manage risks from hazards, including work-related psychosocial hazards, so far as is reasonably practicable' (p 11), and that this includes hazards arising from 'workplace bullying, aggression, harassment including sexual harassment, discrimination, or other unreasonable behaviour by co-workers, supervisors or clients' (p 9). However, the bullying guide states that: 'Unreasonable behaviour may involve unlawful discrimination or sexual harassment which, by itself, is not bullying'. This statement is confusing and misleading: sexual harassment and unlawful discrimination can and does constitute a form of workplace bullying.¹⁷¹ The guide refers readers to the Australian Human Rights Commission, the Fair Work Commission, and state and territory anti-discrimination, equal opportunity and human rights agencies for further assistance. This gives the clear impression that discrimination and sexual harassment are not WHS issues and that WHS regulators have no role to play in addressing them.

As part of Safe Work Australia's 2018 review of Model Laws, stakeholders were asked to comment on 'the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace'.¹⁷² A review of submissions shows that stakeholders hold strong views about this matter, with most favouring legislative reform to specifically address psychosocial risks in the workplace. For example, the Mental Health Commission said that the Model WHS laws 'narrow focus on physical hazards and risks creates the impression that physical health is the primary concern of WHS law. Psychological health, while subject to the same duties, feels very much an afterthought'.¹⁷³

Problems have also been identified with the incident notification provisions in the WHS.¹⁷⁴ During the harmonization process, a number of triggers designed to identify psychosocial risks were stripped from the Model Laws, including absences from work of more than 7 days. Occupational violence

¹⁷¹ See for example *W v Abrob Pty Ltd t/a Schoonens' Computer Services & Simon Schoonens* [1996] HREOCA 11

¹⁷² Marie Boland '2018 Review of the Model WHS Laws' (Discussion Paper, Safe Work Australia, 2018) 16 <<https://engage.swa.gov.au/32134/documents/71071>>

¹⁷³ National Mental Health Commission Submission to the 2018 Review of the Model WHS Laws, 3.

¹⁷⁴ ACTU submission to the 2018 Review of the Model WHS Laws (2018), 50, [102], [103] <<https://engage.swa.gov.au/32134/documents/78522>>

incidents are not notifiable if they result in psychological harm only. Unless psychosocial hazards are required to be reported, employers and WHS regulators are unlikely to take action to address them.

Experts have noted that organisations face ‘significant practical challenges’ in implementing effective responses to psychosocial risks such as sexual harassment, including variations in perceptions of what constitutes sexual harassment and the reluctance of targets to make formal complaints.¹⁷⁵ In the absence of specific regulation, duty-holders are likely to continue to fail to effectively manage psychosocial risks such as sexual harassment.

Due to these gaps in the regulatory framework, as well as inadequate regulator responses, psychosocial risks such as sexual harassment are channelled into individual complaints processes, rather than preventative and systematic risk management processes, which has limited the development of effective organisational responses.¹⁷⁶ A recent study evaluating Australian WHS regulatory instruments related to psychosocial risk management concluded that, ‘there is poor inclusion of risk assessment, preventive action and poor coverage of exposure factors and psychological health outcomes’.¹⁷⁷

The regulation and code of practice making powers in the Model WHS Act provide the flexibility to deal with new and emerging hazards. It is time to use these powers to address the regulatory gap that exists in relation to psychosocial hazards. The ACTU welcomes the Report of the Review of Model Workplace Health and Safety Laws,¹⁷⁸ released on 25 February 2019, which recommends the urgent development of a new ‘WHS Regulation to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks’, as well as review of the notification provisions to ensure psychosocial hazards are properly captured.

