

# Ai GROUP SUBMISSION

Australian Human Rights Commission

## **National Inquiry into Sexual Harassment in Australian Workplaces**

March 2019

**Ai**  
GROUP

## **About Australian Industry Group**

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

## **Ai Group contact for this submission**

Nicola Street, National Manager – Workplace Relations Policy

[REDACTED]  
[REDACTED]

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## 1. EXECUTIVE SUMMARY

Ai Group welcomes the Australian Human Rights Commission's (AHRC) National Inquiry into Sexual Harassment in Australian Workplaces (**Inquiry**).

Sexual harassment is detrimental to those who experience it, and detrimental to businesses. Businesses often suffer lost productivity, staff turnover, lost custom or brand damage. There is no place for sexual harassment in Australian workplaces or the broader community.

Ai Group supports effective measures to reduce sexual harassment in Australian workplaces.

How employers respond to sexual harassment has a significant impact on prevention of future instances. The current regulatory framework is overly complex, and this leads to a legalistic approach. Employers and employees need to navigate multiple and, in many respects, duplicate sexual harassment laws.

The current framework constrains employers from taking decisive action when sexual harassment occurs and can penalize employers that do.

In this submission, Ai Group proposes a number of reforms aimed at achieving a more effective framework for preventing and addressing sexual harassment in Australian workplaces, including the following:

- The *Fair Work Regulations 2009* (**FW Regulations**) should be amended to expressly include sexual harassment and associated unacceptable behaviour in the definition of "serious misconduct". The current definition is outdated, and appropriate updating is long overdue.
- The unfair dismissal provisions in the *Fair Work Act 2009* (**FW Act**) should be amended to ensure that workplaces and victims of sexual harassment are better protected. Current unfair dismissal provisions unduly favour procedural technicalities over the welfare of victims and safe workplaces.
- The definitions of sexual harassment in State anti-discrimination laws should be harmonised with the definitions in the *Sex Discrimination Act 1984* (Cth) (**SDA**) to reduce complexity and increase understanding.
- The FW Act's general protections should be tightened to exclude sexual harassment claims, which are already regulated through State and Federal anti-discrimination legislation.
- Non-disclosure agreements are often part of a viable alternative to resolving sexual harassment claims through costly, adversarial and often public court hearings.
- The Australian Government should allocate funding for targeted community campaigns aimed at preventing sexual harassment, with a focus on the role of digital technology in communicating and interacting.

- The Australian Government should allocate funding to educate employers, including Small and Medium Enterprises (**SMEs**), in effective ways to identify and address sexual harassment in the workplace.
- Innovative enterprise initiatives to reduce sexual harassment should be showcased and shared by engaging with industry groups and the leaders of relevant businesses.

## **2. Ai GROUP'S CONTRIBUTION TO THE INQUIRY**

Ai Group supports the AHRC's Inquiry. There is no place for sexual harassment in Australian workplaces. More effective measures are needed to prevent and address sexual harassment.

Ai Group has been appointed as a member of the Reference Panel for the Inquiry. We have conducted extensive employer consultations, both with the Sex Discrimination Commissioner, and through our own Member forums to discuss employer experiences in preventing and dealing with sexual harassment in their workplaces.

Employers have had a lot to say. They have contributed to the proposals outlined in this submission and they have taken many important steps in their own workplaces to reduce sexual harassment.

## **3. SEXUAL HARASSMENT IS DETRIMENTAL TO BUSINESSES**

Sexual harassment in the workplace is detrimental to businesses. It has a strong corrosive effect on workplace culture. It reduces productivity and increases business costs in staff turnover and lost sales. There is no place for it in Australian workplaces.

Sexual harassment can be devastating for victims due to its impact on physical and psychological safety and can be detrimental to their economic empowerment.

It is not in the interests of employers for employees to absorb experiences of sexual harassment as just part of the work culture, nor is it in the interests of employers to employ people who cause harm to others and in doing so damage professional relationships, reduce productivity for themselves and others, and damage an employer's brand and reputation.

Employers don't want sexual harassment in their workplaces. It prevents businesses from focusing on objectives that enable them to thrive and prosper.

## 4. FOURTH NATIONAL SEXUAL HARASSMENT SURVEY – RELEVANT FINDINGS

The AHRC's [fourth national survey on sexual harassment in Australian workplaces](#) appropriately inform this Inquiry. The results were announced on 22 September 2018 and key findings included:

### Incidence of sexual harassment

- 1 in 3 people had experienced sexual harassment at work in the past five years. In the last 12 months, 23% of women and 16% of men had experienced some form of workplace sexual harassment.
- People aged 18 – 29 were more likely than those in other age groups to have experienced workplace sexual harassment in the past five years.

### Common features of sexual harassment

Harassers were most often a co-worker employed at the same level as the victim and, in the majority of cases, had sexually harassed others in the same workplace in a similar manner.

The most common form of workplace sexual harassment experienced was offensive, sexually suggestive comments or jokes.

More than half of workplace sexual harassment occurred at the victim's workstation or where they work and one-quarter of incidents occurring in a social area for employees.

40% of workplace sexual harassment incidents were witnessed by at least one other person. But in the majority of cases (69%) the witness did not intervene.

The rates of workplace sexual harassment were particularly high in the Information, media and telecommunications industries (87%), followed by Arts and recreation services (49%), Electricity, gas and waste services (42%), and Retail trade (42%).

### Reporting of sexual harassment

Fewer than one in five people (17%) made a formal report or complaint in relation to workplace sexual harassment. The most common reasons for not reporting were that other people would think it was an over-reaction and it was easier to keep quiet.

Importantly, however, the most common outcome for victims who made a formal report or complaint about workplace sexual harassment was that the harassment stopped.

## 5. THE CHANGING CULTURE AND DIVERSITY IN WORKPLACES

As a peak industry group, Ai Group represents companies across diverse industry sectors. Many of these industries have historically been and remain male-dominated, but this is changing – particularly as businesses are catching on to the proven business benefits of diversity of thought and diversity of workforces.

Industry is making gains, not just in improving the number of women represented across the workforce and in leadership positions, but also in starting to address some of the workplace barriers that have prevented the full participation and positive experiences of many women in the workforce. These barriers include workplace culture, workplace behaviour and the importance of leadership in effecting real, and sustainable change.

It is important to recognise the momentum that is building within businesses for change and the growing importance of business embedding organisational values such as professionalism, accountability and respect into mission statements, business decision making and expectations of workplace behaviour.

The Inquiry is very timely, not just in the context of the changes that have flowed from the #MeToo movement, but in the context of the greater awareness of businesses and the positive actions that they have taken to prevent sexual harassment in their workplaces.

