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National Inquiry into Sexual Harassment in Australian Workplaces  
Australian Human Rights Commission  
Via online submission form.

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the National Inquiry into Sexual Harassment in Australian Workplaces.

Please do not hesitate to contact me and my colleagues [REDACTED] if we can further assist with the Commission's important work.

Yours faithfully,



**Alex Grayson**  
**Principal Lawyer**  
**MAURICE BLACKBURN**





**Maurice  
Blackburn**  
Lawyers  
Since 1919

**Submission in Response  
to the National Inquiry into  
Sexual Harassment in  
Australian Workplaces**

**February 2019**

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## **Introduction**

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

## **Our Submission**

Maurice Blackburn is grateful for the opportunity to contribute to this important inquiry, and congratulates the Australian Human Rights Commission (AHRC) on its instigation.

Our experience and expertise in representing those who have fallen victim to the scourge of sexual harassment in the workplace affords us a unique view of the current system for handling complaints. This includes observations on the various pieces of legislation which make up the current framework, the complaints and appeals processes, and the assistance available to victims.

The impacts on victims can be life long and life changing.

Maurice Blackburn is of the view that one of the significant failings of the current legislative scheme is the onus it places on victims to seek redress for the harm they have suffered, rather than placing a positive obligation on employers to prevent the harm occurring in the first instance. We believe there should be enforceable sanctions against employers who fail in their duty to provide a safe workplace for their employees.

We believe that it is important that the governing bodies of all organisations should be fully aware of the incidence of sexual harassment in their workplace, and that they should be required to report on the number of reported incidents of sexual harassment, as part of their reporting requirements to Workplace Gender Equality Agency ('WGEA').

We believe that the current legislated timeframe for making a complaint through AHRC is unworkable and out of step with other legislative provisions. It should be amended to 6 years in line with other employment law jurisdictions. We believe that the Australian Human Rights Commission Act 1986 (the AHRC Act) or regulations should be amended to expressly prescribe time frames for the scheduling of mediation conferences.

We believe that other authorities, such as State and Territory Work, Health and Safety regulators, along with trade unions and consumer advocates, could and should have a greater role to play in addressing and stamping out workplace sexual harassment.

Above all, we believe that the AHRC should be properly funded and fully staffed in order to fulfil its statutory objectives and enable it to more swiftly and robustly perform its vital role in resolving claims of sexual harassment in the workplace.

In preparing this submission, Maurice Blackburn has engaged with a number of organisations such as NOW Australia and Unions NSW, who share our goal of preventing sexual harassment from occurring in Australian workplaces and securing justice for victims. Specifically, Maurice Blackburn, NOW Australia and Unions NSW hosted a roundtable with

union officials, politicians, barristers and labour lawyers, to facilitate a discussion about the most effective legislative reforms to secure justice for victims of sexual harassment. These round table discussions allowed Maurice Blackburn to draw from the knowledge of other highly experienced professionals working in employment law and industrial relations, in formulating this submission.

These key themes are explored in more detail in the following pages. We also refer the AHRC to the joint statement submitted by over 100 organisations including Maurice Blackburn and the submission to this inquiry from Women Lawyers NSW, which addresses some of these matters in more detail (and with which representatives of Maurice Blackburn have been involved).

## **Maurice Blackburn Responses to Terms of Reference.**

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

Maurice Blackburn is concerned about the impacts that online workplace-related sexual and sex-based harassment is having on many Australians under the current, mostly unregulated on-line environment.

We draw the AHRC's attention to the effects of exposure to such behaviours by those whose work, by necessity, involves interaction via social media platforms.

In particular, we are concerned by the reports from journalists and those involved in the media about the prevalence and impacts of on-line workplace-related sexual and sex-based harassment.

We believe that employers must be held accountable for creating a work environment that exposes their employees to the risk of this form of sexual harassment.

We are aware that some employers in the media industry, for example, have expectations of their staff relating to their on-line inputs, and set key performance indicators in areas such as the number of 'hits' a story receives.

Journalists are also frequently expected by their employers to participate in on-line discussions that emanate from their story. Some employees have reported that employers expect them to express personal opinions in relation to on-line stories. We are concerned that these 'forced' interactions are exposing media professionals to online workplace-related sexual and sex-based harassment.

We note the reporting of the Media, Entertainment and Arts Alliance (**MEAA**) on this matter:

*"The lived experience of many MEAA members working in the media industry is of being regularly subjected to harassment, abuse and threats on social media".<sup>1</sup>*

MEAA has written substantially on the topic, noting that their members have suffered diagnosable psychiatric injuries as a consequence of cyber abuse.

