



National Working Women's Centre Submission

to the Australian Human Rights Commission

National Inquiry into Sexual Harassment in Australian Workplaces

28 February, 2019

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Part 1 - National Working Women's Centres

The National Working Women's Centres (NWWC) are pleased to have the opportunity to submit our response to this National Inquiry into Sexual Harassment in Australian Workplaces.

NWWC comprise community based, not for profit centres in South Australia, Northern Territory and Queensland that provide advice and support to vulnerable women by providing a free and confidential service on all work-related issues.

NWWC also conduct research and project work on a range of issues that women experience in relation to work, including discrimination, sexual harassment, unfair dismissal or treatment, work-life balance, pay equity, the needs and experiences of Aboriginal and Torres Strait Islander and CALD women and the impact of domestic and family violence on women workers and their workplaces.

Although some of the issues have changed since the centres began operation in 1994 (1979 for South Australia), the work performed remains consistent with the philosophy that all women are entitled to respect, to information about their rights and to equal opportunity in the workplace.

The centres rely on funding from state/territory and commonwealth governments to undertake their work.

NWWC have included in this submission case studies of clients. It should be noted that in each case study pseudonyms have been used and details have been changed and omitted. This is done in a way that preserves the integrity of the message but protects client anonymity.

Part 2 – Summary of National Working Women's Centres' Recommendations

NWWC will expand on the summary below in this submission. We believe there are many complexities that need to be recognised to effectively address the issues around sexual harassment and assault along with other impediments to gender equality and the well-being of women.

There is much to be done by way of legislative reform in this area. This should be approached in an integrated and collaborative way between jurisdictions for consistency and to broaden protections. These include:

Recommendation – 1

That the AHRC publish an interim discussion paper with proposed recommendations for further consultation with the Australian community.

Recommendation – 2

To adopt all of the recommendations of the Our Watch submission as they relate to the primary prevention of sexual harassment and violence against women in the workplace and all areas of life.

Recommendation - 3

The introduction of a clear positive duty on employers within the WHS framework to prevent sexual harassment from occurring.

Recommendation - 4

That WHS regulators respond to sexual harassment as a workplace hazard like any other workplace hazard including guidance on the prevention of sexual harassment, the introduction of a code of practice and a regulatory response where sexual harassment occurs including the issuing of improvement notices and fines.

Recommendation - 5

That the Australian government investigate whether federal, state and territory work health and safety laws require amendment to explicitly state that sexual harassment and discrimination are safety issues that are covered by these laws or whether WHS could use existing powers to address sexual harassment.

Recommendation - 6

Appropriate resources are dedicated to the skill development of WHS regulators so that WHS regulators are equipped to lead Australian workplaces with expert knowledge in the area of prevention of sexual harassment and in their regulatory response.

Recommendation - 7

That WHS regulators collect and publish sex disaggregated data on gendered occupational violence complaints and enquiries.

Recommendation - 8

Workers Compensation agencies to develop a comprehensive and immediate support response framework to applications of compensation for injury arising from workplace sexual harassment. This should ensure that victims of harassment are resourced and supported to make effective applications for necessary medical interventions and compensation for lost wages and should be designed to minimise the risk of re-traumatisation or stressors in going through the claims process.

Recommendation – 9

That amendments to the Fair Work Act are further explored in three areas with a view to establishing which amendment, or amendments, are most effective;

1. Clarify and strengthen adverse action provisions by expressly including sexual harassment.
2. The introduction of a stand-alone civil remedy provision which provides guidance on the type of conduct that is unlawful.
3. The expansion of stop-bullying provisions to include stop sexual harassment provisions.

Recommendation - 10

Strengthening the existing jurisdiction, obligation and capacity of the Fair Work Ombudsman to investigate and prosecute complaints of sexual harassment as breaches of workplace rights.

Recommendation - 11

The introduction of a clear positive duty on employers and guidelines for compliance within discrimination legislation to prevent sexual harassment from occurring.

Recommendation - 12

Strengthening the power of the AHRC and state and territory Anti-Discrimination Commissions to conduct investigations of their own motion, enter into enforceable undertakings, issue compliance notices and issue proceedings to remedy a contravention of the law.

Recommendation - 13

To increase the time limit for making complaints to six years or abolish it entirely.

Recommendation - 14

We recommend that the states and territories implement into their discrimination commissions a Sex Discrimination Commissioner role to work closely with the federal commissioner.

Recommendation - 15

The removal of compensation caps for damages arising for sexual harassment or assault related claims in all relevant jurisdictions (where these exist).

Recommendation - 16

To resource existing NWWC appropriately so that women who experience sexual harassment at work are no longer turned away due to a lack of resources. To re-instate Working Women's Centres in NSW and Tasmania and open Working Women's Centres in jurisdictions where none have existed.

Recommendation – 17

Companies that have more than 100 employees and all public service agencies should be required to report to the Workplace Gender Equality Agency on preventative sexual harassment measures taken and the number of sexual harassment complaints made.

Smaller businesses should be encouraged and rewarded for demonstrating similar measures with random WHS audits on small businesses where complaints of sexual harassment are made to check that risk assessment and prevention measures are sufficient.

Part 3 – The Current Framework and Why it is Insufficient

Currently, an employee who has been sexually harassed has a multitude of options, including legal avenues to address the harassment. Part 3 of the submission will provide our perspective on these options and the issues they present for complainants. These include:

Making an Internal Grievance

An employee who has been sexually harassed has the option of raising this issue directly with the harasser, or with their employer and/or the human resources department of the agency they work for. Unfortunately, many employers do not properly manage such complaints. This may be due to a number of reasons that include:

- they do not have an adequate policy in place that explicitly addresses sexual harassment complaints and a grievance management process;
- they do have a policy in place but the policy is not followed, or there are no trained personnel with the skills required to investigate and resolve a complaint;
- a policy is in place, but the staff are not aware of the policy or how to access it, or do not understand the policy;
- the business is very small, and the person about whom the complaint is being made is the same person delegated to investigate and resolve the complaint; or
- staff have seen others pursue an internal complaint with negative consequences for them and their career (including victimisation or no satisfactory resolution of the complaint), and are dissuaded from going down the same path. The AHRC Survey 2018 found that 2 in 5 people experienced negative consequences of making a formal report or complaint.¹

Fewer than one in five people make a formal report or complaint when sexual harassment occurs² and for those that do make a complaint many are dissatisfied with the outcome. A study conducted on behalf of Shine Lawyers found that 75% were dissatisfied with the outcome with 34% saying that their complaint was ignored completely³.

Anecdotally in the experience of NWWC many women who seek advice regarding sexual harassment do not proceed to the lodgement of a complaint with the AHRC or other relevant state or territory authority. Historically, data at the QLD centre showed that less than 10% of women reporting workplace sexual harassment proceeded to lodge a claim while at the WWC SA statistics indicate that of the 47 women who enquired about sexual harassment in 2017-2018 only eight proceeded to lodgement of a complaint. Reasons for this include lack of faith in or understanding of the process, fear about the process and outcome (including loss of their job), belief that they will not be believed or supported, previous experience in attempting to redress sexual harassment, financial implications of engaging legal or other assistance to support them through the process and fear of not gaining other employment if the matter becomes public.

¹ AHRC, (2018), Everyone's business: Fourth national survey on sexual harassment in Australian workplaces, p 73.

² AHRC, (2018), Everyone's business: Fourth national survey on sexual harassment in Australian workplaces, p 67.

³ <https://www.shine.com.au/blog/abuse-law/survey-reveals-almost-75-of-women-sexually-harassed-in-the-workplace-not-happy-with-outcome>

Some of the reasons these concerns exist is because there is no external regulation of internal complaints procedures for sexual harassment in the workplace. There is no legal requirement that an employer has policies, processes, training and skilled personnel in place to address such complaints.

