



# NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES

WESTJUSTICE SUBMISSION

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## INTRODUCTION

WEstjustice welcomes the opportunity to make this submission to the Australian Human Rights Commission (AHRC) as part of its National Inquiry into sexual harassment in Australian workplaces (**Inquiry**).<sup>1</sup>

This submission seeks to address the terms of reference most relevant to the WEstjustice Employment Law Program, specifically:

- The drivers of workplace sexual harassment
- The current legal framework with respect to sexual harassment
- The impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers compensation claims, employee turnover and absenteeism, and
- Recommendations to address sexual harassment in Australian workplaces.

## SUMMARY OF RECOMMENDATIONS

WEstjustice refers to and endorses the recommendations made by Victoria Legal Aid in their submission to this Inquiry (**VLA submission**).<sup>2</sup> In our submission, we make **eight specific recommendations** for action to address sexual harassment at work. We recommend:

Objective	WEstjustice's recommendations
<b>1. Improved legal frameworks to prevent harm and promote compliance</b>	
<b>Introduce an enforceable positive duty</b>	<b>Recommendation One:</b> A strong, clear and enforceable duty should be introduced that requires employers to take proactive steps to prevent sexual harassment at work. Such a duty should exist in both health and safety, and anti-discrimination, legislation.
<b>Shift the burden of proof off complainants</b>	<b>Recommendation Two:</b> Commonwealth, State and Territory legislation should be amended to introduce a reverse onus of proof such that the employer is required to disprove any allegations once a prima facie case is established by a complainant.
<b>Ensure costs are not prohibitive</b>	<b>Recommendation Three:</b> WEstjustice recommends that the AHRC Act be amended to limit the circumstances where costs can be awarded against an applicant by a Court in actions regarding sexual harassment brought under the <i>Sex Discrimination Act 1984 (Cth)</i> ( <b>SD Act</b> ).
<b>Ensure time limits do not prohibit valid claims</b>	<b>Recommendation Four:</b> Time limits for bringing a complaint of sexual harassment should be extended to six years, to reflect the barriers those who have experienced sexual harassment may face in enforcing their rights and taking action regarding their complaints.
<b>Increase options for complainants to make enforcement more accessible</b>	<b>Recommendation Five:</b> The <i>Fair Work Act 2009 (Cth)</i> ( <b>FW Act</b> ) should be amended to include a civil remedy provision that allows workers, their representatives, unions and the Fair Work Ombudsman ( <b>FWO</b> ) to bring a claim of sexual harassment under that Act (and where relevant, alongside other FW Act claims such as underpayment of wages, contravention of awards or enterprise agreements or adverse action).
<b>Ensure that remedies and processes promote systemic</b>	<b>Recommendation Six:</b> Commonwealth, State and Territory anti-discrimination legislation should be amended to require Courts and tribunals to consider remedies that promote systemic change. Further, as recommended by VLA, standard form

<sup>1</sup> We would like to acknowledge the generous assistance of WEstjustice volunteers in preparing this submission, and in particular Marina Leikina and Caitlin Baillie.

<sup>2</sup> Victoria Legal Aid, Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australia Workplaces, 28 February 2019 (**VLA Submission**).

Objective	WEstjustice's recommendations
change	settlement agreements should include a requirement that employers address the underlying causes of sexual harassment and commissions should be required to collect and share key data.
<b>2. Stronger regulatory frameworks to ensure laws are enforced</b>	
<b>Powerful and well-resourced regulators</b>	<p><b>Recommendation Seven:</b> WEstjustice recommends the creation of independent statutory regulator(s) with the powers and resources to investigate and prosecute sexual harassment in the workplace. The power and resources of the Australian Human Rights Commission (AHRC) and State and Territory Commissions and/or WorkSafe and other work safety regulators should be enhanced, and/or a Discrimination Ombudsman Office be established, to allow for the investigation and enforcement of breaches of anti-discrimination and sexual harassment laws.</p> <p>The independent regulator(s) should be required and properly resourced to promote systemic change within problem workplaces, undertake own-motion investigations and prosecutions, promote and seek systemic remedies including workplace training and compliance audits, celebrate best-practice employers, run powerful education campaigns, and champion the benefits of diverse workplaces free from exploitation.</p>
<b>Access to education and free legal services</b>	<p><b>Recommendation Eight:</b> To prevent sexual harassment and improve enforcement, the State and Federal Governments should establish a fund for the design and delivery of targeted education and legal assistance programs for vulnerable workers including newly arrive migrants, refugees, temporary visa holders and young people.</p>

## ABOUT WESTJUSTICE AND THE EMPLOYMENT LAW PROGRAM

WEstjustice ([www.westjustice.org.au](http://www.westjustice.org.au)) is a community organisation providing free legal help to people in the western suburbs of Melbourne. Our offices are located in Footscray, Werribee and Sunshine, with a number of outreach services.

We assist with a range of everyday legal problems including consumer disputes, credit and debt, family law and family violence, fines, motor vehicle accidents, tenancy, and employment related matters.

We also provide free community legal education, undertake law reform activities and work in partnership with local communities to deliver innovative projects that build legal capacity and improve access to justice.

With a long history of working with migrant and refugee communities, in 2014 we identified a large unmet need for employment law assistance for these communities, who are particularly vulnerable to exploitation at work. In response, WEstjustice established the Employment Law Project, which provided legal assistance to over 200 migrant workers from 30 different countries, successfully recovering or obtaining orders for over \$120 000 in unpaid entitlements and over \$125 000 in compensation for unlawful termination. We also trained over 600 migrant workers, as well as leaders from migrant communities and professionals supporting these communities. Based on evidence from our work, and extensive research and consultation, WEstjustice released the [Not Just Work Report](#),<sup>3</sup> outlining 10 key steps to stop the exploitation of migrant workers.