Strengths of WHS law

WHS law offers a number of features that stakeholders have repeatedly called for in relation to sexual harassment and discrimination regulation, including broad definitions of ‘worker’, ‘workplace’ and duty-holders capable of responding to changing work arrangements, ‘positive’ duties supported by penalties, (comparatively) well-resourced regulators empowered to prosecute breaches, and personal liability for company officers who neglect their duties. Importantly, breaches of WHS laws are offences against the state, compared with breaches of anti-discrimination laws, which are formulated as

¹⁷⁵ Paula McDonald, Sara Charlesworth and Tina Graham ‘Developing a framework of effective prevention and response strategies in workplace sexual harassment’ (2015) *Asia Pacific Journal of Human Resources* 53, 41-58, 42.

¹⁷⁶ Paula McDonald et al, ‘Developing a framework of effective prevention and response strategies in workplace sexual harassment’ (2015) *Asia Pacific Journal of Human Resources* Vol 53, 42

¹⁷⁷ Rachael Pottera et al, ‘Analytical review of the Australian policy context for work-related psychological health and psychosocial risks’ *Safety Science* 111 (2019) 37–48

¹⁷⁸ [Marie Boland, Review of the Model Work Health and Safety laws, Final report, December 2018](#), 30-35

wrongs against the individual. Stakeholders have criticised the ‘questionable moralistic overtones’ of the anti-discrimination regime, which sets up targets as ‘fragile victims’ and perpetrators as ‘morally wrong’.¹⁷⁹ By contrast, the WHS regime adopts a systematic, risk management approach which focuses on the working environment rather than the attributes of individuals. The WHS regime also relies on consultation with and participation of workers and their unions, allowing people to act collectively to address safety risks, rather than bearing the cost and burden of sexual harassment alone. Compliance and enforcement mechanisms such as provisional improvement notices, enforceable undertakings, the right of union officials to enter workplaces and of workers to cease work if safety is threatened in theory provide a suite of powerful mechanisms to quickly and effectively stop sexual harassment at work and change workplace cultures.

Regulator capacity and enforcement activity

Most WHS regulators are attempting to develop and improve their capacity to respond to psychosocial risks, primarily through appointing specialist inspectors and developing guidance material.¹⁸⁰ Prosecutions for psychosocial failures are rare, but do occur.¹⁸¹

However, while different regulators have varying degrees of expertise, on the whole discrimination and sexual harassment are not currently treated as serious WHS risks. Submissions to the Stop Bullying Inquiry noted that while WHS law places an onus on employers to protect employees from physical and mental health risks resulting from poor workplace culture, it is ‘extremely rare’ for an employer to be prosecuted in connection with workplace bullying. A 2011 Australian study has found that psychosocial hazards remain a ‘marginal area of inspectorate activity’.¹⁸²

In a recent interview, a SafeWork NSW spokesperson recently advised that sexual harassment complaints are referred to the NSW Anti-Discrimination Board. Although the spokesperson indicates that a SafeWork NSW inspector ‘might’ attend a workplace to ‘identify any ongoing risks to workers and review the employer’s policies and systems for dealing with workplace harassment and bullying’, it is clear from these comments that SafeWork NSW considers other agencies better placed to handle sexual harassment complaints.¹⁸³ This is consistent with the findings of a recent UK parliamentary inquiry, which found that WHS regulators and employers in the UK have failed to treat harassment as

¹⁷⁹ ‘Collaborative Submission from leading women’s organisations and women’s equality specialists’, Submission No 60 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act (2008)*, 33

¹⁸⁰ Rachael Pottera et al, ‘Analytical review of the Australian policy context for work-related psychological health and psychosocial risks’ *Safety Science* 111 (2019) 37–48

¹⁸¹ In 2017 a company was fined by Work Safe Victoria for failing to provide a safe system of work in relation to (male on male) bullying and harassment by a co-director against a subordinate staff member, including sexual inappropriate comments <<https://www.worksafe.vic.gov.au/prosecution-result-summaries-enforceable-undertakings>>

¹⁸² Richard Johnstone et al, ‘OHS inspectors and psychosocial risk factors: Evidence from Australia’, *Safety Science* (2011) Vol 49, 547–557

¹⁸³ ‘Harassment must be treated as major OHS issue: inquiry,’ OHS Alert, 30 July 2018.