Case study⁴

Lan worked for three years as an assistant in the public sector. She sought advice from the Working Women's Centre in regards to sexual harassment and the employer's response to what occurred.

Following a workplace Christmas party, Lan's boss invited her into his office for a meeting. He told her he had a crush on her and wanted to inform her at the Christmas party however, thought it was best he do so when he was sober. He asked her if she had a crush on him. He told her the best times at work are when he is with her. Lan told him she did not feel the same.

Lan was scared to tell her work about what had occurred, as her boss was married. She spoke to another trusted senior manager about what occurred, in confidence. The manager breached Lan's trust and told the boss what Lan had told about him.

Her boss began to treat her adversely and began to ignore her in the workplace. She became isolated. Human resources did not check on Lan's wellbeing in regards to the matter, despite their knowledge of the incident. She took sick leave intending to resign or move to another department.

More specifically, many NWWC clients report that their experience of the negative management of the internal complaint ended up far worse than the initial sexual harassment.

Case study

Theresa worked as a technician for a large employer. She was sexually assaulted by a work colleague. She was encouraged by her employer to disclose what happened which she did, and was placed on leave. Her employer did not speak to her for a month. She was later assigned a new role at a different worksite. The new role had no job demands and she did not have login access to her computer. The employer did not address her grievances. Her employer also failed to organise her requests to access employee assistance program for counselling. Theresa was depressed and often felt suicidal. She resigned from the role due to the employer's inaction.

Case study

Mariana was a dentist and visa holder and had been employed for three months. Her dentistry qualifications from overseas were not recognised, she was in the process of

⁴ In each case study pseudonyms have been used and details have been changed and omitted. This is done in a way that preserves the integrity of the message but protects client anonymity.

studying for her exams in order to register in Australia. While studying she worked in a dental assistant role and she supported a male dentist, Harvey, who was also her supervisor and on a working visa.

Shortly after Mariana commenced her employment, Harvey had a conversation where he said exotic women are very beautiful, then asked if she would like to move interstate with him or back to his home country? Mariana advised him that she was married and had children.

Harvey continued to behave inappropriately toward Mariana and he would hold her shoulders or her waist with both hands to move her out of the way in the dental room or brush his body against her in passing. She told him she didn't like him touching her and he told her it was ok in his culture.

Prior to her three month probation meeting, Harvey had shown Mariana – without her consent – images of him shirtless on his phone. She told him she was not interested in his life outside of work.

Harvey became angered with Mariana and their working relationship quickly deteriorated. In her three month probation review, he refused to show her the performance feedback he had provided to human resources. Mariana was terminated for not having met her probation requirements. She needed to find a new employer and sponsor otherwise she would need to return to Spain.

Case study

Anne, an older woman, secured employment as a truck driver. One offside Jack was often put on her runs with her, and he began sexually harassing Anne – sending inappropriate texts to her personal phone, saying he loved her and slapping her inappropriately while she was driving. One day Anne felt Jack come up quietly behind her and put his arms around her, another day he tried to kiss her.

Anne repeatedly told Jack this was unacceptable and threatened that she would report his behaviour. However she didn't report the behaviour straight away for fear of repercussions as Jack was mates with the boss Richard.

Anne tried to tell Richard one day but he dismissed her by saying: 'What are you whinging about now?!' so Anne didn't dare raise it with him again.

When another male colleague mentioned to Richard that Anne was being sexually harassed by Jack, Richard shouted at Anne, berating her for not reporting the matter to him. Anne was told she had to make a formal complaint, but as far as she was aware, nothing became of it other than a chat between Richard and Jack over a few beers.

Anne was then dismissed one day before her six month probation was due to finish, with reasons given about customer issues that Anne was given no context to. In

practice, Jack dealt with the customers mostly and would exclude Anne from customer contact.

Lodging a complaint under Federal or State/Territory Anti-Discrimination Legislation

An employee who has been sexually harassed at work may lodge a complaint under the Federal Sex Discrimination Act or equivalent legislation in their state or territory. Under the federal jurisdiction, the complaint must be lodged within six months of the act of harassment occurring. In Queensland, Northern Territory and South Australia, the timeframe is 12 months from the act of sexual harassment.

A complaint, if accepted, will usually lead to a conciliation process between the parties. The conciliation will not result in any finding of unlawful behaviour, but may result in an agreed settlement, including an apology, reinstatement to a job, compensation for lost wages, changes to a policy or developing and promoting anti-discrimination policies. Complaints that are not resolved may escalate to the Federal Court or, for the Northern Territory, the NT Civil and Administrative Tribunal, the Queensland Industrial Relations Commission and Queensland Civil and Administrative Tribunal hear unresolved claims while in South Australia the SA Employment Tribunal has the power to decide claims.

While these processes are very much valued by the NWWC, there are some issues that need addressing. First and foremost, the process places a huge burden on the individual complainant, who is very often a vulnerable and unrepresented woman. A woman choosing to make a complaint is often confronted with a very difficult decision, knowing that simply lodging a complaint may result in losing her job or commencing a lengthy and potentially costly complaint with an uncertain outcome. Fair warning is always given to NWWC clients that there is likely to be an impact on health and wellbeing so this is an added consideration, apart from the financial cost. For women in economically marginal positions, this is often simply not an option.

Case study

Valentina had been sexually harassed in her workplace. She was reluctant to make a complaint to a discrimination commission but felt that if she didn't speak up nothing would ever change.

The Working Women's Centre was unable to represent her through the process due to resource constraints so she went ahead and did it on her own. Some months later the Working Women's Centre received a call from Valentina who said that she had accepted a paltry settlement. She did this due to her fear of how a hearing might damage her health and costs involved.

Valentina reported that the process had been traumatic and had left her soul destroyed. She said that she regretted making a complaint and wanted us to know that we should dissuade future potential complainants from going ahead. Valentina said that she had

dug a hole and put every piece of paperwork associated with her complaint in it and set the paperwork alight. This was her way of putting closure around the experience and moving on.

Case study

Jovi was on a working holiday visa and obtained employment as a cleaner at a remote construction site for the duration of one-week. She sought advice from the Working Women's Centre in regards to sexual harassment and a sexual assault that occurred whilst living on site.

Jovi reported that she and her boss had exchanged sexual banter through text messages, initiated by the boss e.g. he commented on her tattoos and asked her if she is naughty in a sexually suggestive way. He also asked if he could touch her body and mentioned he had a gun with him.

Within her first week of living on site, her boss visited her accommodation. She was scared and intimidated. He sexually assaulted her. Jovi resigned from her role and left the workplace.

Jovi reported the assault to the police and no charges were made. She chose not to take the case further as she felt no one would believe her.

Case Study

A young migrant worker on a student visa sought the assistance of the Working Women's Centre after she had lodged a complaint of sexual harassment and sex discrimination with the Anti Discrimination Commission Queensland. The complaint included extreme sexual harassment and sexual assault that continued for more than six months at a Brisbane restaurant. The power imbalance in the case was highlighted because her sixty year old employer had promised to assist her with a 457 visa application with the implication that she needed to become his 'girlfriend'. The client had returned to her home country and was diagnosed with post-traumatic stress disorder and severe anxiety and depression arising from the event she endured. However, she chose to return to Australia to participate in the relevant conferences held to try to resolve the matter before trial.

The matter was not conciliated at the first conference offered by the Anti Discrimination Commission Queensland but proceeded to the Administrative Appeals Tribunals where it settled after a further lengthy conciliation. The matter was written up in the Alternative Law Journal with the permission of the client⁵.

Efforts are made to create an 'equal playing field' in the form of a conciliation, however the reality for many women is that the significant power imbalance between them and their harasser (or employer) cannot be mitigated.