There is greater understanding amongst employers of the importance of taking action to eliminate sexual harassment from their workplaces and that doing nothing is bad for business and bad for employees.

This is also reflected in a growing number of high-profile employer decisions to remove senior people from their businesses following complaints of sexual harassment or inappropriate behaviour.

Australian employers overwhelmingly take positive steps to prevent sexual harassment, with many doing this in a formal or systematic way.

Employers who report to the Workplace Gender Equality Agency (**WGEA**) are required to report, amongst other aspects, against six gender equality indicators with one such indicator being whether or not they have a policy dealing with discrimination and harassment complaints.

The [2018 results](#) from the WGEA show that, of reporting employers:

- 97.9% have a formal policy or strategy on sex-based harassment and discrimination prevention;
- 97.4% include in their policy or strategy a grievance process for sex-based harassment and discrimination; and
- 86.2% provide training for all managers on sex-based harassment and discrimination prevention, up from 77% in 2014.

These figures demonstrate that employers take their obligations seriously by investing in and creating internal frameworks for the prevention and resolution of sexual harassment.

## 6. THE LEGAL FRAMEWORK IS OVERLY COMPLEX AND INEFFECTIVE

Key to developing an effective regulatory framework aimed at preventing sexual harassment, is ensuring that employers are free to create workplaces of accountability.

Loading up preventative obligations on employers will achieve nothing if there is no corresponding ability for employers to address instances of sexual harassment in an appropriately serious manner. Preventative strategies can quickly be undermined and not taken seriously without employers having appropriate access to remedial action.

The flawed nature of the current framework contributes to the high rates of sexual harassment and business frustration. Imposing more preventative obligations on employers without addressing the current excessive constraints which prevent employers from dealing effectively with those who engage in sexual harassment would lead to even more problems.

The AHRC's Fourth National Survey found that the majority of sexual harassment cases reported were initiated by co-workers at the same level as the victim/complainant.

To create accountable workplaces and to minimise the risk of harm sexual harassment frequently causes, employers should be able to discipline or terminate the employment of an employee who has sexually harassed another. Currently, to do so, carries significant risks of industrial and legal claims because the current legal framework:

- Incentivizes dismissed employees to deny the occurrence of sexual harassment; making it more difficult for employers to prove that harassment has occurred to the relevant standard of proof;
- Gives inadequate weight to the seriousness of the conduct, and excessive weight to procedural and technical factors, when claims by dismissed employees are assessed.

The regulatory framework should support employers that take their legal obligations seriously and want to do the right thing.

Australia's unfair dismissal laws have a significant influence on how businesses approach and resolve instances of sexual harassment.

Unfair dismissal decisions of the Fair Work Commission (**FWC**), in respect of employees dismissed by employers for engaging in sexual harassment, are very inconsistent and provide employers with little confidence that a decision to remove an employee from the workplace who has sexually harassed another will not be overturned or lead to the payment of compensation.

The inconsistencies are a product of the unfair dismissal provisions of the FW Act's and of the inconsistent decisions taken by individual FWC members when determining whether a dismissal is harsh, unjust or unreasonable.

Of concern are those decisions where sexual harassment or serious misconduct of a sexual nature has been found, but for various reasons, have nonetheless resulted in a finding that the dismissal was unfair, with orders for the employer to pay compensation to the ex-employee, or to reinstate them, or both. We have seen this in numerous cases ranging from physical sexual harassment of another person, offensive verbal remarks, or the distribution of pornographic material to others at work.

In the case of *Flanagan, Hogan, Pitches v Thales* [2012] FWA 6291, the Commission ordered the reinstatement of three employees who were summarily dismissed for sending pornographic emails in breach of the company's email and internet usage policy. Despite finding that the employer had a valid reason for terminating their employment, the Commission accepted the arguments of the AWU (representing the applicants) that they had not been trained or made aware of the policy by the employer. The Commission also found that there were procedurally unfair timeframes used by the employer in seeking the employees' response to the allegations of misconduct.

Similarly in *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 a Majority FWC Full Bench ordered the reinstatement of three employees dismissed for distributing pornographic material by email. The Majority placed significant weight on the nature of the employer's past enforcement of its company policy as contributing to the dismissals being 'harsh' and therefore unfair. Senior Deputy President Hamberger issued a dissenting decision which held that there was clear evidence of extensive awareness and training about the employer's policy. The decision was appealed by Australia Post to the Full Federal Court. The Court upheld the FWC's decision to reinstate two of the employees.<sup>1</sup>

In contrast, six years earlier, a Full Bench of the then Australian Industrial Relations Commission (AIRC) in *Wake v Queensland Rail* (PR974391) quashed a decision of a single member of the AIRC to reinstate an employee for sending, storing and transmitting sexually-related, pornographic and violent material. In doing so, the Full Bench held that:

"As we indicated earlier, control of email traffic in inappropriate material is a matter of legitimate concern to employers. The Commissioner's approach might well be interpreted to mean that employees with long service ought be immune from termination of employment unless guilty of breaches of the policy involving large amounts of "hard core" pornography. We think that an employer is entitled to take a firmer line than that.

...

The use of company electronic communications systems for storage and transmission of images containing sexually-related, pornographic and violent material is a serious and socially important

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<sup>1</sup> *Australian Postal Corporation v D'Rozario* [2014] FCAFC 89

issue. The appellant, rightly in our view, made sustained efforts over a number of years to make employees aware of its policy and the consequences of breaching the policy. Despite those efforts and repeated warnings the employee breached the policy in a substantial way and on a number of occasions.<sup>2</sup>

The *Queensland Rail* decision drew an explicit and important link between the employer's obligations under anti-discrimination legislation and decisions to take decisive action against employees who distribute pornography.

Reinstating employees who are dismissed for distributing pornography, including where such conduct was found, or admitted to, sends an extremely powerful message back to the broader workforce that inappropriate sex-related conduct at work is not serious misconduct.

None of the decisions addressed whether the sending of pornographic material constitutes sexual harassment under relevant provisions of the SDA. However, Ai Group considers that such conduct would in many cases amount to sexual harassment for which employers may be liable.

In *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156, a senior member of the FWC held that an employee dismissed for sexual harassment, bullying and insubordinate behaviour against multiple people at a work Christmas party was harsh and unfair.

The nature of the sexual harassment included intrusive and unwanted questioning, touching, sexually inappropriate remarks, and aggressive and intimidating behaviour. Many of these behaviours were the types of sexual harassment identified in the AHRC's Fourth National Survey as the more common experiences of sexual harassment. The Commission raised the possibility of reinstatement, but ultimately this was not ordered in the end.

