

Submission to Australian Human Rights Commission National Inquiry into Sexual Harassment in Australian Workplaces

Dr Sarah Ailwood and Ms Jane Diedricks

Faculty of Business, Government & Law
University of Canberra

Sarah Ailwood and Jane Diedricks are academics in the Faculty of Business, Government and Law at the University of Canberra. Our expertise covers law, gender studies, workplace relations and investigations of bullying, sexual harassment and other workplace misconduct. Our submission is focused on exploring options for law reform in response to Term of Reference 5 - the current legal framework with respect to sexual harassment. We believe that before the Australian Human Rights Commission (AHRC) finalises its proposals, it should release an Issues/Discussion Paper outlining law reform options and seek the input of victims, legal practitioners (particularly those serving the community legal sector) and employer groups. Further public and targeted consultation will be required.

1. Effectiveness of the current legal framework

Sexual harassment remains an endemic problem in Australian workplaces – across professions and trades and a myriad of workplace participants casual and non-casual employees, agents, students, customers, volunteers and Board members. This is clear from research and reporting undertaken by the AHRC over an extended period of time; in research into the drivers of sexual harassment in the workplace and the experience of victims and complainants; and in the evidence of legal practitioners, particularly those working in the community legal sector. The #metoo movement has made visible an insidious and widespread issue that disproportionately affects women in Australian workplaces.

The current legal framework for the regulation of sexual harassment in the workplace is composed of 10 pieces of legislation administered by 9 separate regulators across the Commonwealth, State and Territory jurisdictions. With some variations, these Acts define sexual harassment, make it unlawful in certain contexts, and prescribe the powers of regulatory bodies to address unlawful sexual harassment.

Doctrinally, unlawful sexual harassment is classified as a human rights breach rather than as a civil or statutory wrong arising from the employment relationship (in contrast, for example, to bullying and health and safety breaches). This classification affects both the remedies available to victims of sexual harassment and the powers of the AHRC and its state and territory counterparts in seeking to effectively target sexual harassment in Australian workplaces. (Harms attributable to harassment may be addressed under tort or other law but remedies under that law are not readily available.)

1. Remedies for victims of sexual harassment in the workplace

Under the *Sex Discrimination Act 1984* (Cth) (SDA) and the *Human Rights Commission Act 2005* (Cth) (HRCA), victims of sexual harassment may lodge a complaint with the relevant regulatory body, which will then determine whether to investigate or terminate the complaint. The AHRC is endowed with powers to obtain information and interview relevant people. Complaints that are investigated and substantiated are resolved through a conciliation process, the privacy and confidentiality of

which is mandated under the HRA. Complainants have a right of appeal to the Federal Circuit Court and/or the Federal Court.

Other legal mechanisms available to victims include the general protections provisions of the *Fair Work Act 2009* (Cth) and the respective Work Health and Safety legislation of relevant jurisdictions. In many respects, the complaints need to be 'moulded' to meet the application requirement criteria of the specific legal frameworks; this becomes evident where the frameworks perhaps have not been drafted in anticipation of the frameworks being utilised to address complaints of sexual harassment.

The AHRC does not publish data on the number of sexual harassment complaints it receives each year, on how many complaints are terminated, investigated or conciliated, or on the remedies that are agreed between the parties. Rather, it publishes data on the total number of complaints received and conciliated. However, the AHRC's state and territory counterparts do publish data concerning the number of sexual harassment complaints in their annual reports. This data is reproduced in Table 1 below.

Table 1 – Number of sexual harassment complaints received by State and Territory authorities, 2014-2018

Jurisdiction	Number of sexual harassment complaints received / percentage of total complaints				
	2014	2015	2016	2017	2018
ACT	1 (1%)	6 (5%)	6 (4%)	6 (5%)	7 (3%)
NSW	95 (8%)	83 (8%)	53 (6%)	79 (9%)	110 (11%)
NT	58 (30%)	50 (30%)	49 (32%)	83 (47%)*	26 (21%)
QLD	67 (11%)	59 (11%)	72 (15%)	78 (12%)	78 (11%)
SA	18 (9%)	4 (2%)	16 (9%)	30 (12%)	30 (14%)
TAS	19 (10%)	16 (11%)	12 (8%)	14 (10%)	21 (14%)
VIC	185 (12%)	183 (6%)	170 (7%)	131 (7%)	156 (7%)
WA	30 (6%)	36 (6%)	54 (12%)	24 (6%)	30 (14%)

* This figure includes both sex discrimination and sexual harassment complaints.

The table indicates that despite the prevalence of unlawful workplace sexual harassment, with the exception of the Northern Territory the number of complaints received by state and territory regulatory bodies is statistically insignificant. Indeed, the AHRC's most recent survey, 'Everyone's Business', reveals the small number of victims of unlawful sexual harassment who lodge complaints with the relevant authority.