a serious health and safety issue, and that the UK WHS regulator's 'analysis of the potential for harm caused by sexual harassment appears to be cursory and ill-informed.'¹⁸⁴

There are a number of reasons for this failure. Traditionally, WHS laws have protected workers from physically and visibly dangerous situations arising from working with machinery and hazardous substances, and regulators have been resourced and skilled accordingly. Studies have noted the challenge this legacy presents to inspectorates responding effectively to psychosocial issues in contemporary workplaces, including ongoing gender imbalance in inspectorates and the technical focus of regulators.¹⁸⁵ The ACTU has also raised concerns about the enforcement strategies of WHS regulators generally, arguing that that regulators in all jurisdictions are disproportionately focusing on 'positive motivators' at the expense of deterring non-compliance through monitoring and enforcement activities. This criticism is particularly acute in relation to psychosocial hazards.¹⁸⁶

The problems with regulator capacity are further compounded because workers' and unions' rights to hold duty-holders and regulators to account have been seriously diminished. For example, under the Model WHS Laws, unions cannot bring prosecutions. In the past, this right had operated to shine a light on emerging or neglected areas of WHS where regulators were unwilling or unable to prosecute contraventions, a category into which sexual harassment squarely falls.¹⁸⁷

WHS Reform – Recommendation

A new WHS Regulation and Code of Practice should be developed in consultation with social partners and experts on all psychosocial hazards, including sexual harassment. The new Regulation and Code must address the current problematic definition of 'bullying' in workplace law and WHS law and the confused messages in WHS guidance material about the relationship between harassment, violence, discrimination and bullying at work.

The definitions of 'notifiable incident', 'serious injury or illness' and 'dangerous incident' should be reconsidered and redrafted to require reporting in relation to psychosocial hazards, including sexual harassment.

The requirements for managing risks to health and safety that are set out in Part 3.1 of the Regulations should apply to all risks and hazards, not just the risks set out in the Regulation.

¹⁸⁴ Women and Equalities Committee, UK House of Commons, Sexual harassment in the workplace, Fifth Report of Session 2017–19 (2018), 20

¹⁸⁵ John Graversgaard, 'Key role of labour inspection: how to inspect psycho-social problems in the workplace?' in Iavicoli, S. (ed), Stress at Work in Enlarging Europe. National Institute for Occupational Safety and Prevention (Rome 2004) 65–76.

¹⁸⁶ For example, [ACTU submission to the 2018 Review of the Model WHS Laws](#) (2018), 51, [106]

¹⁸⁷ For example, in NSW and New Zealand, trade unions have assisted in bringing cases addressing emerging areas of concern such as psychological injuries, repetitive strain injuries and the commission of criminal acts in the workplace.

Australia's national approach to WHS compliance and enforcement in relation to psychosocial hazards, including sexual harassment, needs an urgent review. Unions should have the right to prosecute for breaches of WHS laws.

Workers Compensation

Employers in every Australian state and territory are required to have workers' compensation insurance to cover workers who suffer a work-related injury. If a workers' claim is accepted, an employer has various legal obligations to support a worker's rehabilitation at work or return to work following a work-related injury, including proving suitable duties. A worker who suffers a psychological and/or physical injury due to sexual harassment in connection with work should be able to access workers' compensation, including paid leave and medical expenses, and if seriously injured, to pursue a common law claim.¹⁸⁸ However, schemes impose onerous requirements for access to compensation which are too difficult for workers to meet. Eligibility for workers' compensation for psychological injury depends on the way in which each scheme defines an eligible worker, a work-related psychological injury, and the connection between the injury and the employment. Problematically, all jurisdictions deny a worker entitlements if the injury arises from 'reasonable management action taken in a reasonable way.'¹⁸⁹ As a result, the numbers of successful claims for psychological injury due to sexual harassment do not reflect the scope of the problem in workplaces. This not only means that Australia's workers compensation schemes are failing to adequately protect workers who are psychologically injured by sexual harassment, it also means that employers are not feeling the financial consequences of failing to create workplaces free of violence and harassment, and are not motivated by the cost of rising premiums to change their workplace cultures.