Given continuing and unmet need, WEstjustice now operates an ongoing Employment Law Program. The Program seeks to improve employment outcomes for vulnerable workers including migrants, refugees, temporary visa holders and young people. We do this by empowering communities to understand and enforce

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<sup>3</sup> Catherine Hemingway, 'Not Just Work: Ending the exploitation of refugee and migrant workers', WEstjustice Employment Law Project Final Report, available at <[www.westjustice.org.au/publications/policy-reports-121](http://www.westjustice.org.au/publications/policy-reports-121)>, last accessed 26 July 2018 (**Not Just Work**).

their workplace rights through the provision of tailored legal services, education, sector capacity building and advocacy for systemic reform.

In addition to our migrant and refugee casework service, we also provide assistance to international students at the Study Melbourne International Students Work Rights Legal Service, and to school students and other young people through our School Lawyer Program and youth clinics.

To date, our service has recovered over \$400 000 in unpaid entitlements or compensation, trained over 1000 community members, delivered four roll-outs of our award-winning Train the Trainer program, and participated in numerous law-reform inquiries and campaigns.

## DRIVERS OF WORKPLACE SEXUAL HARASSMENT

Our understanding of the drivers of sexual harassment is based on observations from our casework service and community education and engagement programs. Although we cannot comment conclusively based on the relatively small number of clients we have seen, we have observed some general patterns.

Consistent with findings in the VLA Submission,<sup>4</sup> we have observed that sexual harassment at work is often driven by gender inequality. All the clients that we have advised in respect of sexual harassment have been female. We have also observed that many of our clients reporting sexual harassment face additional barriers and vulnerabilities connected with their status as newly arrived migrants, refugees, temporary visa holders or young people, and/or their insecure work arrangements.

## WESTJUSTICE CLIENTS

For clients attending the Employment Law Service, sexual harassment is not a commonly reported problem. In contrast with the high levels of sexual harassment reported in the 2018 Survey, in the first two years of the Employment Law Service less than 1% of clients sought advice in respect of sexual harassment.<sup>5</sup> This figure is consistent with reporting to other similar services for vulnerable workers. The [Young Workers Centre](#) identified 3% of their clients presented with bullying/harassment issues in 2017-2018 and in the same year [Jobwatch](#) identified 6.5% of callers to their telephone advice service raised a concern with harassment.

Based on our work in the community, we understand that sexual harassment is common – but severely under-reported. Community leaders participating in our Train the Trainer program explained that many recently arrived migrant and refugee community members have a limited understanding of what constitutes sexual harassment and what legal protection is available. As one community leaders told us:

*“A guy at a factory grabbed a girl on the bottom. The girl started laughing because she didn’t know it was abuse or her rights under law here. At the end of the day I spoke to her and she said it was a joke, and I said no joke, no joke.”*

Of those who have sought advice, our clients have reported sexual harassment in a range of industries including the on-demand economy (ride-share industry in particular), aged and community care, service station/retail, administration and hospitality industries.

In our experience, newly arrived and refugee women as well as young workers are at risk of sexual harassment and face barriers to enforcement of their rights for a variety of reasons including:

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<sup>4</sup> VLA Submission, p 11.

<sup>5</sup> Not Just Work, p 75

- Gender
- Age
- Concentration in insecure work and fear of losing a job
- Visa status
- Low rights awareness
- Language and cultural barriers that prevent access to mainstream services, and
- Limited options to access trusted, comprehensive face to face advice and ongoing support.

## MIGRANT WOMEN

Recently arrived and refugee women are vulnerable to exploitation in the labour market due to the coalescence and intersection<sup>6</sup> of multiple forces including gender, race, recently arrived or refugee status and/or temporary visa status. These forces impact on the ability of women to enforce minimum workplace protections. Specific cultural and community contexts can also increase the risk of sexual violence and sexual harassment for migrant women.<sup>7</sup>

For migrant women in work, exploitation is widespread. The reasons for exploitation are vast and multi-faceted, including the marginalisation of the voices of migrant workers; limited access to decent work; low awareness of workplace rights and services; lack of effective access to mainstream services; absence of targeted community services; and ineffective laws and processes. Workers being exploited are often not aware of their rights, and rarely seek help to enforce the law – this is a particularly acute experience for women, who in our experience are more likely to face the additional burden of community and family pressure not to pursue viable claims.<sup>8</sup>

Migrant women experience a high degree of gender-based discrimination in the workforce, and our clients have consistently reported being subjected to adverse action upon employers becoming aware of caring responsibilities and pregnancy. Through our casework and face to face education sessions at playgroups, sewing groups and other women’s gatherings, we heard similar stories over and over. Migrant women find themselves in an Australian labour market that has entrenched gender inequalities. They experience the existing pay gap between men and women<sup>9</sup> and discrimination when balancing caring or parental responsibilities, negotiating flexible working arrangements, and returning to work after pregnancy. Such exploitation is compounded by the cultural, literacy and practical barriers that prevent many migrant women accessing mainstream services for assistance.<sup>10</sup>

In data analysed for our Not Just Work report, almost half of our female clients came to Australia as refugees or humanitarian entrants (44%). 17% came as international students, 11% were temporary migrant workers

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<sup>6</sup> For discussion of intersection in relation to female migrant workers see Margaret L. Satterthwaite, ‘Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers,’ (2005) 8(1) Yale Human Rights and Development Law Journal.

<sup>7</sup> *Violence against women in CALD communities: Understandings and action to prevent violence against women in CALD communities*, AMES Australia, <<https://www.ames.net.au/-/media/files/research/20832-ames-actions-report-web.pdf?la=en>> last accessed 26 February 2019.

<sup>8</sup> Not Just Work, p 221. See also Catherine Hemingway, *A Woman’s Struggle: How our system fails to address discrimination at work*, September 13 2018 <<http://www.powertopersuade.org.au/blog/a-womans-struggle-how-our-system-fails-to-address-discrimination-at-work/13/9/2018>> last accessed 27 February 2019.

<sup>9</sup> See also [Workplace Gender Equality Agency, Australian Government, Gender pay gap statistics \(March 2016\)](#).

<sup>10</sup> See in particular chapters 3-5 in Not Just Work.

and 8% were asylum seekers. 80% had a low or no income, 11% had a medium income and there were no high income earners reported. One in five of our female clients required an interpreter.