As a basis for fostering systemic change we recommend that the AHRC publish fuller statistics on a timely basis, ie beyond the total number of complaints received and conciliated. Public access to granular data is a basis for substantive law reform and for the increased community awareness that engenders a respectful culture in workplace and other environments.

2. Investigative and reporting powers of the AHRC

The HRA empowers the AHRC with limited investigative powers and scope. The exercise of those powers and the publication of findings from those investigations take place largely under ministerial discretion. The AHRC lacks the autonomy of an independent regulator in carrying out its functions.

As with a range of bodies the AHRC is critically under-resourced and under-equipped to perform vital functions. Inadequate resourcing vitiates formal powers and results in under-achievement of responsibilities.

We accordingly recommend that the AHRC be provided with resourcing commensurate with its responsibilities.

2. The need for law reform

The continued prevalence of sexual harassment in Australian workplaces and other environments indicates that the current legal framework – which is chiefly composed of a conciliation-based complaints process, limited powers of investigation and policies and practices to encourage employers to comply – is ineffective and demands reform. This reform must target people who unlawfully sexual harass others in the workplace – people who are referred to in this submission as ‘perpetrators’. It must also target workplace cultures in which organisations are either unaware, indifferent to or tacitly endorsing harassment on the basis of gender or sexuality.

The #metoo movement

In its 2017-2018 Annual Report, the Northern Territory Anti-Discrimination Commission notes that ‘the flow on effect of this movement has seen an increase in sexual harassment complaints in other discrimination jurisdictions. However, the same trend has not occurred in the NT’.¹ Table 1 above indicates that the Northern Territory has a high rate of sexual harassment complaints both in number terms, and as a percentage of the complaints it handles in comparison with other Australian jurisdictions. The notable increase in sexual harassment complaints it refers to are reflected in New South Wales, Victoria and Tasmania, though in the two larger jurisdictions the increase is not significant in percentage terms. Further, Sex Discrimination Commissioner Kate Jenkins has noted that there has been no increase in sexual harassment complaints in the wake of the #metoo movement.

As the NT Annual Report states:

The question that needs to be asked is why not, as the ADC’s experience is that it is prevalent and pervasive in NT workplaces. Stories of sexual harassment in the NT are very common and appear to cross industry and location. We have seen a clear increase in preparedness to discuss experiences of sexual harassment in many forums from senior students, senior women public servants and women lawyers. However in the Northern Territory these have not as yet translated into complaints.

We suggest that the reason the #metoo movement has not resulted in an increase in sexual harassment complaints is because victims of sexual harassment (and people who advise those victims) do not view the current legal framework as providing an effective remedy against perpetrators. The confidential conciliation process fails to either target perpetrators or to publicise the prevalence of sexual harassment, the experience of victims or conduct by perpetrators and employers.

An economic problem?

According to the National Inquiry’s Terms of Reference, the AHRC must ‘have regard to the economic impact of sexual harassment in the workplace, drawing on economic modelling’. It is probable that the AHRC will find that there are substantial costs to the economy from workplace sexual harassment.

In developing our law reform options below, we have drawn on the enforcement powers and practices used by other regulators empowered to eliminate unlawful conduct that has similarly vast

economic costs. It is timely that Kenneth Hayne AC QC has recently handed down his Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, another a parallel inquiry to this one that similarly investigated widespread breaches of the law that caused personal and financial cost to victims and significant harm across the economy. In his opening remarks, Commissioner Hayne emphasised the necessity that entities that break the law are 'properly held to account':

Misconduct will be deterred only if entities believe that misconduct will be detected, denounced and justly punished. Misconduct, especially misconduct that yields profit, is not deterred by requiring those who are found to have done wrong to do no more than pay compensation. And wrongdoing is not denounced by issuing a media release ... having a wrongdoer compensate those harmed is one thing; holding wrongdoers to account is another.²

Throughout his report, Commissioner Hayne stresses that the people who should be held to account are those who engage in unlawful behaviour. Indeed, targeting the perpetrators of harm is critical to any effective regulatory regime. Ensuring awareness within organisations that house the perpetrators and, where appropriate, assigning responsibility to key decisionmakers in those organisations is also critical.

3. Law reform recommendations

The existing legal framework must be reformed to target the perpetrators and enablers of sexual harassment with sufficient threat of investigation, public exposure and penalties to deter them from engaging in sexual harassment in the workplace. This focus on perpetrators must be matched by a focus on their employers.

The current legal framework, with its emphasis on a confidential conciliation process, protects perpetrators, shields employers and conceals the extent of the problem. The current legal framework provides virtually no deterrence to individuals from engaging in unlawful sexual harassment whatsoever.

We acknowledge the barriers that victims of sexual harassment face in complaining to either their employer or a regulatory body; we believe that victims should be given greater support, particularly through legal representation. We similarly support measures to support employers in eliminating sexual harassment from their workplaces. However, measures that are focused only on supporting victims or employers are insufficient to address the problem unless any new legal framework includes substantial deterrence targeted at both the perpetrators of sexual harassment and their employers.

We set out below a number of options for a new legal framework and the rationale behind each.