Workers Compensation regimes should be reviewed to ensure that they respond effectively and fairly to workers who suffer injuries as a result of psychosocial hazards, including sexual harassment.

Existing measures and good practice

There is not a lot of detailed information available about current Australian employer practices in relation to sexual harassment. However, the available information is concerning. The evidence suggests that most employers are simply doing the bare minimum, while others are actively discouraging employees from complaining.

¹⁸⁸ Safe Work Australia, 'Work-related psychological health and safety: A systematic approach to meeting your duties' National guidance material (2018) 25-27

¹⁸⁹ Safe Work Australia, 'Taking Action: A best practice framework for the management of psychological claims in the Australian workers' compensation sector' (2017)

Respondents to the ACTU survey reported that less than half of their workplaces had proper preventative measures in place, including mandatory training for staff, a clear workplace policy, an effective complaints mechanism, or access to workplace health and safety processes. Respondents supported a range of stronger rules to protect workers from sexual harassment, including better protection from victimisation (60%), a quicker complaints process (34%), more information and support for those experiencing sexual harassment (54%), a stronger role for the union (33%) and better remedies for complainants (47%).¹⁹⁰ This is backed up by an independent national survey of workplace behaviours in December 2011, which found that 76% of respondents felt behaviour was dysfunctional at their workplace, 30% had experienced sexual harassment, and 44% said that their organisation did nothing or turned a blind eye to their issue.¹⁹¹ There are some good news stories, but they are few and far between.

Case Study from ACTU Survey

A young female paramedic told us that on her first job out of university, she experienced sexual harassment from her supervisor. It started with lewd jokes and escalated to text messages, sexual propositions and unwanted touching and hugging. The employee was on probation and reluctant to complain, because she was reliant on her supervisor to sign off on her performance. The employee eventually sought assistance from the EAP after a traumatic call out, and the sexual harassment came up in discussion with the EAP counsellor, who advised her to make a formal complaint. The employee did so, the employer investigated, and the perpetrator was dismissed from his job. The employee's union provided support and assistance. While the employee was traumatized by the experience, she was overall happy with the response of the employer and the support she received from the EAP.

¹⁹⁰ https://www.actu.org.au/media/1385284/a4_sexual-harassment-survey-results_print.pdf, page 6

¹⁹¹ <http://www.hrmonline.com.au/topics/health-wellbeing-and-safety/sexual-harassment-just-wont-go-away/>

Unfortunately, most case studies from the ACTU's recent survey show that employer responses to sexual harassment incidents are frequently ineffective, inappropriate and inadequate, and that employees who experience sexual harassment are often treated less favourably or forced to leave their jobs.

Case Studies from ACTU Survey

A female worker in a large, male-dominated, blue-collar workplace was harassed by a co-worker over a period of time via social media, receiving unwelcome, obscene text and FaceBook messages. Her employer failed to act when she reported the matter. Later her employer accepted her request for a transfer, knowing that it was only being requested in order to avoid the perpetrator. As far as the worker is aware, no action has been taken by the employer in relation to the matter, including no consequences for the perpetrator.

A male security guard told us has witnessed sexual harassment of women and sexually inappropriate behavior by his colleagues frequently, including sharing of hardcore pornography. The male worker would like to do something about the behaviour but has not complained because he knows no action would be taken by his employer.