Our female clients are largely concentrated in the services sector and clustered in female-dominated jobs – both skilled and unskilled. We found over half worked in health care and social assistance, education and training and accommodation and food services:<sup>11</sup> all industries in which the AHRC identified reports of sexual harassment as being disproportionately high.<sup>12</sup>

## YOUNG WORKERS

Young people are also vulnerable to exploitation in the workplace. Drivers for this exploitation include low awareness of workplace rights, barriers to entry into the workplace and the prevalence of low paying and insecure work. Over half of 15-19 year olds and over a third of 20-24 year olds are in casual employment, working irregular hours and without paid leave entitlements.<sup>13</sup> A recent Australian survey of young workers indicated that almost three quarters of respondents reported some form of exploitation in the workplace, such as underpayments, unsafe working conditions, bullying or sexual harassment.<sup>14</sup>

## INSECURE WORK ARRANGEMENTS AND VISA STATUS

In our experience, there appears to be an increased risk that workers in insecure work arrangements will be exposed to sexual harassment. For many migrant and young workers, this is caused in part by lack of alternative employment options and lack of awareness of workplace laws and entitlements. The visa status of many workers with temporary visas means they are generally reluctant to complain for fear of losing their employment and deportation.<sup>15</sup>

In our experience, clients engaged as contractors in the on-demand workforce receive even less protection from sexual harassment than other vulnerable workers. These workers face uncertainty about their legal status and rights and despite being some of the most vulnerable workers, have limited access to assistance to enforce their rights.

Our casework and consultation reveals that on-demand work is particularly unsafe and isolated. As discussed in our recent submission to the Victorian Government Inquiry into Victoria's on-demand workforce,<sup>16</sup> on demand workers who experience sexual harassment may not have access to workers compensation payments, which is available to employees. Irini's story shows how workers in the gig economy experience sexual harassment with limited access to recourse:

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<sup>11</sup> 39% of clients worked in childcare/aged care/community services/health care/education; 14% worked in hospitality and 8% worked in food processing industries.

<sup>12</sup> Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces, 2018. Australian Human Rights Commission, p 60 (2018 Survey).

<sup>13</sup> 52% of 15-19 years old, and 34% of 20-24 year old are employed on a casual basis. Foundation for Young Australians (2015), How Young People are Faring in the Transition from School to Work, <<https://www.fya.org.au/wp-content/uploads/2015/11/How-young-people-are-faring-report-card-2015-FINAL.pdf>> last accessed 26 February 2018.

<sup>14</sup> *Welcome to your first job: expect to be underpaid, bullied harassed or exploited in some way*, C Ruiz, D Bartlett, E Moir, Griffith University, <<https://theconversation.com/welcome-to-your-first-job-expect-to-be-underpaid-bullied-harassed-or-exploited-in-some-way-110438>> last accessed 26 February 2018.

<sup>15</sup> Not Just Work, p 227.

<sup>16</sup> WEstjustice Submission to the Inquiry into Victorian on-demand workforce, <[https://www.westjustice.org.au/cms\\_uploads/docs/westjustice-submission--inquiry-into-the-victorian-on-demand-workforce-final.pdf](https://www.westjustice.org.au/cms_uploads/docs/westjustice-submission--inquiry-into-the-victorian-on-demand-workforce-final.pdf)> last accessed 26 February 2018 (WEstjustice On-demand Workforce Inquiry Submission).

### Case Study – Irini

*Irini came to Australia as an international student and worked as a driver for a ride-hailing company. She was engaged as an independent contractor. Although Irini did not have a car, she was able to rent one from a company that had a contract with the ride-hailing company.*

*One night when Irini was working, she received a job to pick up a group of male passengers. When Irini arrived the men were noticeably intoxicated. While Irini was driving, one of the men started to climb through the sunroof of the car, causing significant damage. Irini stopped the car and the man jumped out. At this stage all the men, except for one, got out. The man that stayed began to sexually harass Irini, saying things to her like ‘do you want to kiss me?’ which made Irini feel very uncomfortable.*

*Irini reported the incident to the company she worked for. They refused to cover the full cost of fixing the car, leaving her with a considerable debt to pay. Instead, they offered her a small amount of money on the condition that she would make no further attempts to claim money from them. The company also refused to take any steps to identify the passengers who damaged the car and sexually harassed her.*

*WEstjustice advised Irini that, unfortunately as an independent contractor, her rights against the company were uncertain. WEstjustice suggested that, alternatively, Irini could pursue the men responsible for damaging the car to pay for the repair. However, this would require identifying them. Irini has since been in contact with the police to try to identify the men but the process has been very slow. Months have passed and Irini has not been able to find out the identities of the men.*

### LOW RIGHTS AWARENESS

*“Working in my community I find that women don’t want to share their sexual harassment experiences, are not aware of the law and don’t understand what constitutes sexual harassment or bullying” (WEstjustice community leader)*

In most instances our clients have only reported sexual harassment after seeking advice for other legal problems relating to their employment and once WEstjustice lawyers have had the opportunity to build trust with the client. Clients who have reported sexual harassment have also reported being the subject of unfair termination, underpayment of wages and entitlements, failure to provide pay slips among other issues related to employment.

Fathima’s story highlights how low awareness of rights means that sexual harassment is often not reported, unless other employment issues cause clients to seek legal assistance.

### Case Study – Fathima

*Fathima worked as a console operator at a service station. She came to WEstjustice because she had been unfairly dismissed from her job. After meeting with a WEstjustice lawyer for a number of hours in relation to the dismissal, Fathima mentioned that her boss had been acting inappropriately throughout her employment.*

*When Fathima started working at the service station her manager made a number of inappropriate propositions towards her. When Fathima would message her Manager to request more shifts, he would reply by saying that she could make extra money if she posed for nude photos and that he could arrange it. He would also send her inappropriate photos and messages via email.*

*WEstjustice advised Fathima of her legal rights with respect to her manager’s conduct. Fathima said that did not mention the abuse earlier as she did not know her legal rights. Ultimately she decided that she didn’t want*

*to pursue any sexual harassment claim as she believed she did not have enough evidence and she felt unable to run the matter without legal representation. Further, she was scared at the time that if she made a complaint she would lose her job.*

## IMPACTS OF SEXUAL HARASSMENT

The impact of sexual harassment on our clients is immense. We have observed significant distress and mental harm as well as loss of employment and financial security. Some of our clients have reported being unable to return to work as a result of the harassment. The impact of sexual harassment on our clients makes it difficult for them to discuss their experiences with others and therefore has deterred them from taking legal action.