⁵ <https://search.informit.com.au/documentSummary;dn=221581738428111;res=IELHSS>

Further, the six month timeframe for complaints, reduced from a 12 month timeframe in 2017, presents many difficulties. The timeframe for lodging AHRC complaints on all issues, including sexual harassment, was reduced from 12 months to six months. This occurred as part of a suite of changes made by the Federal government. Mr Porter, the then Minister said 'that this had led to a more efficient complaints process and ensure "unmeritorious or improper complaints [were] dismissed at the earliest possible opportunity".'⁶

On the contrary, NWWC believe that six months is too short a period for women to gain an understanding of their situation, get the necessary information they require and gather the resources and necessary courage to proceed. While complaints can still be lodged after six months, the AHRC president has the power to terminate such cases, leaving the complainants to take their case to the Federal Court.

Many of our clients are not in a position to make a complaint within this timeframe, and thus lose the remedy available to them. Delay in coming forward with sexual harassment complaints is very common. It is common that the first response for many women is to try to address the situation themselves. They may do this by avoiding the harasser, denying or downplaying the gravity of the situation, or they may attempt to manage, ignore or endure the behaviour.⁷ The delay in coming forward can also be prolonged by shame, self-blame, humiliation, fear of being blamed by others, minimisation, fear of not being believed, fear of repercussions, and fear of the complaints process itself.⁸

Case study

Heather worked on a cattle station in the 1980s when she was under 25 years of age. She sought advice from the Working Women's Centre as her trauma from workplace sexual harassment and assault had been triggered by the recent #metoo movement. She wanted to know what options she had to complain.

Heather was one of the first women to ever be employed in her work context. She said she and another young woman were sexually harassed and assaulted by cattle station employees and truck drivers for the duration of a year, both verbally and physically. Heather had known some of the perpetrators since she was a child.

Heather described the sexual harassment: she received a book about sexual facts from a male colleague, was asked continually to go to men's houses, she was pushed into a wall and groped and once had three men hold her down while they 'kissed' her. Heather's supervisor said she should maintain a sense of humor.

⁶ <https://www.smh.com.au/business/companies/australia-s-30-year-old-sexual-harassment-laws-have-real-gaps-20180309-p4z3nc.html>

⁷ AHRC, (2018), Everyone's business: Fourth national survey on sexual harassment in Australian workplaces, p 83.

⁸ AHRC, (2018), Everyone's business: Fourth national survey on sexual harassment in Australian workplaces, p 82.

As Heather's case had surpassed the timeframe she had to make a formal complaint the Working Women's Centre was unable to assist her.

The complaint process can also take several months to complete – the average time in the experience of NWWC is between three and eight months. According to the AHRC 2016-2017 Annual Report just under half of all complaints were finalised within three months (41%), 75% were finalised within six months, 91% within nine months and 97% within 12 months. The average time from receipt to finalisation of a complaint was approximately 4.3 months⁹. For women who remain in their jobs during this time, often working alongside the alleged perpetrator, this process may be untenable.

Another issue is the 'gag clauses' that are written in to settlement agreements, usually formulated as confidentiality or non-disparagement clauses. These non-disclosure agreements effectively silence women, while indemnifying harassers and workplaces and allow the possibility that perpetrators continue with unlawful behaviours, often in the same workplace. Gag clauses can result in cultures of harassment flourishing.

Our experience of supporting and advocating for women is that the process of making and attending to a claim is drawn out and stressful and must be self-driven. This raises questions around true access to justice when none of the Commissions undertake investigations into the allegations and rely on respondents' responses, which lean heavily towards denial.

NWWC raise the concern that the person who experiences the negative and potentially damaging behaviour has to then initiate and fund a potentially costly process to seek redress. While some women have capacity to achieve this, a general 'law enforcement' or auditing approach done by WHS regulators or government body would be more effective as a prevention strategy, with negative findings resulting in automatic consequences for breaches.

In a 2008 study of sexual harassment cases that were supported to human rights jurisdiction conciliation by the Queensland Working Women's Centre it was reported that the average financial settlement was \$5,289¹⁰. However, indications are that this is changing rapidly for some applicants with a number of significantly higher settlements achieved by the Queensland centre in the past three years. During this period the five highest settlement amounts ranged from \$15,000 to \$100,000.

For NWWC despite a relatively small proportion of sexual harassment complaints undertaken in our work, assisting women to respond to matters of sexual harassment is resource intensive. Women often are uncertain about bringing these matters forward and require intensive support and the preparation of

⁹ <https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2016-2017>

¹⁰ Paula McDonald, Sandra Backstrom, and Kerriann Dear, (2008), 'Reporting Sexual Harassment: Claims and Remedies', 46 (2) Asia Pacific Journal of Human Resources, p 173.

both the case (legal argument) and the woman for the conciliation process is extensive, particularly where high settlements are sought.

Two Industrial Officers with the Queensland centre, examined, in a 2008 paper¹¹ the appropriateness of the 'conciliation' approach in a human rights based sexual harassment complaint, highlighting that many women report being uncomfortable in a negotiation process where it involves conflict and competition.

Anecdotally, the increasing involvement of lawyers in representing respondents in these matters has served to detract from the nature of a truly conciliatory process where the parties have a forum for self-expression and exploring options for healing the damage. Brewer and Chase suggested that while conciliation may be intended to provide such opportunities it also offered a band-aid or temporary relief, 'effectively wrapping both the female complainant and the existence of workplace culture of sexual harassment under a cloak of invisibility'.

The study highlighted the expressed experience of their subjects (and reported by many NWWC clients) that the opportunity for trying to maintain effective work relationships had long passed by the time the conciliation conference occurred. It was identified that the systemic poor treatment and neglect of complainants had led to a total breakdown in respect for the harasser and the employer and the women generally desired to exclude both from their lives.

While some women in the study reported that they were happy with the harmonious and non-confrontational style of communication, this did not serve as a panacea for the lack of justice they found through the process.

Further to the issue of resourcing support for women experiencing sexual harassment, assisting women to undertake a formal complaint of sexual harassment is a multi-faceted job. It presents legal, emotional and psychological obstacles for the woman and requires more intensive support than other complaint types. Our experience informs us that this holistic approach is the best model of practice for providing support for a woman to both access her situation and decide whether or not to take action.

For most of our period of operation NWWC have adopted a client centered and feminist approach to our work with women. For a sexual harassment complaint it usually starts with the creation of a space in which the woman can tell us her story – what happened? When it happened? What has been the impact on her since the event or events and what has been the response from her workplace in support (or in many cases rejection) of her claim?. The contact with this woman can also cease at any point and many women make only one or two initial contacts with the service to discuss their concerns or to find out

¹¹ Teresa Chase, Mel Brewer, (2008), Sexual Harassment in the Workplace, Conciliated Outcomes: Who Really Benefits From Conciliation? Presented at the 2008 Australian Labour Law Association Conference, Melbourne.

what their rights are. Feedback from women indicate that the capacity to provide this is valuable to them and in some situations is enough for them to decide to 'move on'.

It becomes the woman's decision to pursue the claim or not, once she has been provided with an assessment of her case with reference to legal and possible workplace policy frameworks and also has an understanding of likely or possible outcomes that may result from various courses of action available to her.

At this stage, many women express a high degree of anxiety about pursuing their case especially if they are still in employment. Many women report a work culture that supports the behavior of the harasser who also is part of work friendships with management figures in the organization. In many cases it is apparent that despite formal policy within organisations, enormous informal obstacles present within organisations that dissuade women from proceeding to raise their matter.

Besides anxiety about making complaints many women report a generally low level of well-being and report experiencing symptoms of anxiety and depression, including sleep disturbances, digestive issues, headaches, nausea and extreme stress. Many women reveal that they have diagnosed depressive, anxiety and adjustment disorders. Some women are active in seeking counseling.

Women report these feelings in association with fear of the behavior continuing, fear of retribution in making a complaint and after experiencing negative responses within their workplaces when they have made a complaint.