The decision is a complex one. Only some of the employee's conduct was held to constitute a valid reason for dismissal, and that was largely his aggressive, demeaning and intimidating questioning of a co-worker. While the Commission accepted that certain incidents of sexual harassment occurred, the Commission found that because they had occurred in the upstairs bar and taxi line after the conclusion of the work Christmas party, the harassment did not have the relevant connection to the workplace over which the employer could act and terminate employment, and that it was not conduct for which the employer would be liable under the sexual harassment provisions of the SDA. In determining whether the nature of the employee's harassment constituted a valid reason for dismissal, an assessment was made as to whether the employer would be liable (or vicariously liable) for the conduct under sexual harassment provisions of the SDA. The Commission found that it would not be.

In determining whether the dismissal was unfair for the conduct over which the employer could take action, the Commission found the dismissal harsh and placed substantial weight on the following factors, amongst others:

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<sup>2</sup> *Wake v Queensland Rail (C2006/3088)* PR974391 at [17] and [22]

- The lack of any significant ongoing workplace consequence of his behaviour;
- His good employment record;
- The isolated and aberrant nature of the conduct;
- The fact that he was intoxicated as a result of alcohol consumption at a Christmas function when he engaged in the relevant behavior.

It can be seen that the decision placed great weight on the impact of the dismissal on the dismissed employee and the role of intoxication in explaining his behaviour. Further, in determining whether there was significant ongoing workplace consequence of the behaviour, the Commission relied heavily on the employee's preparedness to apologise (although there was no evidence that he did) and not having a record of similar behaviour previously. Concerns put forward by the complainants of the fear and distress working with the complainant would cause, were not accorded the same weight because they were not supported by other objective facts. That is, the nature of the conduct in itself in causing distress and concern to the victims was not enough.

Perhaps shaped by the FW Act's unfair dismissal provisions and their complex interaction with the SDA, the decision creates further uncertainty over how and whether the legal framework will support employers who attempt to address sexual harassment and unacceptable behaviour.

The decision also appears to be at odds with that of the Full Federal Court in *Vergara v Ewin* [2014] FCAFC 100 which adopted a broader meaning of workplace, in finding liability for the sexual assault of an employee by a contractor at a hotel establishment outside the workplace.

Ai Group considers that the decision is out of step with broader community attitudes about the impact of sexual harassment on victims, and about individual responsibility and accountability.

In *McDonald v TNT Australia Pty Ltd T/A TNT Express* [2014] FWC 4246, the Commission ordered the reinstatement of an employee found to have engaged in inappropriate conduct with a company customer at a retail store. The conduct involved unwanted lewd, offensive remarks with clear sexual innuendo towards a younger female worker. It was the type of behaviour that would be recognised as sexual harassment as identified in the AHRC's Fourth National Survey. The Commissioner, however, stated that he was unable to conclude that the conversation, or the manner in which it occurred was overtly sexual or that it constituted harassment in any form, and that the final remark of the employee "I better leave before it gets too dirty" was "inappropriate, clumsy and unnecessary" but not serious enough to warrant dismissal.

In *Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal v Jodie Goodall* [2016] FWCFB 5492, a Majority Full Bench of the FWC upheld the reinstatement of an employee dismissed for explicit sexist, homophobic and racist remarks made at work. Factors concerning the employee's past unblemished record, that the remarks were not directed at anyone in particular, and that he was fatigued from shiftwork, resulted in the Majority considering the comments to be in the "low-medium range". Commissioner Johns, however, strongly dissented, relevantly stating:

**[91]** This is not a case of a difference of degree, impression or empirical judgment. There is extensive literature about the effects of discrimination, including in the workplace. Making jokes or comments that are inherently Islamophobic and homophobic is likely to negatively affect the mental health of people in the workplace ranging from anxiety to depression. The Commissioner should have taken “judicial notice” of the same.

**[92]** It is for this very reason that Mt Arthur has a Code of Business Conduct that expressly prohibits behaving in a way that is “offensive, insulting, intimidating, malicious or humiliating”, making “jokes or comments about a person’s race, gender, ethnicity, religion, sexual preference, age, physical appearance and disability.” In implementing the policy, promulgating it and conducting training for its employees (including Mr Goodall) with the aim of eliminating discrimination in the workplace, Mt Arthur was fulfilling its obligations as an employer under Federal and State legislation to ensure that its workplaces are free of discrimination and harassment.

**[93]** In the face of a substantial and willful breach of that policy, Mt Arthur took the matter seriously, and ultimately concluded that it was a valid reason for termination that was not otherwise harsh, unjust or unreasonable. Requiring Mt Arthur to reinstate Mr Goodall in this context is plainly unjust. Mt Arthur took decisive action to eliminate Islamophobia and homophobia in its workplace. It should have been commended for its action, not punished by being required to take Mr Goodall back.”

These decisions send mixed messages to employers, employees and the community at large about what is sexual harassment and the extent to which it should be treated seriously. Such mixed messages from decisions of the FWC do not assist employers who decide to take decisive action to address sexual harassment.

Even where dismissals for sexual harassment have been upheld, these cases have not been without time consuming hearings, the involvement of many witnesses and the engagement of lawyers to run a defence. Typically companies that have gone through this process have been larger employers with greater resources (in time, cost and people) than what is often available to small to medium employers.

For example:

- In *Mr Peter Angelakos v Coles Supermarkets Aust Pty Ltd T/A Coles Supermarkets* [\[2019\] FWC 29](#), the Commission upheld the employer’s decision to dismiss an employee who had engaged in sexual harassment of two female employees aged 17 and 23 and other female employees of school age. The hearing was extensive and involved 17 witnesses and 39 separate allegations.
- In *Homes Abarra v Toyota Motor Corporation Australia Ltd* [\[2018\] FWC 3761](#), the Commission upheld the employer’s decision to dismiss a supervisor who had engaged in sexual harassment of others he supervised, favouritism and nepotism based on personal and sexual relationships with staff and not complying with company procedure in managing his team, amongst other reasons. While the employer’s dismissal was upheld, the hearing was contested and extensive. Approximately 23 witnesses were involved, with many cross-examined.

Business and resourcing pressures often lead to commercial settlements in unfair dismissal cases, including those filed by former employees dismissed for sexual harassment. This is particularly so when an employer is not confident that the FWC will uphold their decision to dismiss a worker given the inconsistencies in Commission decisions and the uncertainties associated with the FW Act's unfair dismissal provisions.

## 7. RECOMMENDATIONS FOR A SIMPLER AND MORE EFFECTIVE LEGAL FRAMEWORK

### Sexual harassment as serious misconduct

Contemporary workplaces are now embedded with digital technologies and different ways of working. Increased remote working and online communications between employees and customers have altered working environments and employee interaction. While this has facilitated greater workforce participation for many, new forms of unacceptable behavior are emerging.