Recounting instances of sexual harassment to WEstjustice lawyers in a confidential environment often caused high level of stress for our clients. In some instances, clients were not prepared to provide details of their experiences unless we could assist with their case.

In Ekta's story we see the devastating impact sexual harassment has on Ekta, including the inability to return to the workplace.

### Case Study – Ekta

*Ekta worked as an assistant at an aged care facility. Her duties involved assisting residents to dress, wash and eat. She worked the overnight shift – and was the only staff member rostered on overnight. She was only paid \$80 per shift – less than \$10 per hour. Ekta did not receive payslips.*

*One day when Ekta was in the kitchen one of the residents came up behind her and touched her bottom. Ekta made a sound and some of the other residents came to see what had happened. Ekta went straight into the staff office and locked the door. She immediately called her supervisor and the police to make a police report. Ekta also noted that one of the other residents would regularly expose himself to her.*

*Ekta decided not to return to work. She said that she has been having trouble sleeping and has been experiencing panic attacks and anxiety. WEstjustice offered to assist Ekta to pursue her underpayments and make a complaint to the Australian Human Rights Commission about the sexual harassment, however Ekta decided it was too difficult and asked WEstjustice to close her file.*

Like Ekta's claim above (which included WorkCover/work safety, wages/entitlements, and sexual harassment components), a majority of clients of the Employment Law Program present with more than one legal problem relating to their employment. In the first two years of the Program, 62% of clients presented with two or more employment issues.<sup>17</sup> The impact of these multi-faceted employment problems is immense, with many clients also presenting with other associated legal and non-legal issues, including eviction and homelessness (including because of loss of employment), problems paying bills, criminal matters and significant health concerns.

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<sup>17</sup> Not Just Work, p 75.

## RECOMMENDATIONS FOR REFORM: IMPROVED LEGAL FRAMEWORKS

Sexual harassment at work has caused our clients horrific pain and suffering. Unfortunately, current regulatory and legal frameworks are inadequate to address the problem.

Not only does our system place the onus on those most vulnerable to address sexual harassment at work, it also fails to address the systemic drivers of sexual harassment. Urgent change is needed.

WEstjustice broadly endorses the VLA Submission to this Inquiry. We make eight recommendations that will particularly assist vulnerable workers.

### POSITIVE DUTY TO PREVENT SEXUAL HARASSMENT

Although workplace safety laws place a general obligation on employers to, so far as is reasonably practical, provide and maintain a safe workplace, this is far from a clear and enforceable positive duty to prevent sexual harassment.

Similarly, Victorian legislation imposes a positive duty to take reasonable measures to eliminate sexual harassment.<sup>18</sup> However, the only consequence for a failure to meet this duty is the potential for the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) to investigate the circumstances in which the duty was not met. There is no regulatory tool for the VEOHRC to enforce a duty to take steps to prevent and eliminate sexual harassment at work.

As articulated in the VLA Submission, we need an effective and enforceable positive duty in both work safety and anti-discrimination legislation. This duty must be clearly articulated and incorporate best practice from around the world, including specific preventative steps such as training and reporting.<sup>19</sup> As discussed **below**, such a duty should be enforced by independent, well-sourced regulator with powers to investigate and prosecute.

### RECOMMENDATION ONE: EMPLOYERS MUST BE REQUIRED TO TAKE POSITIVE STEPS TO PREVENT SEXUAL HARASSMENT

We endorse recommendations two and three in Victoria Legal Aid's submission. We recommend that a strong, clear and enforceable duty be introduced that requires employers to take proactive steps to prevent sexual harassment at work. Such a duty should exist in both health and safety, and anti-discrimination, legislation.

To ensure on-demand workforce workers are also protected, WEstjustice recommends that all workers be provided with access to workers compensation entitlements through specific deeming provisions for certain on-demand industries. It is also recommended that workplace health and safety regulators, such as Worksafe, have the powers to investigate unsafe workplaces of on demand workers and take action to prevent and eliminate sexual harassment in these workplaces.<sup>20</sup>

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<sup>18</sup> *Equal Opportunity Act 2010* (Vic), s 15.

<sup>19</sup> VLA Submission, p 25.

<sup>20</sup> For further details and detailed recommendations, see WEstjustice On-demand Workforce Inquiry Submission, p 43.

## BURDEN OF PROOF SHOULD NOT BE ON THE MOST VULNERABLE

Many of our clients expressed fear about pursuing a claim because they did not have ‘proof’ of what happened. Even when we explained that personal testimony and medical evidence was powerful, they did not feel comfortable or likely to be believed. In order to address the perceived (and sometimes actual) challenge of ‘proving’ sexual harassment against a more powerful and often better resourced employer, WEstjustice recommends amending State, Territory and Commonwealth laws to introduce a reverse onus of proof, similar to the general protections provisions of the FW Act. Such a reverse onus would require complainants to establish a prima facie case. The employer would then be required to disprove the case.

This is fairer as it takes existing power imbalances and vulnerabilities into account. Further, the employer has access to its own internal records, surveillance and evidence about workplace decision making, while the employee does not.

## RECOMMENDATION TWO: SHIFT THE BURDEN OF PROOF

WEstjustice supports recommendation 10 of the VLA submission. We recommend that Commonwealth, State and Territory legislation be amended to introduce a reverse onus of proof such that the employer is required to disprove any allegations once a prima facie case is established by a complainant.<sup>21</sup>

## COSTS MUST NOT BE PROHIBITIVE

For workers seeking to pursue claims of sexual harassment under the Commonwealth framework, the costs risks of pursuing legal action may also act as a deterrent. Unfortunately, under the Commonwealth framework costs generally follow the event. This means that workers bringing proceedings under the SD Act are exposed to the risk of meeting the legal costs of their employers if they are unsuccessful in their claim.