NWWC staff often ends up as 'accidental counselors' although this is not our primary role and through experience and training they learn to identify the stages that a woman may be at with her issue. Feelings of anger may be present and often in the early stages are what drives the complaint.

In summary, many women simply do not make complaints. Women are largely conditioned not to make complaints and they are vulnerable when they do. Some women are especially vulnerable including women in regional and remote locations where alternative employment options are limited or nonexistent, CALD and Aboriginal and Torres Strait Islander women, women who are on visas, young women, women with a background of trauma and women with disabilities to name a few. To cope with the situation women avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore or endure the behaviour.

Case study

Hayley was a young woman who worked part-time in a hospitality role. She came to the Working Women's Centre to find out her rights in regards to sexual harassment she was experiencing at work from her two male supervisors.

Haley had recently broken up with her partner and disclosed this to her employer. He said that if she wanted to have another baby, she should know where to come.

Hayley was later approached by her other supervisor, outside of work. He tried to dance with Hayley and she refused. When she arrived at work for her next shift, he commented

you smell like sex, drugs and alcohol. Her regular shifts were removed from the roster for a month.

Hayley chose not to complain about the treatment and began to seek new employment.

Complaint to the Fair Work Commission

Despite the fact that one in three employees have experienced workplace sexual harassment in the previous five years¹², there is no mention of sexual harassment in our core industrial relations legislation – the Fair Work Act.

Despite this, there are still cases in which an employee who has experienced sexual harassment in the workplace may be eligible to lodge a complaint with the Fair Work Commission. Unfortunately, these avenues are not transparent, and require some legal knowledge and a certain amount of massaging of the events in order to fit in with the legal framework.

Unfair dismissal

If an employee's sexual harassment has led to them being terminated, or being forced to resign, they may be able to make an unfair dismissal claim. For example, the employee has been sexually harassed by her boss, who has repeatedly asked her out on dates. She has rejected these advances, and has been subsequently dismissed. This claim may only be made by employees who have fulfilled the qualifying period of six months service for large businesses, and 12 months service for small businesses, and who are employed by a national system employer. In order to make out a case of unfair dismissal, the employee would need to show that there was no valid reason for the dismissal, and/or that the process of dismissal did not meet with the principles of natural justice.

Complications can arise in dismissal matters where an employer argues that there were performance issues involved in the termination, and the proper process for dismissal due to performance was followed. This would amount to a valid reason, a fair process, and thus not an unfair dismissal. This does not mean that the sexual harassment did not occur, nor that the employee's rejection of her manager's advances were not a reason for her termination, but that these experiences receive no recognition under industrial law.

Strict 21 day time limits apply for unfair dismissal applications which does not often provide women (particularly vulnerable women) with an appropriate length of time to access advice and to prepare and lodge their complaint. If a matter does proceed to hearing the maximum amount that can be awarded

¹² AHRC, (2018), Everyone's business: Fourth national survey on sexual harassment in Australian workplaces, p 26.

in compensation is six months wages (which may be a relatively small amount for part time or award based workers).

General Protections

An employee or prospective employee may also be able to lodge a claim under the general protections provisions of the Fair Work Act because they have been treated adversely.

The meaning of 'adverse action' is defined in section 342 of the Fair Work Act and includes dismissing or refusing to employ a person, and also includes discriminating against the person or otherwise injuring the person in their employment. For a complaint to succeed, there must be a link between the adverse action and the complainant's exercising of a workplace right, or holding of a protected attribute.

Section 351 (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

If they have been terminated from their employment (or had some other form of adverse action taken against them) for a reason based on their sex as a protected attribute, they may bring a general protections complaint. Whether sexual harassment is automatically defined as sex discrimination is unclear. This means that a complainant may need to first argue that sexual harassment is included under the protected attribute of sex. More clarification is required in the Fair Work Act.

A common scenario involving sexual harassment that would come under a 'workplace right' is where an employee makes a complaint about their employment, and is dismissed as a form of victimisation. 'Workplace right' is broadly defined and would appear to encompass making a complaint or internal grievance of sexual harassment under the Sex Discrimination Act or an internal grievance.

Similar to the unfair dismissal process, a general protections application involving dismissal needs to be lodged within 21 calendar days. If it does not involve termination and the individual has been subjected to adverse action, which is not termination, they have six years to lodge an application. Given that the vast majority of cases seen by the NWWC involve dismissal, this is a very tight timeframe for vulnerable women to make a decision regarding the way to move forward and to execute such a decision.

Employers should also be aware that the burden of proof is reversed in general protections claims. This means that an employer must prove that the exercise of a workplace right by an employee (e.g. making a sexual harassment complaint) was not a reason that the employer took the action in question. In some circumstances an employee can seek an injunction against potential 'adverse action' where there is sufficient evidence to suggest that accessing or having the workplace right will lead to adverse action.

Generally, claims cannot be made simultaneously under the Fair Work Act and the Sex Discrimination Act for the same material complaint. This principle was upheld in *Hazledine v Waverley and Gidding* [2016] FWC 4989; in this case an employee had initiated a complaint against her employer under the

Commonwealth Sex Discrimination Act 1984 with the Australian Human Rights Commission and subsequently lodged a general protections application against two former colleagues around the same set of circumstances.

The Fair Work Act contains provisions, which allow for only one application to be made in relation to a dismissal. Therefore, a general protections application involving dismissal cannot be made when a prior application has been made under another jurisdiction, dealing with the same dismissal.

The applicant, Hazledine, argued that the applications were against different sets of parties but the Commission held that as the facts and circumstances that both applications were based on were materially the same, she was barred from bringing the general protections application.

This above bar to proceedings only applies in the cases of dismissal. The Fair Work Act is silent on whether employees can bring a general protections application not involving dismissal at the same time as lodging a complaint with the anti-discrimination body.

As with the Australian Human Rights Commission, applications not resolved via conciliation at the Fair Work Commission, can proceed to the Federal Magistrates Court or if both parties consent, a member of the Commission can hear the application.

The Federal Magistrates Court is a time consuming and emotionally taxing process and many women workers will not have the financial or emotional resources to take matters that far. Access to the jurisdiction is expensive which prohibits many women from taking their matters further. Another risk women bear is that of costs. In the Federal Magistrates Court and Federal Court, the general principle is 'costs follow the event'. The Court can exercise their discretion in the awarding of costs but this is a risk women who have been subjected to sexual harassment need to have in mind when pursuing a remedy for their situation.

Anti-Bullying Jurisdiction

The Fair Work Commission also provides a remedy for workplace bullying complaints. Under the Fair Work Act workplace bullying occurs when an individual or group of individuals repeatedly behaves unreasonably toward a worker or a group of workers at work, and the behaviour creates a risk to health and safety (789 FD(1)). Examples of such behaviours provided in the FWC Anti-Bullying Benchbook include:

- spreading rude and/or inaccurate rumours
- intimidation
- coercion
- threats
- humiliation
- victimisation
- terrorising
- physical, verbal or emotional abuse
- belittling or humiliating comments

- innuendo
- disrespect
- aggressive and intimidating conduct

The Commission may make any order necessary to stop the bullying occurring. The aim of the jurisdiction is for a swift response to protect employees and maintain their employment.

It is arguable that a victim of sexual harassment (if the behaviour is repeated or at risk of being repeated) could make a complaint under this section of the Fair Work Act, though this has never been tested. It is interesting, in examining the behaviours listed above, that many cases of sexual harassment could be described with these terms, albeit with a sexualised overlay. Why is it that the very same behaviours in a gendered context are not included under this law, while non gendered behaviours are? What were the policy considerations that decided workplace bullying was worthy of a separate response while sexual harassment was not?

