



**Australian Government**

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**Department of Jobs and Small Business**

**AUSTRALIAN HUMAN RIGHTS COMMISSION**

**NATIONAL INQUIRY INTO SEXUAL HARASSMENT  
IN AUSTRALIAN WORKPLACES**

**SUBMISSION OF THE  
DEPARTMENT OF JOBS AND SMALL BUSINESS**

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## Introduction

1. The Department of Jobs and Small Business welcomes the opportunity to make a submission to the Australian Human Rights Commission (AHRC) in its National Inquiry into Sexual Harassment in Australian Workplaces (Inquiry) and looks forward to the AHRC's report.
2. The Department views sexual harassment as an extremely serious issue and considers that there should be zero tolerance for sexual harassment, in any form, in the workplace.
3. To fully appreciate the extent of the problem, it is instructive that the most recent AHRC survey found that 1 in 3 people have experienced sexual harassment at work in the past 5 years, and in the last 12 months 23 per cent of women and 16 per cent of men had experienced some form of workplace sexual harassment.<sup>i</sup>
4. Various civil law frameworks apply to workplace sexual harassment within Australia. Criminal offences may also apply depending on the nature of the harassment.
5. The primary legislation which prohibits sexual harassment in employment and related areas is Commonwealth, state and territory anti-discrimination legislation. The Attorney-General's Department is responsible for Commonwealth anti-discrimination legislation, including the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act).
6. The Department has portfolio responsibility for a range of additional provisions within other statutory regimes that may also apply when sexual harassment occurs in the workplace, including the national workplace relations framework, Commonwealth work health and safety (WHS) laws and workers' compensation laws. While sexual harassment is not expressly prohibited by these laws, a range of remedial provisions within these legislative frameworks may be relevant.
7. In addition to these mechanisms, the unfair dismissal provisions in the *Fair Work Act 2009* (Cth) (Fair Work Act) are also a relevant consideration for employers responding to instances of workplace sexual harassment when termination of employment of an alleged perpetrator is being considered.
8. The negative consequences of workplace sexual harassment can be profound and far-reaching, not just for the employees that may be directly affected, but also for the employer and workplace more generally. Sexual harassment is also a significant concern within the broader Australian community.
9. The challenge moving forward is twofold. Firstly, to ensure that the various and complementary legislative schemes are effective in promoting workplaces that are free from sexual harassment and secondly, supporting employers to proactively respond to instances of sexual harassment in their workplaces with confidence that the legal framework appropriately balances the rights of those involved.

10. This submission provides information and considerations to assist in informing the AHRC's review and recommendations to address sexual harassment in Australian workplaces in relation to the following aspects of the Inquiry's Terms of Reference:
  - the current legal framework with respect to workplace sexual harassment focusing on the civil law and including data, where available; and
  - the drivers of workplace sexual harassment in terms of the contexts in which sexual harassment arises as a WHS issue.
11. The submission's principal focus is in relation to applicable legislative regimes within the Department's portfolio responsibility.

## Workplace relations framework

12. The Department has policy responsibility for the Fair Work Act which establishes the national workplace relations framework in Australia for, generally, 'national system' employers and employees, as defined in that Act.
13. While the Fair Work Act does not expressly prohibit sexual harassment in the employment context, it contains a number of protections that may be relevant to individuals who are experiencing sexual harassment in the workplace:
  - The general protections provisions (Part 3-1) prohibit a person (e.g. an employer or prospective employer) from taking 'adverse action' against another person (e.g. an employee or prospective employee) for certain prohibited reasons, including their sex, or because of their exercise of a workplace right, such as making a complaint about sexual harassment; and
  - The anti-bullying provisions (Part 6-4B) enable a worker who has been bullied at work to apply for a 'stop order' which may assist in preventing workplace sexual harassment where it is found to constitute part of a pattern of repeated unreasonable behaviour that creates a risk to health and safety.
14. As already foreshadowed, the unfair dismissal provisions in the Fair Work Act (Part 3-2) are also a relevant consideration for employers in their management of workplace sexual harassment complaints. A perpetrator of sexual harassment who is an employee and is dismissed by his or her employer because of that conduct may bring an unfair dismissal application, alleging that their termination was harsh, unjust or unreasonable. While the Fair Work Commission (FWC) collects data on applications lodged under the Fair Work Act, it does not specifically identify whether applications relate to allegations of sexual harassment.
15. The absence of sexual harassment as an express prohibition in the Fair Work Act means that there is no specific function for investigation of such complaints by the Fair Work Ombudsman (FWO). While this means that the FWO's standard data capture does not include allegations of sexual harassment, it does play an important referral function for affected complainants.