For individuals facing well-resourced businesses, this may act as a significant and real deterrent to taking legal action under the SD Act. To date, no WEstjustice clients have elected to take action through the Commonwealth regime, with the potential exposure to costs a prevailing factor in this decision.

In contrast, for claims under the FW Act the default position is that parties bear their own costs and that costs are only awarded in circumstances where a party where proceedings have been commencing vexatiously, or parties have otherwise acted unreasonably.<sup>22</sup> This creates a significant inconsistency for different types of claims relating to employment.

Similarly, the default position under the *Equal Opportunity Act 2010 (Vic) (EO Act)* is that each party bear their own legal costs.<sup>23</sup> The Victorian Civil and Administrative Tribunal (VCAT) may order one party to pay another parties’ costs where it is satisfied that it is fair in all the circumstances to do so having regard to a range of factors including whether a party has acted unreasonably or vexatiously.

Therefore there is a significant inconsistency between the SD Act and the EO Act in regard to costs which deters workers from pursuing proceedings under the SD Act.

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<sup>21</sup> VLA Submission, recommendation 10.

<sup>22</sup> FW Act, s 570.

<sup>23</sup> VCAT Act (Vic), s 109.

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### **RECOMMENDATION THREE: ENSURE COSTS ARE NOT PROHIBITIVE**

WEstjustice recommends that the AHRC Act be amended to limit the circumstances where costs can be awarded against an applicant by a Court in actions regarding sexual harassment brought under the SD Act. Costs should only be able to be awarded where an applicant has acted unreasonably or vexatiously.

### **TIME LIMITS SHOULD NOT LOCK OUT VALID CLAIMS**

Workers who experience sexual harassment may be unable to report or pursue their complaint within the relevant six or 12 month limitation period, depending on their choice of jurisdiction. These short timeframes mean that workers may be prevented from taking action. Further there is an inconsistency with Commonwealth and State legislation in this regard. These time limits make litigation more complex and impose an additional burden on complainants.

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### **RECOMMENDATION FOUR: ENSURE TIME LIMITS DO NOT PROHIBIT VALID CLAIMS**

WEstjustice supports recommendation 11 of VLA's submission. Time limits for bringing a complaint of sexual harassment should be extended to six years, to reflect the barriers those who have experienced sexual harassment may face in enforcing their rights and taking action regarding their complaints.

### **AMENDMENTS TO THE FW ACT TO MAKE ENFORCEMENT MORE ACCESSIBLE**

Sexual harassment protections are not currently included in the FW Act.

We endorse the recommendation of Victoria Legal Aid to amend the FW Act to expressly protect workers from sexual harassment.<sup>24</sup> This is particularly important as our client often present with a range of issues related to their employment. Currently, if a client wished to pursue their complaint of sexual harassment they would have to do so under a separate framework and process to their other employment rights. This is a very burdensome undertaking for most clients and acts as a deterrent.

It is submitted that the FW Act should be amended to include a civil remedy provision that protects employees and contractors from sexual harassment. The existence of a civil remedy provision is important for the purpose of general deterrence and also as a reflection of the severity of a breach of sexual harassment laws.

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### **RECOMMENDATION FIVE: AMEND THE FW ACT TO MAKE ENFORCEMENT MORE ACCESSIBLE**

The FW Act should be amended to include a civil remedy provision that allows workers, their representatives, unions and the FWO to bring a claim of sexual harassment under that Act (where relevant, together with an action regarding other contraventions of the Act such as underpayment of wages, contravention of awards or enterprise agreements and/or adverse action).

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<sup>24</sup> VLA Submission, p 35.

## DISPUTE RESOLUTION FOCUS PREVENTS SYSTEMIC CHANGE

Currently, when a complaint is lodged with the AHRC or VEOHRC, each service focuses on dispute resolution between a complainant and their employer. While a focus on confidential dispute resolution may help some individual complainants resolve their concerns quickly, in this environment, most claims settle for financial compensation without addressing the underlying drivers of sexual harassment. This enables businesses to “pay their way out” of claims without making any meaningful change to address problem offenders or prevent future unlawful conduct.

Additionally, because most claims settle confidentially, there are rarely visible consequences for unlawful discrimination or sexual harassment. This means that individuals remain unaware of their rights at work. Success stories for those who stand up against sexual harassment are silenced. Employers and individuals in the workplace are not deterred from unlawful behaviours because they are not aware of consequences for others who are caught doing the wrong thing. And so, sexual harassment remains an invisible problem, with no visible consequences and low awareness of rights.

Even within the current individual complaints based model, there are ways to promote systemic outcomes that benefit not only the individual complainant, but others in the workplace and society more broadly. Such measures include a legislative requirement for courts and tribunals to consider systemic remedies, and standard form settlement agreements that include a requirement for the employer to take steps to prevent future harm (for example, through training, audits and/or the introduction of relevant policies).

### RECOMMENDATION SIX: ENSURE THAT REMEDIES AND PROCESSES PROMOTE SYSTEMIC CHANGE

In addition to our recommendation for powerful and well-resourced regulators, WEstjustice recommends that Commonwealth, State and Territory anti-discrimination legislation be amended to require Courts and tribunals to consider remedies that promote systemic change. Further, as recommended by VLA, standard form settlement agreements should include a requirement that employers address the underlying causes of sexual harassment and Commissions should be required to collect and report on de-identified complaint data.<sup>25</sup>

## RECOMMENDATIONS FOR REFORM: STRONGER REGULATORY FRAMEWORKS AND ACCESS TO EDUCATION

### SOLE RELIANCE ON INDIVIDUAL ENFORCEMENT IS PROBLEMATIC

In addition to legislative change, a stronger regulatory framework is needed to address sexual harassment in workplaces. At present, individuals are responsible for reporting and taking action with respect to sexual harassment. For Australia’s most vulnerable workers – this simply does not work.