Complaint to Fair Work Ombudsman

The Fair Work Ombudsman (FWO) is the independent statutory body set up to promote harmonious workplaces. One of their responsibilities is to assess complaints or suspected breaches of workplace laws, registered agreements and awards. The FWO can utilise a range of outcomes, including inspectors assisting the employer to take voluntary action to resolve the issue to the satisfaction of the relevant employee, referring the matter to mediation, inspectors determining the allegation is not sustained, or referring the matter to another body. The FWO also has the power to take enforcement action if there is clear evidence of a contravention. This enforcement action may involve litigation, resulting in enforceable undertakings and penalties. In practice, the most common type of complaint handled by the FWO is in relation to underpayment of wages.

Theoretically, however, if an award or registered enterprise agreement contained a clause that prohibited sexual harassment in the workplace, and this term was breached, a party to that award or agreement could lodge a complaint with the FWO, in the same way that they currently would for a breach of minimum pay scales provided for under an award, or a breach of the National Employment Standards entitlement to 12 months unpaid parental leave.

It could be argued that sexual harassment is already outlawed under industrial law, as sexual harassment is considered a form of sex discrimination which is covered under the general protections provisions of the Fair Work Act. Thus, the Fair Work Ombudsman also has jurisdiction to investigate discrimination against employees, including on the grounds of sex.

While this role is clearly laid out in the Fair Work Act and outlined on the FWO website, it is quite unclear where this role is enforced in practice. The FWO website directs employees with a discrimination complaint (whether involving termination or not) to lodge with the FWC 'in the first instance'.

Since 2006 the FWO have only litigated on a handful of matters involving workplace discrimination. None of these involved sexual harassment.¹³

A Complaint to Workplace Health and Safety Regulators

Employers have a common law duty to take reasonable care for the health and safety of their employees. This common law duty is reinforced by workplace health and safety legislation in all Australian jurisdictions.

Traditionally, work health and safety has been associated with the physical health of workers. The focus has been on protecting workers' physical health and safety by identifying and responding to known risks, such as dangerous chemicals or faulty equipment. With the increased awareness of workplace bullying and other workplace psychological stressors in recent years, this focus has widened to psychosocial risks and the understanding of the need to regulate and respond to these hazards.

Sexual harassment and sexual assault however, remain an area largely unexamined by Work Health and Safety (WHS) regulators. It is not true that the growth in understanding and attention towards workplace bullying from WHS regulators has been matched with a growth in understanding and attention towards the issue of sexual harassment and sexual assault. We must ask why this is. Why is it the case that psychological injuries associated with workplace bullying are widely accepted as a WHS issue, however the psychological injuries associated with sexual harassment are not?

Sexual harassment can be a breach of an employer's common law duty to take reasonable care for the health and safety of employees, as well as a breach of workplace health and safety legislation.

A work environment in which an employee is subject to unwanted sexual advances, unwelcome requests for sexual favours, other unwelcome conduct of a sexual nature, or forms of sex-based harassment, is not one in which an employer has taken reasonable care for the health and safety of its employees and in the experience of NWWC can often reflect the culture of a workplace. A work environment or a system of work that gives rise to this type of conduct is not a healthy and safe work environment or system of work.

Increasingly due to the introduction of laws granting domestic and family violence leave, organisations are having to address the workplace health and safety risks of perpetrators of violence against employees (predominantly women). It is well known that emails and text messages are used by perpetrators of violence and organisations, particularly those undertaking the White Ribbon Workplace Accreditation are

¹³ According to the FWO website discrimination matters litigated are: 3 discrimination matters in 2011-2012, 1 including pregnancy, parental leave and workplace rights discrimination in 2012-2013 and 1 race discrimination in 2017-2018.

turning their minds to appropriate measures to protect the safety of employees from partner or ex partner violence. It should not be a difficult link to apply similar risk management approaches to employees experiencing sexual harassment within organisations.

The physical and psychological harms of sexual harassment—both for employees who are sexually harassed and any bystanders— have been widely documented and include a range of poor psychological outcomes including depression, anxiety and post-traumatic stress disorder along with creating hostile work environments for women that result in less than optimal work cultures to which women must adapt in order to survive. Such hostile workplaces must be considered along the continuum of gendered violence. Many women leave secure employment and careers in order to remove themselves from risk and harm where gendered violence is not addressed.¹⁴ Impacts extend to colleagues and the workplace more generally, and include compromised productivity, lower retention rates, recruitment costs, reduced morale, increased absenteeism, direct and indirect costs of investigations, and reputational damage.¹⁵

The table below displays information displayed on each of the WHS regulator websites and SafeWork Australia when conducting a search on the words ‘sexual harassment’, ‘sexual assault’ and ‘sexual violence’. It depicts a WHS system that largely ignores sexual harassment as a WHS issue. Where some online acknowledgement of sexual harassment exists, it is referred to anti-discrimination agencies.

Table depicting results of searches conducted on the words ‘sexual harassment’, ‘sexual assault’ and ‘sexual violence’ as at February, 2019.

Jurisdiction	Information found using search terms ‘sexual harassment’, ‘sexual assault’ and ‘sexual violence’	Website provided information about sexual harassment as a WHS issue
SafeWork Australia	Sexual harassment – refers to workplace bullying.	no
	Sexual assault – refers to an info graphic on bullying and violence.	
	Sexual violence – refers to guidance on occupational violence, which contains no references to behavior of a sexual nature.	
NT WorkSafe	Sexual harassment - refers to workplace bullying.	no
	Sexual assault – refers to workplace bullying.	
	Sexual violence – refers to workplace bullying.	
WorkCover Queensland	Sexual harassment – refers to workplace bullying and a news bulletin about this Inquiry.	no

¹⁴https://d3n8a8pro7vhmx.cloudfront.net/victorianunions/pages/4164/attachments/original/1511416638/Fact_sheet_stop_GV_print.pdf?1511416638

¹⁵VEOHRC, (2015), Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour in Victoria Police: Phase One Report - Dec 2015, <http://www.humanrightscommission.vic.gov.au/our-resources-and-publications/reports/item/1336-independent-review-into-sex-discrimination-and-sexual-harassment-including-predatory-behaviour-in-victoria-police-phase-one-report-2015>

Jurisdiction	Information found using search terms 'sexual harassment', 'sexual assault' and 'sexual violence'	Website provided information about sexual harassment as a WHS issue
	Sexual assault – refers to workplace bullying and occupational violence.	
	Sexual violence – refers to mental health week and occupational violence.	
Safework NSW	Sexual harassment – refers to mental health and safety, workplace bullying and violence at work. Refers sexual harassment to the Anti-Discrimination Board.	no
	Sexual assault – refers to violence at work, workplace bullying and mental health.	
	Sexual violence- refers to violence at work, workplace bullying and responding to violence at work.	
WorkSafe Victoria	Sexual harassment – 'no results'.	no
	Sexual assault – provides a link to the Victorian Centre's Against Sexual Assault.	
	Sexual violence – 'no results'.	
WorkSafe Tasmania	Sexual harassment – refers to Equal Opportunity Tasmania, Fair Work Commission, AHRC.	no
	Sexual assault – refers to same information above.	
	Sexual violence – refers to same information above.	
SafeWork SA	Sexual harassment – refers to bullying, discrimination information and the Equal Opportunity Commission.	no
	Sexual assault – refers to violence at work (including brief information about stopping violence against women and white ribbon) and bullying.	
	Sexual violence - refers to violence at work (including brief information about stopping violence against women and white ribbon), apprentices/trainees and bullying.	
Worksafe WA	Sexual harassment – provides general information about harassment and sexual harassment. Refers to discrimination legislation.	no
	Sexual assault – refers to bullying and provides contact details for the Sexual Assault Resource Centre.	
	Sexual violence – refers to tenancy law changes, family violence and information about workplace violence.	
Worksafe ACT	Sexual harassment – refers to bullying/harassment, refers discrimination to the ACT Human Rights Commission.	no
	Sexual assault- refers to information on women's refuges and workplace bullying.	
	Sexual assault- refers to information on women's refuges and ACT Human Rights Commission.	