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<sup>1</sup> Ref Media Entertainment and Arts Alliance submission to Legal and Constitutional Affairs References Committee inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying: <https://www.aph.gov.au/DocumentStore.ashx?id=5590919d-ca1e-4049-9834-44ab87e8bedc&subId=562289>

There appears to be clear differences in the impacts of interaction with the readership, between on-line and traditional media functions. These include:

- Anonymity. Reports suggest that anonymity may be a determining factor in whether on-line input is threatening, abusive or personal. It seems probable that the ability to hide behind anonymity might be an enabler of on-line sexual harassment. Journalists, on the other hand, are encouraged to use their own names. This inequality is concerning in the workplace context.
- Immediacy. Responding to on-line media does not encourage introspection or the tempering of language or behaviour.
- The perception that 'the rules are different on-line'. Threats or harassment made on-line seem to be held to a different standard of accountability than if they were made via any other mechanism. Some of the current academic work around 'online disinhibition' is worthy of exploration.

We have long argued that a legislative framework is needed which incorporates:

- Regulation and criminal sanctions holding the behaviours of abusers, employers and carriage services to account, and
- A civil regime through which victims and survivors of online abuse can access legal tools to allow them to seek relief and damages.

This will necessitate criminalising particularly nefarious behaviours, and then providing the relevant police and regulatory services with the resources to successfully prosecute people engaging in sexual harassment through on-line platforms.

We believe that, for this to have the required deterrent effect, it is important that all those who cause, enable or expose people to on-line sexual harassment should be held to account, and this includes employers, and social media platforms, as well as those who generate and distribute the abusive material.

We recognise, however, that given the scope and pervasiveness of on-line sexual harassment, no regulator or law enforcement agency, no matter how well equipped, will be in a position to effectively deal with every case, let alone every extreme case. Hence the need for a concurrent civil process which provides citizens with the tools required to achieve appropriate redress.

Maurice Blackburn believes Australia needs a civil / criminal legislative framework which could ensure:

- That breaches, can be investigated by a statutory body established under the Act, and failing that, the courts.
- That the statutory body can order that offending materials be removed from an on-line platform, and require a correction and/or an apology.
- That the frameworks allows for the release of the identity of anonymous abusers.
- That on-line sexual harassment is criminalised where:
  - the abuser intends a digital communication to cause harm,
  - a person would reasonably expect the person in the position of the victim to be harmed, and

- the individual suffers serious emotional distress.

### **Our submissions in response to ToR 1:**

Maurice Blackburn submits that changes to the regulatory environment in relation to online workplace-related sexual and sex-based harassment must include enforceable sanctions against employers who fail in their duty to provide a safe workplace for their employees.

Maurice Blackburn encourages the AHRC to consider ways that employers can assist in creating a workplace where exposure to discussion and engagement via social media platforms does not impact an employee's right to a safe work environment.

We encourage the AHRC to reimagine how a criminal code and a civil regime to combat on-line sexual harassment in Australia might be implemented.

We submit that any discussion on criminality and penalties must also recognise that it is important to give individuals the legal tools to allow them to:

- Seek injunctive relief and damages from the perpetrators of on-line sexual harassment, and
- Seek injunctive relief and damages from the providers and facilitators of online forums where the provider or facilitator has failed to discharge a duty to monitor and protect users.

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

No response to this Term of Reference

### **3. 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, and some workplace characteristics and practices are more likely to increase the risk of sexual harassment.**

Maurice Blackburn's staff regularly assist clients who have experienced sexual harassment or sex-based discrimination.

Every day, we witness the serious and damaging effect it can have on a person and a workplace.

ABS data<sup>2</sup> suggests that one in two women (53% or 5 million) and one in four men (25% or 2.2 million) have experienced sexual harassment during their lifetime. In the last 12 months, one in six women (17% or 1.6 million) and one in eleven men (9.3% or 836,700) experienced

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<sup>2</sup><https://www.humanrights.gov.au/publications/chapter-4-nature-sexual-harassment-australian-workplaces-sexual-harassment-serious>

sexual harassment, and the proportion of women experiencing sexual harassment in the last 12 months has increased from 15% in 2012 to 17% in 2016.

We are mindful of the figures which the AHRC recently published<sup>3</sup> which show that:

- In the last 12 months, 23% of women and 16% of men have experienced sexual harassment at work;
- Women of colour, young adults (18-24), those with a disability, and LGBTI people are particular targets of sexual harassment<sup>4</sup>;
- In the last 5 years, 81% of employees in the information, media and telecommunications industry having been sexually harassed;
- 40% of workplace sexual harassment incidents were witnessed by at least one other person, and in the majority of cases (69%) the witness did not intervene;
- Fewer than one in five people made a formal report or complaint about sexual harassment in the workplace; and
- Almost one in five people who did report sexual harassment were either labelled a trouble-maker; ostracised, victimised or ignored by colleagues; or resigned.