Each of the legal avenues available to WEstjustice clients to address sexual harassment require the worker to make a written complaint or application or file proceedings in a Court or Tribunal. This necessitates significant levels of legal capacity and/or investment. While in Victoria, the VEOHRC may investigate serious allegations of sexual harassment,<sup>26</sup> VEOHRC does not have the ability to commence legal action on behalf of

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<sup>25</sup> VLA Submission, recommendations 6 and 7.

<sup>26</sup> *Equal Opportunity Act 2010* (Vic), s 127.

complainants, or take any action against alleged perpetrators other than by agreement.<sup>27</sup> Similarly, once a complaint is lodged with the AHRC, its functions are largely limited to dispute resolution and issuing a certificate that allows Court proceedings to be commenced.

Of the clients that contacted our Centre for assistance with reports of sexual harassment, very few decided to pursue their sexual harassment claims, despite meritorious cases and WEstjustice offers of assistance. Clients reported that it was simply too much to recount their story, they were suffering psychological issues as a result of the harassment, and/or worried that pursuing a case would have an adverse impact on their health. Others felt concerned that they didn't have enough evidence or that they would lose their jobs.

Nyala's story demonstrates some of the barriers that our clients face in enforcing their claims. It also shows how the current system fails: employers can act with impunity unless a vulnerable individual takes action.

#### **Case Study – Nyala**

*Nyala was employed as an Administrative Officer.*

*She was often taunted, laughed at and made to feel excluded by her colleagues. Some examples of the bullying include comments that were frequently made to Nyala about her accent and appearance which she believed was directly linked to her African background. On one occasion, a colleague intentionally locked Nyala in a bathroom after office hours so she could not get out.*

*In addition to the bullying behaviour, Nyala was sexually harassed by the owner of the company. Some examples of the sexual harassment included:*

- Touching her arms and legs;*
- Telling her she would only keep her job if she slept with him;*
- Buying a piece of carpet which he placed under her desk and told her to sleep on;*
- Booking a hotel room for the two of them and leaving the keys on her desk; and*
- Telling her she should move to the city and that he would pay her rent and he would move in.*

*When Nyala would reject the owner's sexual advancements the bullying behaviour would become worse. Nyala even started to experience bullying from Human Resources. The behaviour included asking Nyala to report directly to Human Resources when she started and finished work every day and redirecting her to perform menial manual duties such as carrying heavy files or unpicking staples.*

*WEstjustice assisted Nyala by providing her with information on the WorkCover scheme and offered to refer her matter to Victoria Legal Aid. However, Nyala did not want to pursue any legal action in relation to the bullying and sexual harassment at this time. She felt concerned about sharing her story with a different legal service, so WEstjustice offered to run her case. Nyala said that she would contact WEstjustice if and when she felt ready to pursue her legal options.*

Often our vulnerable clients are not willing to pursue a wages claim, but request that we make an intelligence report to the Fair Work Ombudsman in the hope that they will take action to protect other workers. In cases of sexual harassment, it is not possible for WEstjustice to report concerns to a regulator who can investigate and enforce the law. As a result, employers act with impunity and the abuse continues.

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<sup>27</sup> *Equal Opportunity Act 2010* (Vic), s 139.

## REGULATORS MUST BE EMPOWERED AND RESOURCED TO TAKE ACTION

At present there is no proactive regulator who can commence proceedings on behalf of a vulnerable worker, or gather evidence in support of these proceedings and prosecute an employer for contraventions of the SD Act or the EO Act. The expectation is for individuals to drive and progress legal action. This is inconsistent with the barriers individuals face in reporting or seeking advice in respect of sexual harassment and which presently prevent workers from taking legal action.

### Case study – Andrea

*Andrea came to Australia as an international student. Andrea found an ad on Gumtree for a job distributing fliers for a painting and home improvement company. Andrea applied for the job and she was hired by a man named Tony. Tony told her that her pay would vary depending on how quickly she delivered the fliers.*

*The arrangement was that Tony would pick Andrea up from the station and drive her to different locations. One day when Tony was driving Andrea from the station he started to ask her personal questions and made some comments about her physical appearance. Tony then started to try and kiss her. Andrea felt scared and uncomfortable so she got out of the car. Tony began to follow her in his car, so she ran until he was out of sight.*

*Andrea reported the sexual harassment to the police. She was never paid for the jobs she did for Tony. WEstjustice helped Andrea write a complaint to the FWO. However, because Andrea only knew Tony's first name and had no other personal information, WEstjustice was unable to take further action.*

*Andrea had nobody she could complain to about her sexual harassment experience, and no regulator that could investigate her sexual harassment complaint.*

In the UK, US and some Canadian jurisdictions, the regulator can provide advice and direct support to complainants. We consider that the VEOHRC, AHRC and work safety regulators should have the power to assist clients with meritorious claims; investigate claims; promote compliance via various enforcement mechanisms such as compliance notices and enforceable undertakings; and run strategic litigation where required, just as the FWO can stand in the shoes of an applicant and prosecute a company directly. Like the FWO, mediation and enforcement could be delivered by separate teams within the VEOHRC and AHRC, which we consider appropriate, given their specific expertise in anti-discrimination conciliation.

The introduction of a Discrimination and Sexual Harassment Ombudsman (operating independently or as part of a strengthened AHRC/workplace safety regulator) would assist in addressing the fundamental causes of discrimination and sexual harassment as experienced by women in the workforce.

WEstjustice considers that the implementation of a well-resourced regulator with widespread enforcement powers would 'counter the deep pocket/repeat player advantage enjoyed by some respondents'.<sup>28</sup> It could promote systemic change within problem workplaces, by:

- Undertaking own-motion investigations and prosecutions
- Promoting and seeking systemic remedies (including workplace training and compliance audits)
- Running powerful education campaigns, and

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<sup>28</sup> [Beth Gaze and Rosemary Hunter: Access to justice for discrimination complainants: courts and legal representation \(2009\) 32 UNSW Law Journal 699, p 699.](#)

- Championing the benefits of diverse workplaces free from exploitation.