A recent review of the issue by the House of Commons Women and Equalities Committee in the UK stated: 'Sexual harassment in the workplace is a serious health and safety concern, but we were astonished to find that the Health and Safety Executive [UK government health and safety regulator] does not see tackling or investigating it as part of its remit ... The HSE's website has guidance on issues including temperature in the workplace, noise levels and working with young people, but nothing specifically on sexual harassment.'¹⁶

Unfortunately, this is also the case in Australia. For example, the NT Worksafe website lists many hazards and includes guidance material for employers on fireworks, 'burn out' competitions and Samsung Galaxy mobile phones, yet there is no information on gendered violence at work.

NWWC assert that WHS regulators are largely ignoring sexual harassment as a WHS issue within their remit. What is the justification for intervening where there is occupational violence but not sexual harassment? Whether WHS regulators are of the view that sexual harassment is within their remit and is an issue they regulate is unclear to our centres. If WHS regulators are of the view that sexual harassment is an issue they regulate, NWWC are interested to learn of the WHS regulators enquiry levels, number of complaints, policy, outcomes and skills of the investigators.

NWWC are particularly concerned about WHS risks for women who work in regional and remote locations and conduct work trips with a perpetrator of sexual harassment or sexual assault. For such women an experience of sexual harassment or assault can be compounded by the inability to remove themselves from the perpetrator. For example, where they are travelling together in a remote location and/or where their accommodation is shared or closely located.

Case Study

Sabrina was employed under a working holiday visa on a farm in central Queensland. When she arrived she was told by other workers that the employer was sleazy and often spied on the women workers in their accommodation. Sabrina experienced inappropriate sexual comments and a request for sex during her first week of employment. She lasted a month and then left without being paid for two weeks of work. Sabrina raised concerns about levels of safety generally with substandard accommodation, bathing and toileting facilities that were not private and the behaviour of the employer which she said had caused her distress and anxiety during her brief period of employment.

Case study

Chloe had been in her job for six months when she was required to travel with a male colleague to an isolated area on a work trip. She knew the colleague, but not well. The work trip was to last three days, one day of travel, one day of service delivery and another day to travel home. The area they were travelling to was remote.

¹⁶ House of Commons Women and Equalities Committee, (2018), Sexual harassment in the workplace, House of Commons.

<https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>

One the first day of travel the colleague and Chloe were taking a short break from driving and were both outside of the car. The colleague grabbed Chloe and sexually assaulted her. Chloe was stunned and shocked and terrified of the assault and how she could get out of the situation. There were no other forms of transport, no police.

Chloe was forced to get back into the car and continue the trip. She endured the three days of work with the perpetrator of the sexual assault.

When Chloe returned home she disclosed what had happened to her employer, a transfer of office location was organised but she made no complaint and did not report to the police.

Workers' Compensation Claims

The impact of sexual harassment on women is evident in our work with clients at the NWWC. Women seeking assistance with these matters often report psychological and social avoidance concerns that can become particularly evident over time, especially if the sexual harassment is not recognised as an offence and resolved with such recognition.

The stress response can remain even after the removal of the stimulus (sexual harassment) and can precipitate not only mental health disorders but also unhealthy 'coping behaviours' such as drug and alcohol abuse, and can be associated with chronic disease. Meta-analytic findings show that sexual harassment is associated with withdrawal from work, physical and mental ill health and symptoms of PTSD, and the experience of sexual harassment has been found to be a significant predictor of psychological distress among women¹⁷.

The experience of the NWWC in working with victims of workplace sexual harassment tells us that numerous women slip through the net of being able to properly address, receive support and recover from events of sexual harassment in their workplaces. Anecdotal evidence suggests that a high proportion of women fail to receive financial compensation or treatment for the injuries that arise from sexual harassment and that workers compensation claims made to compensate for injuries related to sexual harassment are often rejected. The reasons for this include:

- Claims being made outside of the timeframe (i.e. within six months of the incident or from when incapacity occurs). This is often due to lack of information or inclination to initiate the process because of fear (or experience) of not being believed or supported and fear of losing employment.
- Sexual harassment or assaults happening 'outside' of work situations such as after Christmas or staff parties or at 'non-work' social events or meetings.
- Employers denying the allegations of harassment or not conducting appropriate enquiries to substantiate claims thus limiting evidence available to support the claim.

¹⁷ M Nielsen and S Einarsen, (2012), Prospective relationships between workplace sexual harassment and psychological distress. *Occupational Medicine*, 62:226 – 228, Oxford University Press.

- Women withdrawing from the workers compensation process because of fear of continuing, impact of the stress of the experience or not appealing an initially 'rejected' claim because of costs, lack of information or exhaustion from the process.
- In the cases where workers' compensation has been approved for incapacity to work and treatment there is a further lengthy, potentially costly, and uncertain process of a common law claim for 'negligence' and the difficulties in establishing that employers have failed in their duty of care to avoid foreseeable injury.
- An employer can be liable for foreseeable injuries which could have been prevented by taking the necessary precautions. As there is considerable evidence documenting the extent and effects of sexual harassment in the workplace, it has been argued that the duty to take reasonable care imposes a positive obligation on employers to reduce the risk of it occurring.

A Civil Law Complaint – Tort or Breach of Contract

Employers owe a duty of care to their employees under the common law, as well as under express or implied terms in employment contracts. Failure to fulfil the duty of care can amount to a breach of the employment contract as well as negligence on the part of the employer. This means that an employee who has been harmed, for example, through workplace sexual harassment, could bring an action against their employer in contract or tort. A contract breach in this respect could include breach of a term in a contract that provides for a harassment-free environment for the employee, or breach of a complaint handling process contained in an employee's contract.

There have been several high profile cases of this nature, with damages awarded in the hundreds of thousands of dollars, far in excess of the average compensation achieved through settlements in the AHRC and FWC. Some of these cases include:

- *Richardson v Oracle*: Ms Richardson was awarded \$130,000 for general damages and economic loss due to sexual harassment by her co-worker in the form of multiple humiliating and sexually explicit comments and sexual advances. The injuries suffered by Ms Richardson included changes in her demeanour and physical condition and a decline in sexual intimacy between her and her husband.
- *Collins v Smith*: Ms Collins was awarded \$332,280 for general damages, lost earnings, future earnings and expenses due to prolonged, persistent, unwelcome sexual conduct including touching by Ms Collins' only manager in the workplace. The conduct resulted in Ms Collins suffering PTSD, major depression and anxiety. The conduct also negatively affected her relationship with her husband and led her to resign from her employment.
- *Matthews v Winslow*: Ms Matthews was awarded \$1,360,027 for psychiatric and physical injury and loss of past and future earnings due to significant abuse, bullying and sexual harassment by other employees of, and contractors to, her employer which included inappropriate conduct by her direct supervisor. Ms Matthews suffered a major depressive disorder, significant, chronic PTSD and Bipolar disorder. Ms Matthews also suffered a jaw injury from grinding her teeth due to her distress.
- *Eaton v Tricare*: Ms Eaton was awarded \$436,000 in damages including on the basis that Ms Eaton would likely never be able to work again due to her injuries caused by bullying at work by

her manager. Ms Eaton had a pre-existing anxiety disorder that was exacerbated by the workplace conduct resulting in a major depressive disorder, prominent anxiety and PTSD.

- STU v JKL (Qld): the unnamed applicant was awarded \$313,000 in general damages and past and future loss of earnings due to sexual harassment and assault by a contractor to the employer, which resulted in the woman suffering PTSD and another depressive illness. She also developed a problem with alcohol abuse, anxiety, difficulty sleeping, an inability to drive and a loss of personal interest.

The main driver of these awards of significant damages is a recognition that injury, illness and loss of enjoyment of life due to sexual harassment and bullying should be compensated in the same way as in personal injury cases where courts have long been awarding six and seven figure amounts for psychological injury.