In a recent case involving Marriott Support Services, the Victorian Civil and Administrative Tribunal found that a divisional manager had told a worker with a disability who wanted to make a formal complaint about sexual harassment that she was, 'working in a man's working environment and needed to expect that kind of unwanted attention', and had 'deflected' and 'discouraged' the worker from complaining. The employer was ordered to pay the worker \$10,000 in damages.¹⁹²

In 2015, the Victorian Supreme Court ordered Winslow Constructors to pay a female labourer \$1.36 million in damages and compensation after finding she was unlikely ever to work again as a result of 'very considerable psychiatric injuries' as a direct consequence of the bullying, abuse and sexual harassment levelled at her by employees and subcontractors of Winslow. The Court found that the worker had been 'reluctant' to complain to her supervisor because he himself had made some of the offensive remarks, and had laughed when she complained about an offensive comment made by another worker. When the worker raised concerns with the area site manager, he told her to leave it with him, but the worker received no further feedback from him.¹⁹³

¹⁹² [XVC v Joanne Baronessa \(Human Rights\) \[2018\] VCAT 1492 \(3 October 2018\)](#)

¹⁹³ [Kate Mathews v Winslow Constructors \(Vic\) Pty Ltd \[2015\] VSC 728 \(17 December 2015\)](#)

International practice

As noted above, the continuing prevalence of violence and harassment at work worldwide and regulatory gaps (both national and international) has prompted the ILO to commence work on a new international standard on violence and harassment at work. While no country has managed to develop or implement truly effective measures to prevent sexual harassment to date, the ACTU draws AHRC's attention to the following initiatives for further consideration, without making comment on their strengths or weaknesses, or suitability in the Australian context.

United Kingdom

The UK *Equality Act 2010 (the Equality Act)* introduced a new 'public sector equality duty' (**the duty**), which came into force on 5 April 2011. It consists of general duties set out in the Equality Act and specific duties set out in Regulations. The duty replaced separate race, disability and gender equality duties which had previously applied. The race equality duty had been introduced in 2001 following the murder of a black teenager by the Metropolitan Police Service. A report published in 1999 had concluded that the Metropolitan Police Service was 'institutionally racist' in its investigation of the murder.¹⁹⁴ The Equality and Human Rights Commission website explains the reasoning behind the public sector equality duty in the following way:

Prior to the introduction of the race equality duty, the emphasis of equality legislation was on rectifying cases of discrimination and harassment after they occurred, not preventing them happening in the first place. The race equality duty was designed to shift the onus from individuals to organisations, placing for the first time an obligation on public authorities to positively promote equality, not merely to avoid discrimination.¹⁹⁵

Under the Public Sector Equality Duty, public sector bodies must have due regard to the need to eliminate discrimination, including sexual harassment. Section 26 of the Equality Act defines sexual harassment as 'unwanted conduct of a sexual nature' which has the purpose or effect of violating dignity or 'creating an intimidating, hostile, degrading, humiliating or offensive environment.'

General duties

Section 149 imposes a duty on 'public authorities' and other bodies when exercising public functions to have 'due regard' to the need to:

a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act

¹⁹⁴ [Sir William MacPherson 'The Stephen Lawrence Inquiry' February 1999;](https://www.equalityhumanrights.com/en/public-sector-equality-duty-scotland/background-equality-duty)

<https://www.equalityhumanrights.com/en/public-sector-equality-duty-scotland/background-equality-duty>

¹⁹⁵ <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty>

b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it

c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

In addition, regulations impose specific duties on certain public authorities.¹⁹⁶ The Equality and Human Rights Commission has issued voluminous guidance material explaining the duty, including 'Technical Guidance' providing 'authoritative, comprehensive' information for 'individuals, businesses, employers and public authorities' to 'understand the Act, exercise their rights, and meet their responsibilities complying with the public sector equality duty'.¹⁹⁷

The guidance material explains that to have 'due regard' means that a body must 'consciously consider' the need to do the things set out in the general equality duty (namely eliminate discrimination, advance equality of opportunity and foster good relations) in decision-making and other day-to-day activities.¹⁹⁸ The duty is explained in this way:

A public authority must consciously think about the need to do the things set out in the general equality duty as an integral part of the decision-making process. Having due regard is not a matter of box ticking. The duty must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision. There should be evidence of a structured attempt to focus on the details of equality issues.