These statistics, broadly speaking, reflect the lived experience of our clients.

In our and their experience, sexual harassment is largely about power and so it will be more frequently visited on the most vulnerable including those in precarious employment and those who cannot take the great risk of speaking out about abuse. The trauma caused by sexual harassment cannot and must not be underestimated.

#### **4. The current legal framework with respect to sexual harassment.**

There are a number of areas within the current legal framework where Maurice Blackburn believes that adjustment is required in order to achieve the goals of this inquiry.

In the section below, we have separated these into a number of discrete areas of law for discussion:

- i. Positive obligation on employers;
- ii. Health and safety;
- iii. Expanding company reporting requirements;
- iv. 6 month time limit on complaints;
- v. Damages; and
- vi. The Complaints Process.

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<sup>3</sup> Australian Human Rights Commission, 'Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces' (2018).

<sup>4</sup> Australian Human Rights Commission, Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities (2017).



### ***i. Positive obligation on employers***

Sexual harassment in the workplace has been prohibited in Australia since the passing of the *Sex Discrimination Act 1984* (Cth) ('**SDA**'). However, the persistent prevalence of sexual harassment within Australian workplaces since that time suggests that the current legislation has failed in preventing this kind of conduct.

Maurice Blackburn is of the view that one of the significant failings of the current legislative scheme is the onus it places on victims to seek redress for the harm they have suffered, rather than placing a positive obligation on employers to prevent the harm occurring in the first instance.

The current legislative scheme requires victims of sexual harassment to take the step of making a complaint before they are able to pursue a remedy in relation to the unlawful harassment ('**the Individual Complaint Model**')<sup>5</sup>.

This means that an individual, who may (and often does) have limited access to the law, is obliged to take the step of filing a complaint with the AHRC, in order to seek redress. This process can be burdensome and difficult to navigate without legal advice. We will return to our concerns regarding the current system in our discussion on the Complaints Process.

It can also be daunting for victims who are emotionally distressed, unfamiliar with legal processes, fearful of reprisal, and who are unsure of their legal rights. Further, women who are of a low economic status, who are from migrant backgrounds, or who have limited career mobility are among the most vulnerable groups<sup>6</sup>.

Indeed, it is the persistent and increasingly low rates of reporting<sup>7</sup> that fundamentally undermines the effectiveness of the Individual Complaint Model<sup>8</sup>. In the Fourth National Survey on Sexual Harassment in Australian Workplaces ('**the Fourth Report**'), the AHRC found that only 17 percent of people who had experienced sexual harassment in the workplace reported the behaviour<sup>9</sup>.

That means that in 83 percent of cases, the victims did not make a complaint for a whole host of reasons. These statistics demonstrate that in the vast majority of cases the current legislative scheme has both failed to prevent the conduct through deterrence, and has failed to address the conduct through providing victims with access to an adequate remedy.

Under the current scheme, an employer's obligation to take reasonable steps to prevent sexual harassment only becomes relevant where they are defending a claim of sexual harassment - that is, after the harassment and the harm have already occurred<sup>10</sup>.

Specifically, under s106 of the SDA an employer can escape vicarious liability for sexual harassment, where it can establish that it took all reasonable steps to prevent the sexual harassment from occurring<sup>11</sup>.

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<sup>5</sup> 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) ('Halfway to Equal Report').

<sup>6</sup>Elyse Shaw, Ariane Hegewisch, M. Phil and Cynthia Hess, (2018) 'Sexual Harassment and Assault at Work: Understanding the Costs' *Institute for Women's Policy Research*.

<sup>7</sup> Everyone's business: Fourth National Survey on Sexual Harassment in Australian Workplaces, p63.

<sup>8</sup> Paula McDonald, Sara Charlesworth, Tina Graham (2015) *Asia Pacific Journal of Human Resources* 'Developing a framework of effective prevention and response strategies in workplace sexual harassment', Vol 53, Issue 1.

<sup>9</sup> *Everyone's business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, p63.

<sup>10</sup> S106 of the *Sex Discrimination Act 1984* (Cth).

<sup>11</sup> S106 of the *Sex Discrimination Act 1984* (Cth).

While there is no definition of 'reasonable steps' contained in the SDA, 'reasonable steps' may include having an internal policy that prohibits sexual harassment, conducting training on what constitutes sexual harassment and dealing with sexual harassment complaints in an appropriate manner.

Maurice Blackburn is of the view that the burden currently borne by victims to enforce their rights should be more evenly shared between victims, employees, and employers.

Maurice Blackburn submits that rather than the obligation to take reasonable steps being used to prevent sexual harassment being used as a defence to liability, the SDA should impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment occurring in the workplace, whether an incident has occurred or not.