Access to this type of litigation for the vast majority of women is unrealistic. Court cases of this nature are long, expensive and extremely distressing for all involved. It is hoped that recognition of the seriousness of sexual harassment in the form of larger damages could trickle down to settlement outcomes in tribunal jurisdictions, however this remains to be seen, and is barred in many jurisdictions by compensation caps.

A Criminal Law Process via a Complaint to the Police

Some types of sexual harassment may also be offences under criminal law, depending on the jurisdiction, as criminal codes vary from state to state. Relevant criminal offences may include physical assault, indecent exposure, sexual assault and stalking. The alleged perpetrator is prosecuted by the Crown, who must prove that the alleged perpetrator committed the alleged offence 'beyond reasonable doubt'. This is a higher standard of proof than in civil proceedings.

There is a clear body of evidence around the difficulties for victims of gendered violence in making complaints to police, having these complaints heard and acted upon. In many cases, the police decide not to pursue charges.

A Lack of Support

There is a lack of support services tailored to women experiencing sexual harassment in the workplace. Whilst we do believe that there is a need for expanded counselling services, we strongly advocate for structural changes to the current legal and regulatory system and the introduction of a prevention program. Our view is that sexual harassment survivors require advice, support, advocacy and counselling. Whilst Working Women's Centres are not funded to provide formal therapeutic counselling sessions, our clients come to us for advice, information and advocacy on the range of their legal and non-legal rights, and options, and to discuss their preferred outcomes. They come to us for supported referrals to counselling and support services. They come to us for a client-centred and specialist approach to their

issue and perhaps most importantly, they come for advocacy. NWWC have played an important and historical role in providing individual assistance and advocating for systemic change.

Unfortunately, there are now only three Working Women's Centres left in Australia, only two of which continue to be federally funded. A lack of federal government support has resulted in the closure of the NSW and Tasmanian centres and a withdrawal of funding to the QLD centre. We do not have the capacity to support all women, and many women who have experienced sexual harassment and who require support have been turned away due to our lack of resources. There is no other appropriate service for them. Counsellors cannot provide industrial advice. Lawyers are beyond the means of most women in this situation, and many are searching for non-legal solutions in any case.

Summary: an Individual Burden for a Systemic Problem

Part 3 of this submission has highlighted some common procedural themes in the existing legal framework for sexual harassment complainants such as: gag clauses, inaccessible justice avenues, prohibitive time limits and re-traumatisation through process of redress. NWWC submit that whilst there are a multitude of complaint avenues, none are satisfactory in ensuring access and safety of the process for the victim.

However, our primary concern with the system as it exists is that it places the burden on the individual. There is no systemic responsibility for the prevention and regulation of sexual harassment in Australian workplaces. We have placed the burden of regulation and action upon the people who need the support the most, the victim survivors. For example, individuals who have experienced sexual harassment at work may make a complaint through the State Anti-Discrimination Commissions, the Australian Human Rights Commission, to the police in some cases, or internally through their workplace grievance processes. Unfortunately, many victims do not pursue complaints due to fear of victimisation, or because they cannot trust their employer to take robust action. Many of those who do access internal or external complaint mechanisms experience negative consequences as a result.

One of the most serious consequences of a system that places the burden of redress on the shoulders of victim survivors occurs where the victim survivor does not make a complaint. In this instance the hazard - or perpetrator of sexual harassment - remains, but without the victim survivor to trigger a response in the form of an individual complaint, there is likely to be no other response or regulation to remove or correct the hazard. We know that only a small percentage of people make a complaint, and that the clear majority of complaints made are not addressed, so the vast majority of sexual harassment is unregulated. It also means that responses are individualised, informal, confidential, temporary and do nothing to challenge the systemic problem or protect other employees. Australian workplaces need structural change.

Case study

Erin was an apprentice arborist. She sought advice from the Working Women's Centre as she wanted to know her rights and complaint options in regards to ongoing sexual harassment at work.

Erin was the only woman in the team. Across the span of two years, she experienced sexual harassment from a number of her colleagues. Erin said staff made ongoing comments about the size of her breasts e.g. I don't know if that harness will support you, you're a bit top heavy and careful where you walk, you're a bit top heavy and might fall over. One colleague told her he had shaved his testicles the night before and they were super smooth.

*One day a fellow colleague stuck his middle finger up, pushed it into her face and called her a c*nt. She responded by defending herself verbally. When her boss heard about the incident he sent her home and then dismissed her. Her boss called other companies in the area and told them not to employ her.*

Part 4 – Recommendations

In Part 4 of this submission NWWC make a suite of recommendations to respond to and regulate sexual harassment in Australia. A suite of options is necessary to give the victim survivor choice over the type of process and outcome they engage in and to shift the burden of response from the individual victim survivor to the appropriate regulators.

Interim Discussion Paper

NWWC advocate for major structural changes to the prevention and regulation of sexual harassment in Australia. Due to the magnitude of the task at hand to appropriately reform the system, NWWC propose that the AHRC publish an interim discussion paper. An interim discussion paper is necessary to ensure that proposed AHRC recommendations have been thoroughly considered by academics, legal services, community groups, employer bodies, NWWC and unions.

Recommendation – 1

That the AHRC publish an interim discussion paper with proposed recommendations for further consultation with the Australian community.

The Introduction of a Prevention Framework

NWWC submit that there is currently no effective obligation on Australian workplaces to prevent sexual harassment from occurring but a prevention framework is essential in order to reduce the incidences of sexual harassment. NWWC support Change the story: a shared framework for the primary prevention of

violence against women¹⁸ as an appropriate framework for addressing sexual harassment in workplaces and endorses all of the recommendations of the Our Watch submission.

Sexual harassment does not only occur in workplaces and to address sexual harassment effectively it must be addressed in all areas of life, over the life cycle and as part of a broader gender equity strategy.

Recommendation – 2

To adopt all of the recommendations of the Our Watch submission as they relate to the primary prevention of sexual harassment and violence against women in the workplace and all areas of life.

Working with WHS Regulators to Address Workplace Sexual Harassment

WHS agencies have not prioritised sexual harassment as a health and safety issue despite having the power to address sexual harassment as a safety risk.

An additional and less individualistic response to sexual harassment and other forms of gendered violence in the workplace could be to understand them as serious health and safety hazards, requiring the same sort of response as other workplace risks. This would place more responsibility on employers, overseen by regulators, to protect workers from gendered occupational violence.

As with any other workplace safety hazard, gendered violence is preventable and can be eliminated in our workplaces. This requires employers and WHS regulators to adopt a new response to gendered violence that treats it as a serious health and safety issue. Employers who fail in this regard should be subject to the same monitoring, investigation and penalty as for any other workplace health and safety breach. Prevention needs to include the development of education materials, guidance materials and campaigns as preventative measures to address the issue of gendered violence risks in the workplace.

NWWC submit that the required expertise to respond to sexual harassment as a WHS issue does not currently exist within the WHS system; however a high level of expertise is critical to ensure the safety of complainants and an effective response. WHS regulators need to develop (or contract in) the expertise and capacity to respond seriously to complaints of gendered violence. WHS regulators should also take a leading role in supporting employers in implementing best practice workplace family violence policies.

Recommendation - 3

¹⁸ Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth, (2015), Change the story: A shared framework for the primary prevention of violence against women and their children in Australia, Our Watch, Melbourne, Australia.

The introduction of a clear positive duty on employers within the WHS framework to prevent sexual harassment from occurring.

Recommendation - 4

That WHS regulators respond to sexual harassment as a workplace hazard like any other workplace hazard including by providing guidance on the prevention of sexual harassment, the introduction of a code of practice and a regulatory response where sexual harassment occurs including the issuing of improvement notices and fines.

Recommendation - 5

That the Australian government investigates whether federal, state and territory work health and safety laws require amendment to explicitly state that sexual harassment and discrimination are safety issues that are covered by these laws or whether WHS could use existing powers to address sexual harassment.