Compliance should be appropriate to the size of the authority and the nature of its functions. Through decided cases, Courts have provided further detail on what public authorities need to do to comply, including collecting an adequate evidence base for decision-making.¹⁹⁹

Specific duties

There are two types of duty. Firstly, authorities are required to prepare and publish (at least annually) information showing compliance with the general equality duty, and secondly, to prepare and publish one or more 'equality objectives' which will help it to achieve any aspect of the general equality duty, including (for authorities with more than 150 employees) specific information relating to people with a protected attributed who are employed by, or affected by, the authority's services or policies.²⁰⁰

Enforcement

¹⁹⁶ The Equality Act 2010 (Specific Duties) Regulations 2011.

¹⁹⁷ The Equality and Human Rights Commission, 'Technical Guidance on the Public Sector Equality Duty: England' 2010, p 5

¹⁹⁸ Technical Guidance, p19

¹⁹⁹ Equality and Human Rights Commission, 'The Essential Guide to the Public Sector Equality Duty: England and Non-Devolved Public Authorities in Scotland and Wales', Last Revised July 2014

²⁰⁰ Equality Regulations, Reg. 2 and 3

In addition to its educative function, the Commission is responsible for enforcing the public sector equality duty. The Commission can conduct an assessment of whether (or how) a public authority is complying with its public sector equality duty; and can issue a 'compliance notice' requiring the person to comply with its duty, provide written notice of steps taken or proposed for the purpose of complying with the duty, and require the production of information. If the Commission thinks that a person to whom the notice has been given has failed to comply with a requirement of the notice, it may apply to the county court in England and Wales for an order requiring the person to comply. It is an offence to fail to comply with a notice or falsify information in a notice.

A breach of the public sector equality duty does not give rise to any private cause of action.²⁰¹

Does it work?

The recent UK House of Commons Inquiry observed that:

It should be expected that the Public Sector Equality Duty would help make public sector employers exemplars for good practice. Despite this, we found that specific actions to tackle sexual harassment in the workplace were thin on the ground, although more general initiatives on workplace conduct and ethics might be in place.²⁰²

...

We were left with an impression of organisations which have not taken this issue seriously in the past, which have failed to put procedures in place, and which have relied on more generic workplace policies that are not sufficient to tackle sexual harassment.²⁰³

The failure of organisations to collect adequate data on the scope and nature of the problem was one reason identified for this, in part because of the low reporting rates.

The Inquiry recommended that the Government direct public service employers to take 'immediate action' to tackle and prevent sexual harassment in the workplace, including setting out unacceptable behaviours, complaints processes and penalties for perpetrators. The Inquiry also recommended the introduction of an additional 'specific duty' requiring relevant public employers to conduct risk assessments for sexual harassment in the workplace and develop action plans to mitigate such risks, including investigation processes and guidance on penalties for perpetrators.²⁰⁴ Originally, the Equality Act made employers liable for failing to protect workers from third party harassment if they were aware that harassment had occurred on two prior occasions and had failed to take reasonable

²⁰¹ Equality Act, s 156

²⁰² UK House of Commons Report [22]

²⁰³ Ibid [23]

²⁰⁴ Ibid [14]

steps to prevent it from happening again. In 2013, these provisions were repealed.²⁰⁵ The Inquiry recommended the re-introduction of provisions dealing with third-party harassment, this time with no requirement for previous incidents to have occurred.²⁰⁶

Ontario

The Ontario government announced new specific occupational health and safety legal obligations to prevent sexual harassment and violence in 2015.²⁰⁷ The Ontario Occupational Health and Safety Act sets out the roles and responsibilities of workplace parties with respect to workplace violence and workplace harassment, including developing and implementing policies and programs and providing information and instruction. It is supported by a *Code of Practice for Workplace Harassment*, developed by the Ministry of Labour, which is intended to help workplaces comply with the workplace violence and workplace harassment requirements in the Occupational Health and Safety Act.

New Zealand

Employees in New Zealand are protected from sexual harassment in the workplace by the *Employment Relations Act 2000* and the *Human Rights Act 1993*. An employee can choose to pursue a grievance under either Act; but cannot do both. Remedies include orders restraining the defendant from continuing the conduct or permitting others to engage in the conduct. The ER Act has specific provisions covering not only employers and managers but third parties, and provisions to deal with circumstances where no adequate steps have been taken to prevent a repetition of harassment.