This positive obligation would work in a similar way to, and in conjunction with, the statutory obligation an employer has to ensure the health and safety of its employees when they are at work in accordance with relevant workplace health and safety legislation.

We note that this was recommended by the HREOC in their submission to the Senate Inquiry on the Effectiveness of the Sex Discrimination Act, in 2008<sup>12</sup> but was not adopted. We are of the view that it should have been.

### ***ii. Health and Safety***

The duty proposed in the previous section should not detract from the current and often ignored responsibility of safety regulators in each State and Territory to investigate and prosecute breaches of health and safety legislation.

In our view, it should be made abundantly clear, via legislative reform or through delegated legislation, that regulators are required to investigate sexual harassment complaints given the health and safety implications of same.

We acknowledge that regulators are chronically understaffed and underfunded in many States and Territories and would encourage the establishment of a properly funded discrete directorate within WHS regulators aimed at investigating risks to health and safety arising from sexual harassment.

In order to reduce the load on regulators, trade unions should also have the ability to prosecute for health and safety breaches reinstated where such rights have been removed.

### ***iii. Expanding company reporting requirements***

It has been argued by the leading academics in this space that the prevention of sexual harassment is enhanced if senior managers in a workplace understand what behaviour constitutes sexual harassment and that there are consequences for the business if it occurs<sup>13</sup>.

Maurice Blackburn considers the elimination of sexual harassment against women in the workplace to be an essential component of achieving gender equality more broadly.

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<sup>12</sup> Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Affairs Committee, Inquiry Into The Effectiveness Of The Sex Discrimination Act 1984 (Cth) In Eliminating Discrimination And Promoting Gender Equality, 2008, pg145.

<sup>13</sup> McDonald, Charlesworth, Graham (2015).

Businesses are already required by legislation to report on key gender equality indicators to WGEA annually. We are of the view that as part of this reporting, businesses should also be required to report on the number of reported incidents of sexual harassment.

Further, reporting to Board and senior management level (in smaller business) must also be mandated if real cultural change is to occur.

Whilst we acknowledge that the figure reported will not be representative of the true number of instances of sexual harassment given the very low reporting rates, we are of the view that this measure would create an important incentive for large businesses, and their senior managers, to take their obligation to prevent sexual harassment seriously.

#### ***iv. 6 month time limit on complaints***

Following a Joint Parliamentary Committee inquiry into freedom of speech ('**JPC Inquiry**') in April 2017 the *Human Rights Legislation Amendment Bill (2017)* ('**the Amendment**') was passed by both houses of Parliament.

One of the most significant effects of the Amendment was to amend s46PH of the AHRC Act so that a complaint, including a complaint in relation to sexual harassment, can be terminated by the President of the AHRC if it is lodged more than 6 months after the alleged events took place.

The effect of this change is significant. While this time limit does not operate in the same way as a statutory limitation period does, the effect of a decision of the President to terminate the complaint is that a complainant loses access to the confidential mediation process facilitated by the AHRC.

The benefit of having access to the AHRC's mediation process is that it allows victims of sexual harassment, whom typically have restricted access to the law, the opportunity to engage in a relatively low cost, less adversarial dispute resolution process.

Maurice Blackburn submits the Amendment should be repealed and that the time for making complaints should be amended to 6 years in line with other employment law jurisdictions.

This submission is made for the following reasons:

- There is no sound policy reason for imposing the time period on complaints;
- A six-month time period is out of step with other Australian employment law jurisdictions; and
- Reducing access to an informal, low-cost dispute resolution process has a negative impact on the efficient resolution of complaints.

These are elaborated upon below:

There is no sound policy reason for the new time limit.

At the time the Amendment was passed, there was no clear policy rationale put forward by the legislature for the change to the time limit, save for the apparent need to mitigate unmeritorious or vexatious claims being made<sup>14</sup>.

The JPC Inquiry recommended that the AHRC adopt time limits for the processes related to complaint handling activities at the initial assessment of the complaint<sup>15</sup>. However, this recommendation did not extend to reducing the time limit a complainant has to lodge a complaint<sup>16</sup>.

Indeed, the JPC Inquiry made a number of recommendations in relation to expanding the President's power to terminate a complaint pursuant to s46PH of the Act. Notably, none of these recommendations related to reducing the time limit available to complainants for lodging a complaint.

There is no evidence which suggests claims that are made more than six months after the alleged events took place are less meritorious than those that are made before this time period.

In fact, to the contrary, it is well documented that victims of sexual harassment may face a number of hurdles in bringing a complaints in short time periods for a number of reasons, including the emotional and psychological impact the conduct often has them.<sup>17</sup>

Of the 17 percent of people who made a complaint to their supervisor, the majority of complaints were made shortly after the events occurred. The statistics in relation to the timing of reporting sexual harassment were set out comprehensively by the AHRC in the Fourth Report, and are illustrated in the graph below.

