



Ms Kate Jenkins  
Sex Discrimination Commissioner  
Australian Human Rights Commission  
Level 3, 175 Pitt Street  
Sydney NSW 2000

*By email: SH.Inquiry@humanrights.gov.au*

Dear Commission,

## **NSW Society of Labor Lawyers Submission National Inquiry into Sexual Harassment in Australian Workplaces**

The New South Wales Society of Labor Lawyers ('the Society') welcomes the opportunity to make a submission to the National Inquiry into Sexual Harassment in Australian Workplaces conducted by the Australian Human Rights Commission ('the Commission').

The Society aims, through scholarship and advocacy, to effect positive and equitable change in the substantive and procedural law, the administration of justice, the legal profession, the provision of legal services and legal aid and legal education. To this end, the Society submits that the time limit in s 46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth) (the 'AHRC Act') be amended to provide a greater opportunity for victims of sexual harassment in the workplace to make complaints under Division 3 of the *Sex Discrimination Act 1984* (Cth).

Sexual harassment is endemic in Australian workplaces. This much is clear from four national sexual harassment surveys conducted by the Commission in 2003, 2008, 2012 and 2018. The 2018 survey showed that one in three people have experienced sexual harassment while at work<sup>1</sup> and for the first time reported the industries with the highest occurrences of sexual harassment in the workplace:

- 81% - Information, media and higher telecommunications industry;
- 49% - arts and recreation services
- 47% - electricity, gas, water and waste services; and
- 42% - retail.

Despite this widespread prevalence of sexual harassment in the workplace, only one in five people who had experienced sexual harassment at work had made a formal report or complaint.<sup>2</sup> As evident from the #MeToo movement and the Commission's own findings, many people who experience sexual harassment do not report their harassment straight away. There are a number of reasons which prevent people who have been victims of sexual harassment in the workplace from reporting harassment or

<sup>1</sup> Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018), 8.

<sup>2</sup> Ruth Williams, 'Australia's 30-year-old sexual harassment laws have 'real gaps'', *Sydney Morning Herald* (online), 11 March 2018 <<https://www.smh.com.au/business/companies/australias-30-year-old-sexual-harassment-laws-have-real-gaps-20180309-p4z3nc.html>>

even speaking about it at the time it occurs. These include the risk of adverse treatment in the workplace, fear of not being believed, latent trauma (by having to relive the sexual harassment) and embarrassment.<sup>3</sup>

## Recommendations

Noting the issues with bringing a complaint above (which are well known to the Commission), it is crucial that the AHRC Act extend the period for complainants to file complaints about sexual harassment to account for these barriers. Imposing a six-month time limit to report sexual harassment in the workplace while the victim might be struggling with a wide range of issues connected to the harassment creates a significant barrier to filing a complaint. Indeed, the Society is also of the view that in light of recent research and public opinion, the previous 12-month time limit, repealed in April 2017, was also unsuitably short.

Accordingly, the Society recommends that the time limit for filing complaints of sexual harassment be removed from the AHRC Act. In the alternative, the time frame for complaints should be extended to at least six years (with a discretion to extend it beyond six years) as per time limits in other areas of law,<sup>4</sup> for example, in contract and misleading and deceptive conduct claims, and underpayment claims under the *Fair Work Act 2009* (Cth).

Section 46PH(1)(b) applies broadly to all forms of anti-discrimination complaints and, without proffering a view on the merits of extending the time period for other forms of complaint (it being outside the remit of this National Inquiry), the Society suggests that one of two methods could be adopted to extend the period applicable to complaints brought under Division 3 of the SDA. Either:

- 1 Division 3 of the SDA be amended to expressly exempt a sexual harassment complaint from the operation of s 46PH(1)(b) of the AHRC Act; or
- 2 an amendment be made to s 46PH to expressly exempt a sexual harassment complaint under Division 3 of the SDA from being subject to the terms of s 46PH(1)(b).

In circumstances where the Commission recommends the time limit be retained in its current form, the Society suggests that an express provision be included in the AHRC Act directing the President of the Commission to consider, in his or her discretion to terminate a sexual harassment complaint on s 46PH(1)(b) grounds, whether there were extenuating circumstances that led to the complainant lodging the complaint after the expiry of the six-month period. This would include whether the complainant had a reasonable apprehension of adverse treatment in the workplace as a consequence of the complaint.

*NSW Labor Lawyers*

**NSW Society of Labor Lawyers**

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<sup>3</sup> Women and Equalities Committee, House of Commons (UK), *Sexual harassment in the Workplace, Fifth Report of Session 2017–19* (July 2018), 26.

<sup>4</sup> A similar position was recently advocated by Cassandra Taylor and Amy Zhang in the Society's 2018 edition of *Legal Tweaks*.