The existing regulation around "serious misconduct" should expressly recognise sexual harassment.

Intoxication is serious misconduct, as is fraud and theft. It is long overdue for sexual harassment to be addressed in the definition. Ai Group proposes the following amendment to Regulation 1.07 of the FW Regulations:

#### "Regulation 1.07 – Meaning of serious misconduct

- (1) For the definition of **serious misconduct** in section 12 of the Act, **serious misconduct** has its ordinary meaning.
- (2) For subregulation (1), conduct that is **serious misconduct** includes both of the following:
  - (a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
  - (b) conduct, that causes serious and imminent risk to:
    - (i) the health or safety of a person; or
    - (ii) the reputation, viability or profitability of the employer's business.
- (3) For subregulation (1), conduct that is **serious misconduct** includes each of the following:
  - (a) the employee, in the course of the employee's employment, engaging in:
    - (i) theft; or
    - (ii) fraud; or
    - (iii) assault; or
    - (iv) sexual harassment; or
    - (v) repeated conduct against another person at work, that a reasonable person

would find intimidating and threatening.

(b) the employee being intoxicated at work;

(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

(d) the employee sending material to other persons at work that, a reasonable person would find highly offensive.

(4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(5) For paragraph (3)(b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform.

For clarity, and to ensure consistency with the well-understood definition of sexual harassment, we further propose that the following definition of "sexual harassment" be included in Regulation 1.03 (Definitions) of the FW Regulations:

*"sexual harassment" has the same meaning as the Sex Discrimination Act 1984 (Cth).*

These amendments would enable employers to more confidently act on forms of conduct that would be recognised as either unlawful under the SDA or conflict with other legal obligations. The amendments would:

- Provide clearer grounds for termination of employment;
- Inform contracts of employment, including for managers and executives;
- Inform workplace policies and codes of conduct about what is and what isn't appropriate workplace behaviour on which employers may act, including to terminate employment;
- Inform the community more broadly about what is not appropriate behaviour at work; and
- Assist in achieving more clarity in unfair dismissal cases.

## **Proposed amendments to the unfair dismissal laws**

As described earlier, there are too many cases where employees dismissed for sexual harassment (and where such harassment has been found to have occurred) have been financially compensated or reinstated under unfair dismissal laws. This leads to uncertainty for employers and impacts upon decisions taken to address sexual harassment that occurs in workplaces.

Ordinarily in unfair dismissal cases, persons dismissed bear the onus of demonstrating to the Commission's satisfaction that their dismissal was unfair in accordance with the statutory criteria.

For persons dismissed for reasons of serious misconduct however, it is generally the employer who must satisfy the Commission that the misconduct in fact occurred, and not whether the employer simply had reasonable grounds to believe that it occurred.<sup>3</sup>

Moreover, the frequent application of the *Briginshaw* principles to sexual harassment unfair dismissal cases, whether by the Commission at its own initiative, or argued by the applicant, generally elevate the Commission's scrutiny of the quality of evidence available, notwithstanding that the standard or proof remains the balance of probabilities. Specifically, in *Briginshaw*, Dixon J said:

“Except upon criminal issues to be proved by the prosecution, it is enough that that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.”<sup>3</sup>

While commonly applied to allegations of sexual harassment, a higher level of evidential scrutiny is not required for cases of dismissal for poor performance, incompetence or unsatisfactory conduct, or more generic breaches of company policies. Also, cases of serious misconduct involving theft, serious WHS breaches or damage to business viability do not tend to consistently attract the application of *Briginshaw* in the same way as cases concerning sexual harassment. In effect, this may place a greater onus on the employer (and in part complainant, or victim) to demonstrate a higher quality of evidence that the harassment occurred, when compared to some other misconduct by the employee.

Collectively, an employer's onus to satisfy the Commission that the misconduct occurred, the application of *Briginshaw* principles, combined with the unfair dismissal jurisdiction being a 'no-costs' jurisdiction and carrying low application fees, are all factors that enable employees dismissed for sexual harassment to readily and often successfully challenge their termination of employment.

A person dismissed for sexual harassment or serious misconduct who is compensated or reinstated is damaging to an employer's efforts to make their workplaces safer. Currently, the unfair dismissal laws do not achieve the right balance. The laws:

- Disproportionately disadvantage victims of serious misconduct, including victims of sexual harassment;
- Undermines the work health and safety of the broader workforce;
- Can conflict with other statutory obligations on employers, for instance work health and safety obligations; and

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<sup>3</sup> *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201, *Sherman v Peabody Coal Ltd* (1998) 88 IR 408; *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1

- Can damage an employer's business.

Ai Group proposes the following amendments to section 385 of the FW Act:

**"385 What is an unfair dismissal**

A person has been unfairly dismissed if the FWC is satisfied that:

- (a) The person has been dismissed; and
- (b) The dismissal was harsh, unjust, or unreasonable; and
- (c) The dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) The dismissal was not a case of genuine redundancy; and
- (e) The dismissal was not a case of *serious misconduct*."

The effect of this amendments is to create a much-needed limitation on the FW Act's unfair dismissal jurisdiction in cases of serious misconduct.

Consistent with cases where applicants are dismissed for reasons other than serious misconduct, persons dismissed for serious misconduct should bear the onus of proving their case.

An employer who acts, or want to act, decisively, soundly and properly in response to sexual harassment in its workplace should not have to gamble on its chances in an unfair dismissal case. It is time to review the FW Act's unfair dismissal provisions to ensure that employers that address unacceptable workplace behavior are appropriately supported, and that victims of sexual harassment are appropriately protected.

## Complaints framework

Ai Group generally considers the SDA to be a robust framework for regulating sexual harassment as unlawful and creating liability for those who engage in it.

However, the SDA's interaction with the overall employment framework governing complaints of sexual harassment is complex, duplicated and piecemeal. The confusion creates uncertainty for employers in determining how to prevent and manage sexual harassment complaints. Complainants are faced with multiple systems, and multiple rules. For both employers and complainants, legal advice is generally needed.

Specifically, the SDA administered by the AHRC makes sexual harassment unlawful and through the *Australian Human Rights Commission Act 1996 (Cth)* enables the making of complaints and possible resolution through conciliation conferences. Complainants may also go to the Federal Court or Federal Circuit Court for enforcement of the SDA's sexual harassment provisions. Generally a 60-day timeframe applies for escalating a complaint to the Courts following any termination of the complaint by the AHRC.

The jurisdictions of the Federal Court and Federal Circuit Court in determining sexual harassment complaints are compensatory, with no cap on the quantum of damages that may be ordered.