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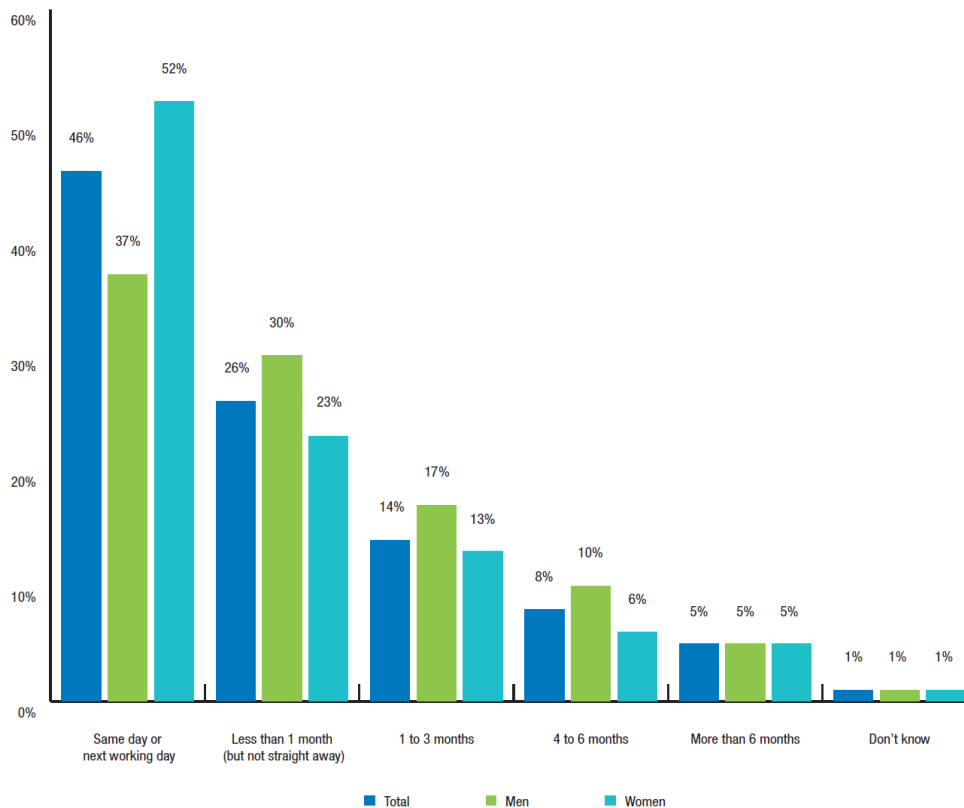
<sup>14</sup> Explanatory Memorandum, Human Rights Legislation Amendment Bill 2017, para 116-118.

<sup>15</sup> Recommendation 8 of Report Freedom of speech in Australia Inquiry into the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) and related procedures under *the Australian Human Rights Commission Act 1986* (Cth)

<sup>16</sup> Recommendation 8 of Report Freedom of speech in Australia Inquiry into the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) and related procedures under *the Australian Human Rights Commission Act 1986* (Cth).

<sup>17</sup> See for example <https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html>

**Reproduced from the Fourth Report (p.70)**



Base: Respondents who had been sexually harassed in the workplace in the last 5 years and made a formal report/complaint (n=435): Men (n=170): Women (n=260)

Maurice Blackburn is of the view that these statistics demonstrate two things:

- Given that underreporting remains high, it may be the case that the majority of victims require more than 6 months to make a complaint; and
- It is simply not the case that a large number of victims report sexual harassment a long time after it has occurred, so as to justify the imposition of the 6 month time restriction as a deterrence for a large number of unmeritorious complaints.

This means that in addition to there being no sound policy reason for the time period for lodging sexual harassment complaints with the AHRC being reduced to 6 months, there is a strong case for the time period being extended beyond the 12 month period that is placed on complaints in different jurisdictions, and which existed before the Amendment was enacted.

For this reason, the time limit imposed by s46PH(b) of the AHRC Act should be abolished, especially with respect to sexual harassment complaints.

We are of the view that the 6 year time limitation period that applies to other kinds of discrimination matters in the Fair Work jurisdiction should apply to complaints made by the AHRC, particularly for sexual harassment complaints.

Additionally, there are sufficient grounds under s46PH of the AHRC Act that allow the President to terminate a complaint where the complaint is without merit or is better dealt with in another jurisdiction, without the inclusion of s46PH(b).

Indeed, s46PH(c) provides the President with very broad powers to terminate a complaint in circumstances where “having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted”.