The 2018 Survey found only one percent of people who experience sexual harassment take legal action by making a complaint to the AHRC or State agency such as the VHREOC.<sup>29</sup> This clearly shows that the system is not working.

We endorse recommendations four and five of the VLA Submission in this regard.

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## **RECOMMENDATION SEVEN: POWERFUL AND WELL RESOURCED REGULATOR(S)**

WEstjustice recommends the creation of independent statutory regulator(s) with the powers and resources to investigate and prosecute sexual harassment in the workplace. The power and resources of the Australian Human Rights Commission and State and Territory Commissions and/or workplace safety regulators should be enhanced, and/or a Discrimination and Sexual Harassment Ombudsman Office be established, to allow for the investigation and enforcement of breaches of anti-discrimination and sexual harassment laws.

The independent regulator should be required to promote systemic change within problem workplaces, undertake own-motion investigations and prosecutions, promote and seek systemic remedies including workplace training and compliance audits, celebrate best-practice employers, run powerful education campaigns, and champion the benefits of diverse workplaces free from exploitation.

## **ACCESS TO EDUCATION AND FREE LEGAL ASSISTANCE**

Coupled with high levels of exploitation, vulnerable workers face multiple barriers that prevent them from accessing mainstream legal services and thus, enforcing their rights at work. As noted **above**, low levels of rights awareness prevent many workers from even being aware that they have a legal problem – or knowing that there are services that can help. Language, literacy, cultural understandings and practical considerations all form additional critical barriers to accessing mainstream services and enforcing rights.

The complex, multi-jurisdictional nature of laws governing work also contributes to the problem – for a non-English speaking underpaid worker who has been sexually harassed and unfairly dismissed, there are a myriad of agencies that may assist with part of the problem, but no ‘one-stop shop’ to provide a culturally appropriate and accessible service and guide vulnerable workers through the quagmire of legal and non-legal options available to them. For many of the most vulnerable workers, there will be no assistance at all.

As documented in the Not Just Work Report and our recent submission to the Victorian Government Inquiry into the Victorian on-demand workforce, evaluation of our community-based, face-to-face education and legal programs shows greatly increased awareness of laws, access to services and legal redress for many vulnerable workers and target communities. In addition to continuing and extending the important work of Victoria Legal Aid, there is urgent need for more community-based programs.

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## **UNMET NEED FOR LEGAL ASSISTANCE**

Our clients generally require active assistance from the time of making a complaint through to mediations, and formally settling their dispute. At the initiation of a claim, clients require assistance with the completion of letters of demand, or the relevant forms and calculations. Many clients faced with the requirement to calculate underpayments/compensation/appropriate remedies and prepare a letter of demand, let alone a

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<sup>29</sup> 2018 Survey, p 9.

Court application, outline of submissions or witness statement would be locked out of the system without extensive assistance. The imbalance of power inherent in many of these disputes makes independent assistance for vulnerable workers crucial.

Despite significant need for employment law services, there are limited avenues for workers to get help with their problems. Given the amount of time required to prepare and run underpayment and other employment matters, few private firms offer employment law advice on a no win no fee basis. Therefore, for low income earners, private legal assistance is not an option. Mainstream agencies, with their focus on telephone-based self-help models of assistance, are largely inaccessible to vulnerable workers, and do not provide enough ongoing support.

Unfortunately, there is very little funding available for employment law services. Existing services are struggling to meet demand with limited resources. JobWatch, a community legal centre specialising in employment matters, cannot meet 57% of demand for telephone assistance (even fewer receive casework support and the most vulnerable will not utilise a telephone service). Justice Connect, a community organisation that helps facilitate pro bono referrals, reports that employment law is one of the top four problems that people request assistance for, however only around one fifth of matters receive much needed help.<sup>30</sup> Victoria Legal Aid provides much-needed assistance to Victorian workers with sexual harassment issues, but has stricter eligibility criteria than community legal centres (CLCs), and is not always able to assist with other employment matters such as underpayment of wages. Collaboration between agencies, CLCs, legal aid commissions, unions, community leaders and community organisations is key.

Apart from the WEstjustice Employment Law Service, there are no other targeted employment law services for newly arrived communities in Victoria. As observed in a Report by the Federation of Community Legal Centres, 'there is a significant gap between the need and demand for assistance and the services that are currently available.'<sup>31</sup>

Despite being well placed to provide face-to-face comprehensive assistance embedded in the community, very few generalist community legal centres provide employment law services. This is not due to a lack of need. Employment law is a highly specialised area of law with short limitation periods, and there is no recurrent funding for generalist centres to do this work. This means that centres are often unable to allocate scarce resources to this area. Even fewer community organisations provide assistance to vulnerable contractors – and the government-funded Independent Contractor Hotline no longer operates.

As a result, many vulnerable workers are simply unable to find out about their entitlements, or take action to enforce their rights.

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## NEED FOR TARGETED EDUCATION

As documented **above**, many newly arrived and refugee communities understand little about sexual harassment laws in Australia.

Without targeted legal education for vulnerable workers, justice at work will remain largely inaccessible. Education not only informs people about their rights at work and where they can find help, but also empowers communities to enforce their rights by building relationships and trust between vulnerable workers and services that can assist.

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<sup>30</sup> Hemingway, above n 4, p 139.

<sup>31</sup> Ibid.