An employee has 90 days to raise a personal grievance under the Employment Relations Act. If the matter is not resolved, an employee has 3 years after raising the grievance to lodge an application with the Employment Relations Authority.

Alternatively, an employee has 12 months to complain under the Human Rights Act. The Human Rights Commission will work with a complainant to try and resolve the issue through informal methods, or example phoning the other party, providing information or conducting mediation.

If a complaint remains unresolved, an employee can complain to the [Human Rights Review Tribunal](#). The tribunal can award compensatory damages (up to \$350,000) for losses suffered. There are no filing fees, but the Tribunal may award costs. The [Office of Human Rights Proceedings](#) may provide free representation to an employee with a meritorious claim if it is in the public interest to do so.

²⁰⁵ Enterprise and Regulatory Reform Act 2013, s 65

²⁰⁶ UK House of Commons Report, p 48 (Recommendation 8)

²⁰⁷ It's Never OK: An Action Plan To Stop Sexual Violence And Harassment

When raising the grievance, the employee is required to clearly state what their grievance is and the reasons why they believe that they have a grievance, preferably in writing.

Ireland

In October 2015, Ireland adopted a 'one-stop-shop' model for workplace complaints. The 'Workplace Relations Commission' absorbed the employment-related roles and functions previously carried out by other bodies, including the Equality Tribunal, providing a single avenue for complaints and appeals. The *Employment Equality Acts 1998-2015* make sexual harassment and harassment of an employee (including agency workers and trainees) in the workplace unlawful, including harassment by co-workers, clients or customers, including anyone the employer could 'reasonably expect' the worker to come into contact with. An employee has 6 months to make a complaint of workplace discrimination or sexual harassment, with capacity to apply for an extension to a maximum of 12 months from the date of the last incident with 'reasonable cause'. The WRC has the power to mediate, conciliate, or adjudicate. The WRC can make the following orders:

- An order for equal pay (plus a maximum of 3 years arrears before the complaint was referred, where appropriate)
- An order for equal pay from the date of referral
- An order for equal treatment
- An order for compensation of up to 2 years pay or up to €40,000, whichever is the greater, for the effects of discrimination or harassment/sexual harassment suffered (up to €13,000 for someone who is not an employee of the respondent).
- An order for compensation of up to 2 years pay or up to €40,000, whichever is the greater, for the effects of 'victimisation' (up to €13,000 for someone who is not an employee of the respondent).
- An order for a specified person to take a specified action
- An order for re-instatement or re-engagement

The provisions are supported by a statutory [Code of Practice on Sexual Harassment and Harassment](#), which is admissible before a court in a dispute about sexual harassment. It requires employers, in consultation with employees and trade unions, to 'adopt, implement and monitor' a 'comprehensive, effective and accessible' policy on sexual harassment and harassment, including a definition of what constitutes sexual harassment and harassment, who is responsible for implementing the policy and how complaints will be dealt with.

Conclusion

Australia's current regulatory framework does not require employers or governments to be proactive in preventing sexual harassment or to address the underlying causes of sexual harassment at work.

Instead, it places the onus on individual workers to hold duty-holders to account at their own expense and risk. Reforms are urgently required to ensure that employers and regulators adopt proactive strategies to identify, assess and eliminate or minimise the health and safety risks arising from violence, discrimination and harassment at work; to improve existing complaints processes, including in our workplace laws; and to strengthen the capacity of the Sex Discrimination Commissioner to address systemic discrimination. The wider context of gender inequality in Australian workplaces cannot be ignored.

Regulatory reform by itself is of course not sufficient. Laws must be appropriately interpreted and applied by relevant bodies and organisations, such as courts and regulators, and supported by adequate resourcing. Without a meaningful political commitment to gender equality and the elimination of violence and harassment at work, regulatory reform can only deliver so much.

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190/2018