We submit that if there is a legitimate concern that a complaint was without merit for any reason, the President is still able to exercise his/her power to terminate it under this provision.

### Comparable Jurisdictions

The 6 month time limit is particularly short when compared with similar jurisdictions that deal with discrimination or employment law issues.

By way of comparison, the discrimination provisions of the *Fair Work Act 2009* (Cth) allow discrimination claims to be dealt with by the Fair Work Commission provided that they are brought within 6 years of the alleged events occurring, where the complaint does not involve dismissal.

Further, the *Anti-Discrimination Act 1975* (NSW), only allows the President of the Anti-Discrimination Board to terminate a complaint if it is brought more than 12 months after the alleged events occurred.

Maurice Blackburn is of the view, that 12 months is a particularly short time period, but 6 months is simply unjustified.

### **v. Damages**

The damages awarded in sexual harassment matters have historically been significantly lower than comparable jurisdictions in which an applicant suffers an illness as a result of unlawful conduct.

While this trend was disturbed somewhat after the decision in *Richardson v Oracle Corporation Australia Pty Ltd*<sup>18</sup> (**Oracle**), where the complainant was awarded \$130,000.00 the detrimental impact of historically low awards of damages should not be underestimated.

Indeed, at the time of writing, there is an absence of a significant body of case law which supports the approach taken by the Federal Court of Appeal, in *Oracle*. While subsequent cases have referenced *Oracle*'s emphasis on changing community standards to support the rationale behind increasing awards of damages, this rationale has not been reflected in the quantum awarded to complainants.

Further, our experience in assisting clients navigate the legal process with respect to sexual harassment complaints suggests that the low awards of damages has an additional deterrent effect when a complainant is making a decision to file a complaint with the AHRC or commence litigation.

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<sup>18</sup> [2014] FCAFC 82.

While damages are assessed in a similar way to tortious common law claims, given claimant's' rights emerge from statute, there may be scope for providing more specific statutory guidance as to the appropriate quantum in respect of awards of damages.

For example, it has been argued that an increased focus on exemplary damages, rather than compensatory damages would better reflect the moral wrong caused by the conduct and have a greater deterrent effect on perpetrators<sup>19</sup>.

One possible reform to remedy this issue would be the insertion of statutory criteria to be taken into account by the Courts when determining an award of damages.

In NSW there is a statutory cap of \$100,000.00 pursuant to s108(7) of the *Anti-Discrimination Act 1977 (NSW)* ('the ADA'). In Western Australia there is a statutory cap of \$40,000.00 on damages pursuant to s s127(b)(i) of the *Equal Opportunity Act 1984 (WA)*.

Given average weekly earnings of women have increased eight times since the enactment of the ADA, the failure of the legislature to increase the caps over time, has rendered the quantum of damages recoverable pursuant to these caps manifestly inadequate in both deterring offenders and compensating victims for harm they have suffered<sup>20</sup>.

Further, the effect of the statutory caps is that only the very worst examples of sexual harassment attract an award of damages of this magnitude. Maurice Blackburn is of the view that statutory caps on damages under state legislation should be abolished to reflect the federal jurisdiction.

#### ***vi. The Complaints Process***

In addition to the limitations of the statutory framework set out above, from our experience, the Individual Complaints System itself can be ineffective at achieving a just result for complainants.

Our primary and overriding submission in relation to the Individual Complaints System is that it is paramount that the AHRC be properly funded and fully staffed in order to fulfil its statutory objectives.

Below we have identified three additional issues which impact the efficacy of the Complaints Process. They are related to:

- Scarcity of data on mediations;
- Employer tactics; and
- The mediation process

These are discussed in more detail below:

#### **Scarcity of Data on Mediations**

It should be noted that there have been very few Australian studies which have examined the outcomes of the mediation process with respect to anti-discrimination matters, and even less with respect to sexual harassment matters specifically. This is largely due to

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<sup>19</sup> Therese MacDermott (2015) 'Reassessing Sexual Harassment: It's time' *Alternative Law Journal*, 40(3), 157.

<sup>20</sup> Harassment compensation caps outdated in #MeToo era

the lack of data available given claims that are settled are often the subject of confidentially terms<sup>21</sup> or settled outside (including after) the AHRC process and not reported.

The scarcity of data and the deficiencies in the currently published data have led to a situation where a significant barrier to commencing proceedings or filing a complaint is the inaccuracy of the quantum of reported settlements.

It is our experience that men and women who have experienced sexual harassment in the workplace will obtain settlements well into the 6 figure mark as a result of mediation or private negotiations.

Despite this, the data reported on the AHRC website (which appears to have last been updated in 2016), together with, a study conducted by Worley, Charlesworth and Macdonald<sup>22</sup> found that during mediation financial compensation was paid in 72 percent of cases they examined, with the median quantum being \$7000.00.