Ai Group considers that the SDA and the jurisdiction of the Federal Court and Federal Circuit Court are a strong framework. In addition to uncapped monetary damages, individuals found to have sexually harassed (including as workplace participants) can be personally liable and exposed to legal action. Employers are vicariously liable for the harassment perpetrated by an employee or agent, unless the employer took all reasonable steps to prevent the employee or agent from engaging in the sexual harassment.<sup>4</sup>

Ai Group also considers that the SDA contains an appropriate, and generally well-understood definition of sexual harassment at s.28A. It contains the following key elements:

- Making an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- Engaging 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.

It is a definition that is capable of practical translation to a variety of scenarios and circumstances and in doing so covers a broad spectrum of behaviors. The existing definition should be retained.

The SDA also contains strong victimization provisions<sup>5</sup> that make it an offence for individuals (and employers) to victimize another person, (specifically to subject, or threaten to subject, a person to any detriment) on the grounds that the other person has made a sexual harassment complaint. Maximum penalties for offences include monetary penalties and three months' imprisonment for individuals.

State-based anti-discrimination legislation also provides avenues for complaints of sexual harassment. Complaints are frequently mediated, conciliated or referred to the relevant tribunal or court to determine the sexual harassment complaint. Some State jurisdictions provide caps on the amount of compensation that can be awarded in sexual harassment cases, and others do not.

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<sup>4</sup> S.106, *Sex Discrimination Act 1984 (Cth)*

<sup>5</sup> S.94

State-based anti-discrimination laws contain differing definitions (even if slight) of sexual harassment to what is defined in s.28A of the SDA, adding to the complexity for employers and workers.

In Ai Group's experience, complaints conciliated under the SDA or State-based anti-discrimination legislation frequently involve and are heavily focused on financial settlements. It is not common for the broader issue of the sexual harassment conduct to be the focus of investigation. Some companies also report that the conciliation experience does not adequately manage expectations of complainants in respect of applicable legal provisions, in the same way as the conciliation processes of the FWC.

For employers operating nationally or across different States, navigating both a Federal framework and different State-based frameworks is difficult without comprehensive and often costly legal advice. It places unreasonable pressure on HR managers who frequently are the point of contact or have the responsibility to resolve employment disputes. HR managers are generally not lawyers. Understanding the differing legal provisions and processes of multiple jurisdictions chews up employer resources that would be better invested in trying to prevent sexual harassment through workplace programs.

Ai Group recommends that the definitions of sexual harassment in State anti-discrimination laws should be harmonised with the definitions in the *Sex Discrimination Act 1984* (Cth) (**SDA**) to reduce complexity and increase understanding.

### **The general protections in the FW Act should not add to existing complexity**

The interaction between Federal and State anti-discrimination laws and the FW Act's general protections provisions also create undue complexity and confusion in respect of sexual harassment.

Both the Federal and State-based frameworks provide compensatory remedies for sexual harassment. There is no need for a third through the FW Act's general protections as some parties to this Inquiry may be suggesting. To do so would:

- Create a further adversarial forum for complainants to seek a remedy;
- Create further confusion for employees and employers in navigating multiple legal frameworks to determine competing rights, obligations and defences; and
- Increase the involvement of lawyers.

The FW Act's general protections are comprehensive and broad in scope. They protect workplace rights for employees, employers and independent contractors.<sup>6</sup> Section 351 prohibits an employer from taking adverse action because of a proscribed ground listed in that section, includes sex.

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<sup>6</sup> See ss. 340, 341, 342 *Fair Work Act 2009* (Cth)

The Fair Work Commission's *General Protections Benchbook* states that:

"Sexual harassment has been found to constitute sex discrimination. Similarly, sexual harassment may constitute adverse action against a person by reason of the person's sex."

However, a number of Court decisions suggest that s.351, for the purpose of adverse action, is to be regarded as separate to anti-discrimination legislation.

In *Hodkinson v The Commonwealth* [2011] FMCA 171, the Federal Magistrates Court held that relevant sections of the *Disability Discrimination Act 1992 (DDA)* do not inform the interpretation of s.351 of the FW Act, and that conduct contravening the DDA does not by reason of that contravention, also contravene the FW Act. Further, Flick J of the Federal Court in *Wroughton v Catholic Education Office Diocese of Parramatta* [2015] FCA 1236, while not resolving whether the SDA was a workplace law (within the meaning of the FW Act's adverse action provisions) nonetheless noted:

"...that s 351(1) of the *Fair Work Act* does not itself employ the term "*discrimination*". Nor does s 351 contain any prohibition upon (in the present case) "*sex discrimination*", including "*sexual harassment*". The prohibition in s 351(1) is a prohibition upon an employer taking "*adverse action against a person...*". And once that constraint upon the prohibition is recognised, attention is then directed back to ss 340 and 341. So much is (perhaps) to be expected in legislation whose objects are those set forth in s 3 of the Act rather than legislation whose specific focus of attention is "*discrimination*".<sup>7</sup>

Flick J went on to conclude:

"Even if it be assumed in favour of Ms Wroughton that s 351 embraces a prohibition of sexual harassment and assuming that her complaint as to sexual harassment by Messrs Whitby and Ricketts is accepted, her claim for relief pursuant to the *Fair Work Act* fails because no "*adverse action*" has been taken against her "*because*" she was entitled to the "*benefit*" of a "*workplace law*" for the purposes of s 341(1)(a) of that Act."<sup>8</sup>

The uncertain and nebulous scope of the FW Act's general protections detracts from what should be a well-understood legal framework about sexual harassment.

Ai Group recommends that:

- Section 351 of the general protections in the FW Act be repealed;
- The Australian Government engage with State Governments through COAG with a view to harmonising the many sexual harassment provisions in state anti-discrimination law to the current standard contained in the SDA.

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<sup>7</sup> [2015] FCA 1236 at [77]

<sup>8</sup> Ibid at [79]

## Work health and safety

Work health and safety (**WHS**) is clearly relevant to sexual harassment. Sexual harassment can be damaging to physical and psychological health and safety.

Australian businesses are subject to robust work health and safety laws. Such laws require employers, or specifically, “persons conducting a business or undertaking (**PCBUs**)”, to ensure, so as far as reasonably practicable, the health and safety of workers.<sup>9</sup> Workers are not just employees, but include contractors, labour hire employees, sub-contractors, volunteers and other categories of persons recognized by the Model WHS laws. Similarly, a workplace is defined broadly under the WHS Act and is considered to be “*a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.*”<sup>10</sup>

Individual officers and workers are also bestowed with specific statutory duties in respect of ensuring safe workplaces.<sup>11</sup> Offences under the WHS Act are serious. Criminal prosecutions can arise for both PCBUs and individuals with high financial penalties, and terms of imprisonment of up to five years for reckless conduct. The model WHS Act has largely been mirrored by most State and Territory Governments, and in Victoria and Western Australia where these laws have not been adopted, similar provisions apply in Occupational Health and Safety laws.