1) Regulatory oversight of sexual harassment in the workplace should remain with the AHRC and its state and territory counterparts.

We believe that regulatory oversight should remain with the AHRC because of its specialist expertise in the area of sexual harassment, particularly in its dealings with complainants and the relationships it has established with employers and employer groups. We do not believe that this function should be transferred to a different regulatory body, for example the Fair

Work Commission, because although it possesses greater powers, it does not have expertise in this specialist and sensitive field.

2) AHRC should be endowed with a broad general power to investigate and report on sexual harassment in specific companies and across industries and sectors of the economy

The AHRC should be empowered to initiate investigations into specific companies, industries and sectors of the economy and to publish the findings and recommendations arising from those investigations without ministerial involvement or approval.

3) AHRC should be able to receive anonymous complaints about workplace sexual harassment

The AHRC should be empowered to receive anonymous complaints about workplace sexual harassment and to record and retain the following information at the discretion of the complainant:

- Name of complainant
- Name of perpetrator(s)
- Name of supervisor
- Name of employer
- Nature of the harassment
- Details – time, place, etc – of the harassment

Empowering victims of sexual harassment to make anonymous complaints to the AHRC will:

- Allow victims of sexual harassment who do not consider the harassment sufficiently serious to justify a formal remedy notify the AHRC that unlawful sexual harassment is occurring.
- Allow victims of sexual harassment who fear that a formal complaint will risk their livelihood to notify the AHRC that unlawful sexual harassment is occurring.
- Enable the AHRC to identify and map sexual harassment trends in particular employers and particular sectors of the economy

The AHRC will then be able to use the data obtained through anonymous complaints as part of the evidence base from which to launch investigations in accordance with recommendation 2) above.

4) Formal information sharing arrangements should be established between AHRC and state and territory counterparts

Information-sharing arrangements between the AHRC and its state and territory counterparts are unclear. Such arrangements need to be formalised to enable the compilation of data to address sexual harassment trends in organisations and across sectors of the economy. This data will assist the AHRC in investigations pursued in accordance with 2) above.

5) *Sex Discrimination Act 1984 (Cth)* should be amended to make it unlawful for employers to fail to address sexual harassment in the workplace

Part II Division 3 of the *SDA* clearly makes sexual harassment unlawful in certain circumstances. However, it does not at present make it unlawful for employers to fail to act

on sexual harassment in their workplaces. The *SDA* must be amended to not only make sexual harassment in the workplace unlawful, but also make it unlawful for employers to fail to address it.

6) Mandatory confidentiality of conciliation processes should be removed

The existing legislative requirement that complaint and conciliation processes be confidential should be removed. Confidentiality should be available only at the discretion of the complainant, and not the perpetrator, the employer or any other party involved.

7) AHRC should be empowered with a range of enforcement functions targeting the perpetrators of sexual harassment and their employers

We recommend that the existing conciliation framework be retained, and that the AHRC be given range of additional powers to enforce legal prohibitions against sexual harassment in the workplace. The AHRC should be able to exercise these powers in two circumstances:

- a. When the AHRC receives a complaint. The AHRC should retain its discretion to decide whether to terminate or conciliate a complaint, and should also have the option of using its enforcement powers against the perpetrator and the employer. This discretion should be exercised in consideration of the complainant, the nature of the harassment and having regard to all of the circumstances of the case. The AHRC should be able to use these powers either through representation of the complainant, or on its own initiation.
- b. When the AHRC has completed an investigation under recommendation 2 above and determined that law enforcement is required.

The AHRC should be empowered to:

- a. Interview witnesses and others relevant to a complaint or investigation under oath
- b. Demand the production of documents in connection with a complaint or investigation
- c. Issue Infringement Notices for unlawful sexual harassment
- d. Issue Public Warnings relating to unlawful sexual harassment
- e. Obtain undertakings from perpetrators for engaging in unlawful sexual harassment, and from employers for failing to address or enabling unlawful sexual harassment, that are enforceable in the Federal Court
- f. Commence proceedings against perpetrators and employers for unlawful conduct breaching legal prohibitions on sexual harassment, whether on behalf of a complainant or self-initiated.

8) The AHRC should be funded and resourced to perform its functions under a new law reform framework

9) The AHRC should publish detailed data on the sexual harassment complaints received and, in general terms, the outcome of those complaints.

4. Conclusion

Under section 3(c), one of the objects of the *SDA* is 'to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity'. The AHRC has reached the limits of what is possible within the existing legal framework, and the result is rampant and increasing unlawful sexual harassment in Australian workplaces. To fulfil this purpose of the *SDA*, the AHRC must be given the regulatory and enforcement powers it needs to eliminate unlawful sexual harassment through deterrence of perpetrators and holding both perpetrators and their employers accountable for wrongdoing and its personal, social and economic harms.

¹ Northern Territory Anti-Discrimination Commission Annual Report, 2017-2018.

² Final Report, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2018), Volume 1, p3.