Better settlement data (including on post mediation outcomes) needs to be obtained, maintained and published by the AHRC so that complainants can understand that there are available remedies which sound in real compensation being negotiated that may go some way to compensating the victims of sexual harassment for the hurt, humiliation, distress and financial losses that they have suffered.

### Employer tactics

In addition, a tactic commonly used by employers to drive up complainant's costs or to discourage commencement in court is to make very low offers at the mediation stage, irrespective of their risk exposure. This is done on the assumption that complainants cannot afford to pursue the complaints process past mediation.

Given there is no risk of the imposition of a fine or a penalty, there is little incentive for employers to make reasonable settlement offers early in the mediation stage.

Accordingly, Maurice Blackburn is of the view that the SDA should be amended so that in addition to compensation, penalties are also payable by respondents who are found liable for sexual harassment.

Penalties are a common feature of the industrial relations landscape in Australia and would have a necessary deterrent effect. They would also overcome the challenge many complainants face (especially those who are low paid and can therefore expect a lower award of damages for economic loss) of having little leverage during the mediation process, especially if they are not financially placed to engage in lengthy and costly litigation.

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<sup>21</sup> Worley, Charlesworth and McDonald (2013) 'Why do some sexual harassment complaints settle while others don't?' *Alternative Law Journal* 38(2), 96-102.

<sup>22</sup> *Ibid.*



## The Mediation Process

### *Model of Mediation*

The study conducted by Worley, Charlesworth and Macdonald<sup>23</sup> found that a number of factors influenced the outcome including differences in the manner in which mediators conducted the mediation, whether the complainant had found another job and of course the level of harm and distress they had suffered.

It is our observation that the approach taken to mediation in the AHRC is for a mediator to take a light touch and express no view as to the merits of a claim or, conversely, as to the potential liability and risk of a respondent to a claim. In our view, a more robust approach to mediation should be adopted in the interests of increasing settlements at mediation.

### *Process after Complaint lodged*

Our experience assisting complainants in the mediation process facilitated by the AHRC, is that there is an unsatisfactorily slow rate at which complaints are dealt with.

This results in complainants feeling fatigued and worn down by the process. In most instances, our experience has been that it takes between 3 and 12 months to have a complaint scheduled for mediation and sometimes months to even have a matter allocated to a mediator. In this time, complainants find it difficult to move on with their lives and take steps toward overcoming the trauma they have suffered as a result of the harassing behaviour.

In order to address this concern, Maurice Blackburn is of the view that the AHRC Act should be amended to expressly prescribe time frames for the scheduling of mediation conferences. This would allow complainants to have their complaint dealt with in a reasonable period of time.

While we acknowledge that a level of informality and flexibility is highly desirable in dealing with discrimination and sexual harassment matters, Maurice Blackburn is of the view that a higher level of certainty with respect to how the mediation conferences are conducted should be given to complainants.

Currently, participation in the mediation process with the AHRC is voluntary for respondents. In our observation this leads to claimants being further traumatised by the actions of their employers - who either do not file a response or do not attend mediation or prevaricate regarding same.

Maurice Blackburn is of the view that in order to encourage respondents and employers to participate in the mediation process in meaningful, constructive and useful way, the AHRC Act should be amended to make it mandatory for respondents to attend the mediation conference and to file a reply document in a specified period of time.

Maurice Blackburn further submits that the AHRC should consider the establishment of a victim advocate role within the AHRC to represent individuals at mediations where those individuals cannot achieve access to justice. We recognise that this service would need to be subject to some form of means test and/or other criteria (by way of example - refugee status,

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<sup>23</sup> Ibid

or ATSI, CALD or LGBTQI status). Whilst being potentially invaluable for victims of workplace sexual harassment, this may have broader carriage within AHRC.

Further, it is our view that claimants should be able to elect to bypass the AHRC and proceed straight to Court. The decision to take such a bold step would necessarily be influenced by the anticipated attitude of an employer and the length of time likely taken to get a mediation at the AHRC.

#### **Our submissions in response to ToR 4:**

That the SDA should impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment occurring in the workplace, whether an incident has occurred or not.

That State and Territory WHS authorities be explicitly authorised to investigate and impose sanctions on employers who have breached their duty to provide safe and without risk workplaces, particularly in the context of sexual harassment.

That State and Territory WHS authorities be appropriately resourced to investigate and prosecute risks to health and safety arising from sexual harassment.

That trade unions be granted the authority to prosecute for health and safety breaches reinstated where such rights have been removed.

That the AHRC recommend a process for formally requiring that reporting of sexual harassment claims and statistics be made to the board of the defined entity and to an external organisation.