The current scope of the WHS Act’s primary duty on PCBUs to ensure the health and safety of workers, extends to psychological safety, including where it may be threatened by the behaviour of another person at work, such as sexual harassment. There are clear positive duties on employers in this regard.

Further in June 2018, SafeWork Australia published [national guidance material on work-related psychological safety](#) which provides a step by step processes for businesses to manage and prevent psychological injury. Such guidance material is highly relevant to all forms of risk, such as sexual harassment that threaten psychological safety at work.

Notwithstanding broad and positive WHS duties on employers, WHS legislation is not the primary legal framework that governs the relationships between employers and employees. This is because the FW Act, amongst other legal instruments (such as modern awards, enterprise agreements and contracts of employments) provide protections for employees in relation to actions by employers to alter conditions of employment, or to suspend or terminate employment.

A remedial response in disciplining, suspending or removing an individual employee from the workplace who has caused psychological harm to another by sexual harassment, is not the same as installing a guard on a piece of machinery in accordance with a relevant regulatory standard. FW

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<sup>9</sup> S.19, *Work, Health & Safety Act 2011 (Cth)*

<sup>10</sup> S.8 – definition of workplace, *WHS Act 2011 (Cth)*

<sup>11</sup> Ss. 27, 28, *WHS Act 2011 (Cth)*

Act obligations must be considered and complied with by employers and sit independently to any WHS obligation to ensure the health and safety of workers.

For this reason, Ai Group does not support additional WHS obligations on employers in respect of sexual harassment. Such additional obligations may conflict with federal employment laws, adding further to the complexity and confusion that already exists. Additional regulation further runs the risk of isolating and prioritising one form of conduct over another, e.g. bullying that may also cause psychological injury.

This is not to say that WHS practices and management systems are not relevant. Reinforcing the connection between sexual harassment as a WHS issue has the benefit of engaging with existing strong work cultures around health and safety that presently exist in industry. The 'culture of safety' is one that regularly extends to employee wellbeing and psychological safety and it is one that should include concepts about safe relationships and safe interactions at work.

### **Workers' compensation**

A further part of the complex regulatory framework relating to sexual harassment is the workers' compensation jurisdiction. Employers frequently report that the workers' compensation framework is, in itself, complex and costly, with differing systems in each State or Territory.

The workers compensation framework provides in many circumstances, monetary compensation to workers who have suffered illness or injury in the course of their employment. While in each jurisdiction there are varying legal thresholds as to if and when an employee's illness or injury is compensable, injuries to workers clearly caused by sexual harassment at work, are generally capable of being accepted as claims accepted for compensation.

In several cases, and for the purpose of assessing claims, scheme managers (e.g. Agents, Insurers) may conduct their own investigations into the substance of the workers compensation claim; namely the nature and occurrence of any sexual harassment complaint and its relationship to the injury complained of by the claimant. These investigations can create additional pressure and confusion for employers and workers who may be dealing with the complaint through other avenues in accordance with different legal obligations (for instance anti-discrimination legislation). Further, employers are often not provided with the outcomes of the scheme manager's investigation, which may mean that the employer does not have a full picture of the circumstances, nor an opportunity to respond to additional issues raised during such an investigation.

Despite its complexity, an employer's workers' compensation premiums can increase when a worker lodges a workers' compensation claim; in some jurisdictions this impact occurs even in the claim is ultimately rejected. Employers are generally incentivized to minimize the risk of injury and illness to workers caused by sexual harassment at work, by taking relevant preventative action.

## Non-disclosure agreements

Ai Group supports the Inquiry's examination of non-disclosure agreements, or confidentiality provisions, as instruments which have a role in resolving legal claims relating to sexual harassment. However, it is our view, that they remain a viable alternative to lengthy, adversarial and often public litigation of sexual harassment related legal claims.

### The nature of 'non-disclosure agreements'

Non-disclosure obligations frequently appear in legal agreements to resolve legal disputes without going to Court. They frequently appear because they reflect a key motivation for parties to avoid litigation. As part of a typical settlement agreement, a monetary payment (which can be substantial) is often paid to the complainant or party to the deed, in exchange for discontinuing or not initiating threatened legal claims, and to maintain a level of confidentiality over a claim that will not be tested in Court.

Non-disclosure agreements can take a variety of forms. The 'non-disclosure' aspect is usually one of many terms, parties to a legal dispute have agreed to. A non-disclosure term can take the form of a confidentiality obligation, a non-disparagement obligation, or both. Confidentiality obligations may require a party to keep confidential the terms of a financial settlement of a legal claim, while non-disparagement obligations may prevent a party from publicly communicating information about the other party that is negative or critical.

Confidentiality and non-disparagement provisions are common in resolving legal matters of any kind, not just sexual harassment. They appear very frequently as a "standard term" in settlement agreements used in most employment matters, including unfair dismissal cases, other termination of employment cases, and in anti-discrimination matters. Indeed, in Ai Group's experience, it has not been uncommon for confidentiality provisions to form part of standard terms in template settlement agreements issued by various employment tribunals in the course of mediation or conciliation conferences relating to employment claims.

In relation to sexual harassment claims, varying types of non-disclosure provisions can be used in settlement agreements between:

- Complainants of sexual harassment and the alleged perpetrator;
- Complainants of sexual harassment and an employer or business that is alleged to be vicariously liable for the sexual harassment;
- Alleged perpetrators and their employer, in cases where, for instance, a perpetrator has been dismissed but challenges his/her termination of employment through an unfair dismissal claim.

In Ai Group's experience, it is rare for non-disclosure provisions (in whatever form they take) to prohibit all disclosures. Invariably there will be times when employers and individuals must make

disclosures to satisfy other legal obligations (e.g. under workers' compensation) or for the purpose of seeking legal or financial advice. For this reason, it is not uncommon to see confidentiality provisions drafted so they are "*subject to law...*", or "*subject to disclosures required by law...*", or "*unless for the purpose of seeking financial or legal advice...*".

### **Misuse of non-disclosure agreements**

Non-disclosure agreements (or settlement agreements with confidentiality provisions) have recently been the subject of close scrutiny following the #MeToo movement, with details emerging about the nature of some confidentiality provisions contained in particular settlement agreements between complainants of sexual harassment and their employer and/or individuals accused.