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## BEST PRACTICE EDUCATION APPROACHES

Any education program should adopt best practice education approaches to ensure that it is accessible and useful for target communities. Based on feedback from over 50 community presentations, a literature review, and over 300 surveys of community members, community workers and community leaders from newly arrived and refugee communities, we found that the following features make targeted education effective:<sup>32</sup>

- **Face-to-face and verbal:** Information provided face-to-face, both verbally as well as in writing
- **Client's language and community workers:** Using interpreters, community guides and bilingual community workers from relevant communities
- **Visual materials and multimedia:** Use of pictures, visual aids (such as DVDs) or other multimedia (including community radio)
- **Information sessions, English classes and pre-arranged community meetings:** Delivering community education via information sessions or as part of English classes is effective, as is visiting existing community groups
- **Clear language:** Using clear and simple language
- **Key information only:** Outlining key concepts and where to go for further information/assistance
- **Cultural awareness:** Ensuring presenter understands the community culture.
- **Convenient location:** Considering location of CLE and contacting existing organisations. As one community worker recommended: 'I think taking time to identify a number of community groups and associations that are already established and are meeting for a purpose on a regular basis. Request to be invited to talk about this issue which I think would be very popular within these communities.'
- **Practical and timely:** Providing information 'that is linked to outcomes', for example by facilitating employment in industries and workplaces where rights can be realised. Ensuring that workers receive the right amount of information at the right time so it is not abstract. Understanding audiences' level of understanding and targeting information at the appropriate level.
- **Developed in consultation with communities:** Ensuring that education is developed in consultation with community members and community workers, and responds to identified needs. There is strong evidence to suggest that face-to-face assistance and advocacy is essential to provide a service to refugee clients, and that without targeted assistance focused on relationships, collaboration and trust, government employment services are often inaccessible to refugee and newly arrived communities.

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## WESTJUSTICE EDUCATION PROGRAM

Raising awareness of sexual harassment laws and services is a critical step in rights enforcement. In response to community feedback regarding the importance of face-to-face, targeted employment law services and information, WEstjustice developed and implemented a Community Legal Education Program (**CLE Program**), commencing May 2014.

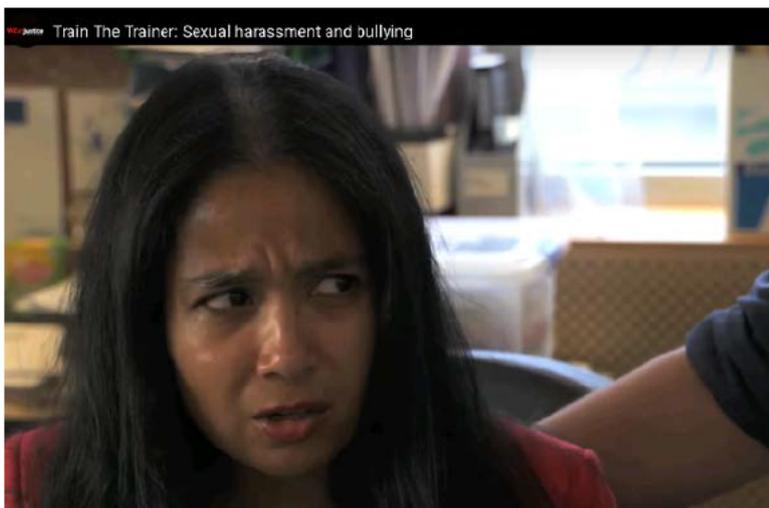
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<sup>32</sup> Not Just Work, p 23-26.

The CLE Program has consisted of:

- Information sessions for community members (delivered at a variety of locations including English as Additional Language classes, community meetings, settlement agencies and schools);
- Information sessions for community workers (to enable staff to identify when their clients have an employment law issue and make appropriate referrals); and
- The Train the Trainer Project, (an award-winning nine day training program, working with community leaders – for further information and evaluation reports please see our website and/or contact us).

We have developed numerous resources including template PowerPoint presentations, activity sheets and educational videos especially tailored for English as Additional Language students. Please visit our website for access to these resources.<sup>33</sup> Some example images and script from one video are below:



RICKI  
Anna, are you ok?

ANNA  
I'm fine.

RICKI  
You know, you don't have to put up with it.

ANNA  
(shrugging her shoulders)  
But he's the boss... And it's just his way.

RICKI  
No, actually it's bullying... and sexual harassment. Have you spoken to HR? Or a different manager?

ANNA  
But I really need this job, Ricki.

RICKI  
You can't get fired for reporting harassment. There's laws to protect you. I've had the same problem. Speak to HR head office, they can make this stop.

ANNA  
But I feel so ashamed. I don't want my friends and family to know about this.

RICKI  
That's ok. You can go to a community legal centre. It's strictly confidential and they can give you all the information to help you make a decision.



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<sup>33</sup> See: <<http://www.westjustice.org.au/community-development-and-law-reform/community-legal-education/newly-arrived-and-refugee-employment-law-140>> last accessed 26 July 2018.

As discussed in detail in the Not Just Work Report (chapter 3), each of these programs has been evaluated, and results indicate that the CLE Program has dramatically increased migrant worker understanding of laws and access to services. For example, after attending a WEstjustice information session, 89% of participants surveyed stated that as a result of the CLE session they now knew where to go for help with an employment problem.

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## **RECOMMENDATION EIGHT: ACCESS TO EDUCATION AND FREE LEGAL SERVICES**

Tailored education programs are required to raise awareness of laws and build trust and accessibility of services. WEstjustice recommends that the Commonwealth and State Governments provide increased funding for the design and delivery of:

- Targeted education programs for vulnerable workers including
  - Direct education programs for community members
  - Train the trainer programs for community leaders, and
  - Education programs for community workers in key organisations working with communities at risk of sexual harassment.

Further, without assistance, vulnerable workers cannot enforce their rights, and employers can exploit with impunity. WEstjustice recognises the important work of Victoria Legal Aid Equality Law Program. However, community legal centres are necessary in the community to work alongside Legal Aid Commissions, regulators and unions to provide additional support to vulnerable workers. Yet there is no recurrent funding for generalist centres to do this work, and significant unmet need.

The State and Federal Government should provide recurrent funding for community legal centres to deliver free, accessible legal services, including the following:

- **Legal service:** face to face, comprehensive legal advice and assistance to vulnerable workers who experience sexual harassment at work, and referrals to mainstream agencies where appropriate;
- **Education program:** coordination and delivery of a tailored Community Legal Education program to vulnerable workers, including community leaders and community workers, to raise awareness of laws and services that can assist and prevent exploitation; and
- **Systemic change:** pursuing strategic policy and law reform objectives arising from casework and education programs, including consultation with key stakeholders to raise awareness of vulnerable worker experiences and to promote legal and policy change.