That businesses should also be required to report on the number of reported incidents of sexual harassment, as part of their reporting requirements to WGEA.

That the *Human Rights Legislation Amendment Bill (2017)* should be repealed and that the time for making complaints should be amended to 6 years in line with other discrimination jurisdictions.

That the time limit imposed by s46PH(b) of the AHRC Act should be abolished, especially with respect to sexual harassment complaints.

That AHRC explore the insertion of statutory criteria to be taken into account by the Courts when determining an award of damages.

That the SDA should be amended so that in addition to compensation, penalties are also payable by respondents who are found liable for sexual harassment.

That the AHRC Act should be amended to expressly prescribe time frames for the scheduling of mediation conferences.

That the AHRC Act should be amended to make it mandatory for respondents to attend the mediation conference and to file a reply document within a specified period of time.

That the AHRC be properly funded and fully staffed in order to fulfil its statutory objectives.

That AHRC consider the establishment of a victim advocate role within the AHRC to conduct mediations for those who cannot achieve access to justice.

That a complainant be given the right to elect to bypass the AHRC and proceed straight to court.

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

No response to this Term of Reference

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

It is our experience that victims of sexual harassment will suffer some form of mental health effect (including but not limited to a formal diagnosis of depression, anxiety, adjustment disorder or post-traumatic stress disorder). The effects of these illnesses are lifelong and will be felt not just by a victim but by their loved ones.

In our observation, the trauma inflicted by sexual harassment is rarely transient and can have flow on effects for the duration of a person's working life.

This will often play out by an individual having to take sick leave or make a workers compensation claim given the effect of their health. In many circumstances, it will impair a person's ability to work. In the most serious of cases, involving sexual assault, some of our clients have needed to be institutionalised and their treating medical practitioners have indicated that they may never work again (or may never return to their chosen career) or may only ever work reduced hours.

Of course, the effects of this trauma on entire families cannot be underestimated with many of our clients reporting a loss of enjoyment of life and the inability to interact with loved ones including children.

In our view, prevention is key.

## **7. Recommendations to address sexual harassment in Australian workplaces.**

Maurice Blackburn makes the following recommendations:

1. That changes to the regulatory environment in relation to online workplace-related sexual and sex-based harassment must include enforceable sanctions against employers who fail in their duty to provide a safe workplace for their employees.
2. That AHRC should consider ways that employers can assist in creating a workplace where exposure to discussion and engagement via social media platforms does not impact an employee's right to a safe work environment.
3. That AHRC investigate how a criminal code and a civil regime to combat on-line sexual harassment in Australia might be implemented.
4. That any discussion on criminality and penalties designed to combat on-line sexual harassment must also recognise that it is important to give individuals the legal tools to allow them to:
  - Seek injunctive relief and damages from the perpetrators of on-line sexual harassment, and
  - Seek injunctive relief and damages from the providers and facilitators of online forums where the provider or facilitator has failed to discharge a duty to monitor and protect users.
5. That the SDA should impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment occurring in the workplace, whether an incident has occurred or not.
6. That State and Territory WHS authorities be explicitly authorised to investigate and impose sanctions on employers who have breached their duty to provide safe and without risk workplaces, particularly in the context of sexual harassment.
7. That State and Territory WHS authorities be appropriately resourced to investigate and prosecute risks to health and safety arising from sexual harassment.
8. That trade unions be granted the authority to prosecute for health and safety breaches reinstated where such rights have been removed.
9. That the AHRC recommend a process for formally requiring that reporting of sexual harassment claims and statistics be made to the board of the defined entity and to an external organisation.
10. That businesses should also be required to report on the number of reported incidents of sexual harassment, as part of their reporting requirements to WGEA.
11. That the Human Rights Legislation Amendment Bill (2017) should be repealed and that the time for making complaints should be amended to 6 years in line with other discrimination jurisdictions.
12. That the time limit imposed by s46PH(b) of the AHRC Act should be abolished, especially with respect to sexual harassment complaints.
13. That AHRC explore the insertion of statutory criteria to be taken into account by the Courts when determining an award of damages.

14. That the SDA should be amended so that in addition to compensation, penalties are also payable by respondents who are found liable for sexual harassment.
15. That the AHRC Act should be amended to expressly prescribe time frames for the scheduling of mediation conferences.
16. That the AHRC Act should be amended to make it mandatory for respondents to attend the mediation conference and to file a reply document within a specified period of time.
17. That the AHRC be properly funded and fully staffed in order to fulfil its statutory objectives.
18. That AHRC consider the establishment of a victim advocate role within the AHRC to conduct mediations for those who cannot achieve access to justice.
19. That a complainant be given the right to elect to bypass the AHRC and proceed straight to court.