In particular, the terms of the non-disclosure agreements between Zelda Perkins and Harvey Weinstein and the Presidents Club Dinner as reported by the Women and Equalities Committee of the House of Commons shone a spotlight on their misuse. Zelda Perkins stated that her non-disclosure agreement prevented her from telling anyone about her complaint and related information, including enforcement authorities and providing testimony in Court. She also reported that she was not provided a copy of the agreement she had signed.

If such circumstances were to occur in Australia, this would, in Ai Group's view, offend a range of legal obligations to the Court and conflict with legal professional and ethical duties to which legal practitioners are subject. Such professional conduct duties are enshrined in legislation and regulations and carry consequences ranging from penalties to professional disqualification.

Moreover, while there is no one set of uniform circumstances where confidentiality provisions may be agreed, in Ai Group's experience the extreme and unethical use and terms of non-disclosure agreements of the kind seen in Harvey Weinstein and the President's Club Dinner cases, are not representative of the vast majority of settlement arrangements that occur between complainant and employer in Australia.

To the extent that the AHRC is concerned about the misuse of non-disclosure agreements, Ai Group recommends active consultation with the legal profession and legal professional bodies in the context of existing regulation around legal ethics and professional conduct.

### **Confidentiality provisions are needed to avoid litigation**

Settlement agreements for matters relating to sexual harassment provide a viable alternative to adversarial (and often public) litigation. Appropriate confidentiality provisions, where agreed, play an important role.

Confidentiality provisions are key incentives for parties to legal claims to settle. For an employer that is alleged to be vicariously liable for sexual harassment, a settlement term requiring confidentiality over the alleged claim is an important and valuable incentive to avoid public litigation and brand damage. Removing the right to agree on confidentiality terms in a settlement agreement removes that incentive to avoid litigation. In turn, complainants would face an increased likelihood

of incurring the expense, the time and the psychological strain of adversarial litigation, which may not result in the ordering of the remedy they are seeking. The protracted and adversarial nature of litigation would most certainly deter other complainants from coming forward, leaving even greater levels of sexual harassment unreported and unaddressed.

It should not be assumed that confidentiality over a complaint is detrimental to the complainant's interests. It may be that complainants place high value on not wanting a particular incident made public (notwithstanding that they may not have been at fault) and on avoiding litigation, and the associated cost and strain.

### **Non-disclosure and safe workplaces**

In addition to the rights and interests of individual parties to resolve legal claims, is the broader issue of safe workplaces. Settlement agreements with confidentiality terms are not necessarily incongruous with general employer duties to provide safe workplaces.

Employers have ongoing statutory obligations under work health and safety laws to provide a safe place of work and eliminate or control safety risks. These are described above. Employers cannot 'contract out' of work health and safety obligations and are required to eliminate or control the risk to health and safety by taking appropriate action to eliminate or prevent risks to health and safety caused by sexual harassment.

In effect, this may mean an employer considers it necessary to take remedial action to remove a risk of sexual harassment, even if a settlement deed with confidentiality provisions has been entered into. Or alternatively, an employer may still be required to disclose to a work health and safety regulator, during a formal investigation, reported details of a sexual harassment incident. For this reason, blanket confidentiality obligations on employers over allegations of sexual harassment are not appropriate; nor is it in their interests to agree to one.

### **Recommendations**

Ai Group supports the Inquiry's examination of non-disclosure agreements and their misuse, but it is important that non-disclosure agreements:

- Be allowed to continue as a viable alternative to litigation;
- Be drafted in plain English for ease of understanding by non-lawyers.
- Be the subject of ongoing consultation and education with the legal profession and legal professional bodies, particularly in respect of existing regulations regarding legal ethics and conduct.

## **8. THE IMPORTANCE OF COMMUNITY EDUCATION AND RESOURCES**

Investing in changing cultural and community attitudes is critical to curbing sexual harassment both within and outside workplaces.

Attitudes about what is appropriate conduct and perceived gender roles form in early childhood and normalized to adulthood. This creates great challenges for employers. When businesses employ people, they also employ attitudes and behaviours shaped by a community. The greater level of tolerance and acceptance the broader community has of sexual harassment, the greater presence of it in the workplace.

Ai Group supports the specific allocation of Government funding for an effective community campaign to change attitudes and behaviours around sexual harassment. This is particularly important for a community reliant on newer forms of digital technologies to interact and socialize, including the emergence of online groups (e.g. via WhatsApp or WeChat). The creation of such online groups by employees to socialise and interact in and outside of work creates huge difficulty in preventing and enforcing relevant policies about appropriate behaviour at work. The blurring of what it means to be “at work” is another point of complexity that employers have to grapple with and not one easily dealt with through regulation (as described above). Community education about appropriate use of digital technology in respectful relationships and interactions with others is essential and must start at a young age.

### **Tailoring of resources to SMEs**

The creation of resources for businesses, particularly SMEs without dedicated HR personnel, should be an important outcome of this Inquiry. Small businesses employ a significant portion of the Australian workforce.

SMEs are often time poor, with individual managers and owners wearing many ‘hats’ and responsibilities. That said, many small businesses have strong, quality relationships with their staff, who they often see every day.

SMEs, because of their size and limited resources, are more sensitive to the disruption caused by inappropriate conduct at work, including sexual harassment. They are generally pushed to resolve problems without relying on internal complex policies or procedures. A quick response can also be extremely effective when delivered with the right skill.

Ai Group recommends that tailored resources be created for SMEs targeting:

- Skills-based capability to identify, address and confront sexual harassment;
- Appropriate checklists focused on simplifying a complex framework;
- The creation of an online ‘hub’ for businesses, to provide access to relevant regulatory bodies and services for the purpose of gathering information and advice about sexual

harassment matters.

## **Leading practices of employers**

As part of this Inquiry, it is critical to learn and identify leading practices that are effective in reducing sexual harassment and implementing sustainable cultural change. Enterprise practices in challenging and transforming workplace culture can be extremely effective at targeting the 'everyday' forms of inappropriate behaviour that may include sexist innuendo, jokes and off-hand remarks. While these behaviours are not at the severe end of sexual harassment, they often exist where more serious sexual misconduct occurs.

Organisations which recognise that sexual harassment is part of broader workplace culture are in a stronger position to take effective remedial action than those that may treat it as an individual grievance. Integrating sexual harassment into broader expectations around workplace conduct can be effective in shaping appropriate workplace behavior and more respectful workplaces.

It also important to recognize that 'no one size fits all' when it comes to various strategies and different businesses. For instance, many SMEs have less formal mechanisms to prevent sexual harassment than larger businesses. Also, different industries may favour different strategies because of heightened risks associated with common work practices, e.g. remote work, night work or higher levels of customer interaction.

Ai Group regularly facilitates the sharing of best practice and leading examples through its diversity and member networks. Enterprise initiatives are valuable tools from which other businesses can learn and implement. Ai Group has identified some leading initiatives below.