Recommendation - 6

Appropriate resources are dedicated to the skill development of WHS regulators so that WHS regulators are equipped to lead Australian workplaces with expert knowledge in the area of prevention of sexual harassment and in their regulatory response.

Recommendation - 7

That WHT regulators collect and publish sex disaggregated data on gendered occupational violence complaints and enquiries.

Workers Compensation

Recommendation - 8

Workers Compensation agencies to develop a comprehensive and immediate support response framework to applications of compensation for injury arising from workplace sexual harassment. This should ensure that victims of harassment are resourced and supported to make effective applications for necessary medical interventions and compensation for lost wages and should be designed to minimise the risk of re-traumatisation or aggravation of the injury when going through the claims process.

Strengthening the Fair Work Act

Sexual harassment is currently not explicitly included in the protections of the Fair Work Act like other forms of discrimination. NWWC submit that sexual harassment amendments to the Fair Work Act are attractive because of the seriousness with which some employers regard the Fair Work Commission

relative to Anti-Discrimination Commissions. In the experience of NWWC there is a perception that employers perceive Anti-Discrimination Commissions as those that deal with side or marginal issues such as discrimination whereas the Fair Work Commission deals with the more serious productivity related industrial issues. Of course, this perception is not shared by NWWC. Additionally, the Fair Work Commission has the capacity to deal with complaints more swiftly and provides the opportunity for employees who have claims in addition to sexual harassment to have them heard in one jurisdiction rather than bringing multiples claims in multiple jurisdictions.

NWWC clients seek assistance from our services in varied circumstances however, two common scenarios occur. Any amendments to the Fair Work Act must appropriately accommodate both of these scenarios.

1. The sexual harassment has resulted in the termination of employment or relationship breakdown to the extent that an ongoing employment relationship is no longer viable.
2. The sexual harassment has not resulted in the breakdown of the employment relationship, the client wants the harassing behaviour to stop and to maintain their employment.

Recommendation - 9

That amendments to the Fair Work Act are further explored in three areas with a view to establishing which amendment, or amendments, are most effective;

1. Clarify and strengthen adverse action provisions by expressly including sexual harassment.
2. The introduction of a stand-alone civil remedy provision which provides guidance on the type of conduct that is unlawful.
3. The expansion of stop-bullying provisions to include stop sexual harassment provisions.

Recommendation - 10

Strengthening the existing jurisdiction, obligation and capacity of the Fair Work Ombudsman to investigate and prosecute complaints of sexual harassment as breaches of workplace rights.

Australian Human Rights Commission and State and Territory Anti-Discrimination Commissions

On paper, a six-month time limit for sexual harassment complaints to be lodged with the Australian Human Rights Commission (AHRC) might seem adequate. In reality, by the time a victim is ready to open up about their experiences, often months, or even years, have passed.

Longer and more reasonable time frames already exist for other employment law breaches (for example, six years for breach of contract cases) and there's a good case to be made for extending the time limit to six years or abolishing the AHRC's six month limit to make a sexual harassment complaint. Extending the time limit to six years would bring it in line with claims for entitlements, unpaid wages and non-termination general protections.

By removing or increasing the time period for making a claim, victims can seek justice, including confidential mediation, when they are ready and strong enough to do so.

Our laws do not include any enforceable positive duty on organisations to ensure that they comply with discrimination laws. This results in enforcement only when an individual complaint has been lodged. Discrimination laws could be amended to include an enforceable positive duty on duty holders to eliminate discrimination and harassment. Commissions could be empowered to enforce this positive duty in the way that work health and safety agencies can proactively enforce work, health and safety laws before an injury occurs.

Our laws currently place the burden of enforcing sexual harassment laws entirely on the individual. The Anti-Discrimination Commissions do not have sufficient powers to achieve the objects of discrimination laws to eliminate discrimination and harassment as far as possible. Compare with the Fair Work Ombudsman, which has a range of powers to enforce protections in the Fair Work Act. The Australian Human Rights Commission Act 1986 and state and territory discrimination laws could be amended to include the power for these Commissions to:

- conduct investigations of their own motion
- enter into enforceable undertakings
- issue compliance notices
- issue proceedings to remedy a contravention of the law

Recommendation - 11

The introduction of a clear positive duty on employers and guidelines for compliance within discrimination legislation to prevent sexual harassment from occurring.

Recommendation - 12

Strengthening the power of the AHRC and state and territory Anti-Discrimination Commissions to conduct investigations of their own motion, enter into enforceable undertakings, issue compliance notices and issue proceedings to remedy a contravention of the law.

Recommendation - 13

To increase the time limit for making complaints to six years or abolish it entirely.

Recommendation - 14

We recommend that the states and territories implement within their discrimination commissions a Sex Discrimination Commissioner role to work closely with the federal Commissioner.

Remove Caps on Damages

An extensive period of sexual harassment can hurt a victim physically and mentally, and affect their ability to make a living. This is where financial compensation plays a key role in helping complainants get back on their feet.

There has been an acknowledgment by the courts in recent years that higher compensation for victims of sexual harassment is needed. But in our most populous state, New South Wales, there is an archaic cap on damages of \$100,000 if a case is heard by the state-based anti-discrimination tribunal and not the AHRC. In the Northern Territory, the cap under the territory legislation is \$60,000.

It is time to scrap this cap. All victims of sexual harassment should have the same opportunities to access financial compensation, regardless of where they live or work.

Recommendation - 15

The removal of compensation caps for damages arising for sexual harassment or assault related claims in all relevant jurisdictions (where these exist).

Support Services

We assert that NWWC are ideally located to provide specialist support, advice, information, advocacy and representation to women who have experienced sexual harassment. As community based, non-legal services, Working Women's Centres provide a holistic and gendered approach to accessing a remedy through the full range of state/territory and federal agencies.

NWWC are equipped to deal with a breadth of industrial issues so that where sexual harassment is combined with another issue such as workplace bullying, underpayment of wages, breaches of an Award condition, workers compensation, unfair dismissal etc., the Working Women's Centre can assist with the range of issues and settle them holistically. This avoids complex arrangements between services and clients that involve multiple advocates across organisations and is therefore simpler for workplace representatives and more accessible for clients.

However, resourcing of NWWC is either insufficient or has ceased. Due to federal funding issues the NSW Working Women's Centre was forced to close in 2005 and the Tasmanian Centre in 2006. In December 2016 federal funding for the QLD Working Women's Centre was withdrawn. Federally funded Centres remain in SA and NT only.

NWWC are regularly approached for representation and support by women who experience serious sexual harassment but who are turned away. On a daily basis our services must make difficult decisions regarding the women and cases that will receive ongoing case work assistance based on merit of the case, need of the client and resources of the respective Working Women's Centre. Too often, deserving women, with terrible sexual harassment experiences, are turned away due to our lack of resources and capacity to assist.

Recommendation - 16

To resource existing NWWC appropriately so that women who experience sexual harassment at work are no longer turned away due to a lack of resources. To re-instate Working Women’s Centres in NSW and Tasmania and open Working Women’s Centres in jurisdictions where none have existed.

External Oversight

At present, there is no formal requirement for individual agencies to report sexual harassment statistics (including claims, and complaint outcomes) either internally or externally.

Companies above 100 employees (except for the public service) are required to report to the government’s Workplace Gender Equality Agency on a range of other equity measures, but not sexual harassment.

This reporting should be compulsory, and should be expanded to a broader range of public and private agencies, to provide us with a pool of data and hold workplaces to account.

Recommendation - 17

Companies that have more than 100 employees and all public service agencies should be required to report to the Workplace Gender Equality Agency on preventative sexual harassment measures taken and the number of sexual harassment complaints made.

Smaller businesses should be encouraged and rewarded for demonstrating similar measures with random WHS audits on small businesses where complaints of sexual harassment are made to check that risk assessment and prevention measures are sufficient.

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