### **Strong effective leadership**

Executive and organisational leaders who engage with workplace culture as a business objective can effect enormous change. Many business structures still view workplace culture as a separate subject matter to be dealt with by Human Resources or People Managers. While this approach lends itself to efficiently managing strategies, systems and people issues through specialist knowledge, organisations can be easily locked into thinking that a good work culture simply follows from how well procedures are understood.

Leaders who understand that sexual harassment at work may be symptomatic of other areas of workplace disfunction, can be effective in addressing the problem beyond it being a 'people issue' or 'women's issue.' Productivity, customer engagement, brand promotion and talent attraction and retention are all areas that can improve when the values of a desired culture are role modelled. Simply creating policies and grievance procedures, while important for any business to have, often has limited effect on broader workplace change.

It is Ai Group's experience that businesses with leaders who engage with and speak openly about workplace culture, its faults, its strengths and its importance, typically build workplaces that are safer, more adaptive and more productive.

## **A strong code of conduct**

Employers that have a history of strong action against sexual harassment often have a strong values-driven culture, embedded in organisational KPIs and KPIs for individual positions, as well as a strong code of conduct.

More employers are developing, hiring and firing on a strong overarching code of conduct. In doing so, employers are claiming ownership of how they expect their employees to behave and enforcing accountability.

A strong code of conduct that is well known in the business also carries greater weight in employment tribunals and Courts. That is, these businesses are more likely to be successful in defending an unfair dismissal claim by an employee who has been dismissed for sexual harassment.

Professionalism, treating others with respect, and accountability are often key values that have great influence in shaping people's behaviour at work (compared to say a blanket ban on sexual relationships at work).

A strong code of conduct bridges individual allegations of inappropriate behaviour or sexual harassment to a broader set of expectations that affect the organisation as a whole.

## **Third party notification**

It is not uncommon these days, particularly for larger global organisations, to have implemented third or external party notification points for employees (or others) to raise concerns about conduct directed at them, or witnessed in relation to others. This can include the reporting of ethical issues and problems with work practices, in addition to instances of sexual harassment.

The notification process can also provide more accurate data and diagnose 'problem spots' or 'risk areas' in larger workplaces, that can focus management attention and increase supervision if needed.

Some of these points of notification attract anonymous callers, while others adopt programs that, where the complainant is comfortable, will seek further identifying information. For instance, some companies use simple 'chat box' style forms of communication to identify whether persons reporting can provide further information, including about themselves, if they feel comfortable.

Similarly, low-cost programs and apps, like Vault, that foster anonymous reporting of sexual harassment, have emerged. Under the Vault app, managers are notified where there are two or more employee reports of inappropriate behaviour about the same individual. Employers receive the information as reported by the complainant.

With third party notification, particularly anonymous reporting, there are obvious procedural fairness issues as to how far an employer can go in eliminating sexual harassment based on anonymous sources, particularly in respect of confronting and taking action against the accused. However, programs like the Vault app are appealing because:

- They can provide a broad diagnostic tool to monitor the safety of workplace culture;
- They can foster a safer employee experience in reporting, which may encourage sharing of information that an employer may find useful.

### **The re-thinking of EEO/ sexual harassment training – leadership capability**

Employers who value and build leadership capability can also invest in skills to confront, reduce, and prevent poor behaviour, including sexual harassment. Throughout our Member consultation process for this Inquiry, it became apparent that many organisations were re-thinking what it meant to ‘train’ employees about sexual harassment. It is very difficult to ‘train’ or ‘teach’ attitudes; but providing people with a skill or different way to lead was proving to be more effective in challenging behaviours and cultural norms.

Some organisations were engaging heavily with the role of bystanders by giving them the tools and confidence to intervene and speak up if they saw something that concerned them or others. For instance, a simple question in conversation of *“Say again?”* in a response to an inappropriate comment. Others were confronting their leadership teams with questions such as *“Would you recommend your organisation to your daughter as a place to work?”*

As part of showcasing leading practices, Ai Group recommends that focus be given to leadership skill and capability. Management capability in initiating difficult conversations is extremely important. This is critical for all businesses, but particularly smaller businesses that may not have comprehensive written policies and where employees and managers may work closely with each other and for long periods of time. The skill in initiating and managing difficult conversations with individuals or groups about harassment is just as critical as appropriate policies.

### **Employers who treat diversity as a business issue**

Businesses that value and embrace diversity of thought and diversity of workforce, especially those with measures to achieve greater gender balance, typically perform better.

Organisations with greater gender balance can better challenge prevailing cultural norms about what is acceptable and appropriate behaviour. Some companies also report that greater gender balance also creates safe workplaces by reducing incidents, not because one gender is inherently safer than the other, but because employees were more likely to ‘speak up’ in workplaces with a greater gender balance, and were less vulnerable to ‘group think.’

## 9. CONCLUSION

Ai Group supports the National Inquiry into Sexual Harassment in Australian workplaces. There is no place for sexual harassment in Australian workplaces. It is detrimental to victims, employees and employers.

Ai Group's recommendations propose a practical way forward for Australian workplaces to reduce sexual harassment. We would be happy to discuss our recommendations with the AHRC in more detail.



### AUSTRALIAN INDUSTRY GROUP METROPOLITAN OFFICES

**SYDNEY** 51 Walker Street, North Sydney NSW 2060, PO Box 289, North Sydney NSW 2059

**CANBERRA** Ground Floor, 42 Macquarie St, Barton ACT 2600, PO Box 4986, Kingston ACT 2604

**MELBOURNE** Level 2, 441 St Kilda Road, Melbourne VIC 3004, PO Box 7622, Melbourne VIC 8004

**BRISBANE** 202 Boundary Street, Spring Hill QLD 4004, PO Box 128, Spring Hill QLD 4004

**ADELAIDE** Level 1, 45 Greenhill Road, Wayville SA 5034

**PERTH** Suite 1, Level 4, South Shore Centre, 85 South Perth Esplanade, South Perth WA 6151

### REGIONAL OFFICES

**ALBURY/WODONGA** 560 David Street Albury NSW 2640

**BALLARAT** Suite 8, 106-110 Lydiard St South, Ballarat VIC 3350, PO Box 640, Ballarat VIC 3350

**BENDIGO** 87 Wills Street, Bendigo VIC 3550

**NEWCASTLE** Suite 1 "Nautilus", 265 Wharf Road, Newcastle 2300, PO Box 811, Newcastle NSW 2300

**WOLLONGONG** Level 1, 166 Keira Street, Wollongong NSW 2500, PO Box 891, Wollongong East NSW 2520

**[www.aigroup.com.au](http://www.aigroup.com.au)**