## General Protections

16. The general protections provisions in the Fair Work Act include certain protections that may provide an additional avenue of redress for a person who is experiencing sexual harassment in the workplace, most particularly the protection of workplace rights<sup>ii</sup> and protection against discrimination.<sup>iii</sup>
17. The provisions prohibit 'adverse action' being taken against a person for a prohibited reason and in the employment context cover a range of conduct including:
  - dismissing an employee;
  - injuring an employee in their employment, which includes actions such as those that result in a loss of pay or reduction in rank;
  - prejudicially altering the position of an employee, which includes any deterioration of the advantages enjoyed by the employee, for example, a detrimental change to the employee's roster; and
  - discriminating between employees.<sup>iv</sup>
18. The general protections provisions apply broadly, and depending on the circumstances, may also be accessed by potential employees, principal contractors and independent contractors.
19. Unlike the various anti-discrimination regimes discussed later in this submission, the general protections provisions incorporate a reverse onus of proof. This means, for example, that if an employee alleges that an employer's conduct was taken for a prohibited reason, it will be presumed that the conduct was taken for that reason unless the employer proves otherwise.<sup>v</sup>
20. A two stage complaints process applies for general protections claims involving dismissal from employment. The dispute is dealt with at first instance in a conciliation conference conducted by the FWC. If the dispute remains unsettled after the conclusion of that conference, the dismissed employee can proceed to court, or consent arbitration by the FWC if both parties agree. In all other cases of adverse action falling short of dismissal, participation in an FWC conference is voluntary and a person can instead elect to proceed directly to court.
21. For claims involving dismissal, an applicant must generally file an application with the FWC within 21 days of the dismissal.<sup>vi</sup>
22. Where a breach of the general protections provisions is established, a court (or the FWC by consent arbitration) can make an order it considers appropriate, including reinstatement or compensation.
23. The Fair Work Act also contains multiple action provisions to deal with cases where there may be more than one remedy available for the same conduct or circumstances. Of most relevance, these provisions prevent an application or complaint being made under a

Commonwealth, state or territory anti-discrimination law where a general protections application in relation to the same conduct has been made.<sup>vii</sup>

#### *Protection against adverse action when exercising a workplace right*

24. The general protections provisions prohibit a person from taking adverse action against another person because they have exercised or propose to exercise a workplace right, which relevantly includes making a complaint or inquiry in relation to their employment under a workplace law. 'Workplace law' is broadly defined to include any law of the Commonwealth, state or a territory that regulates the relationships between employers and employees and would include anti-discrimination laws.
25. Depending on the circumstances, this means that an employee may be protected from adverse action because they make a sexual harassment complaint internally (e.g. employee to employer), or to an external body such as the FWC, AHRC or a WHS regulator. Under this limb of the workplace rights protection, it is the adverse action following the making of the complaint (e.g. dismissal or prejudicial alteration of the employee's position) that attracts the protection, rather than the sexual harassment itself.<sup>viii</sup>
26. In this way, the workplace rights protection is similar in certain respects to the protection from victimisation against persons for bringing a complaint under the Sex Discrimination Act. Prohibitions against victimisation give statutory recognition to the importance of protecting those who complain about unlawful discrimination or harassment, in addition to the substantive protection afforded to those who experience it.

#### *Protection from workplace discrimination*

27. The general protections provisions also protect employees from workplace discrimination by prohibiting an employer from taking adverse action against an employee (or prospective employee) for a discriminatory reason, such as the employee's sex or sexual preference, subject to certain exceptions.<sup>ix</sup>
28. While sexual harassment is generally considered to be a form of sex discrimination under the Sex Discrimination Act,<sup>x</sup> it is not the case that this conclusion is necessarily imported into the workplace discrimination protection in the Fair Work Act. This is particularly because of the differential framing of the protection in s 351, which prohibits adverse action rather than discrimination per se. While it is yet to be definitely resolved by the courts, there is a reasonable argument that sexual harassment is within the scope of the prohibition on adverse action because of an employee's sex.<sup>xi</sup> The Federal Court is currently considering a general protections claim going to this issue which may provide further guidance.<sup>xii</sup>

#### **Anti-bullying provisions**

29. A further remedial measure that may be available to a person experiencing sexual harassment in the workplace is the anti-bullying protections in the Fair Work Act.

30. A worker who reasonably believes they have been bullied at work can apply to the FWC for a stop bullying order. Where the FWC is satisfied that a worker has been bullied at work and there is a risk that the worker will continue to be bullied at work, it may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work. These provisions commenced on 1 January 2014.
31. While the anti-bullying jurisdiction can extend to instances of workplace sexual harassment where it forms part of the bullying behaviour, sexual harassment in and of itself, is not considered to be bullying. Sexual harassment may be bullying if it is repeated or forms part of a pattern of repeated unreasonable behaviour that creates a risk to a worker's health and safety.<sup>xiii</sup>
32. A stop bullying order is available to any person who carries out work in any capacity for a person conducting a business or undertaking, as defined in the *Work Health and Safety Act 2011* (Cth) (the Commonwealth WHS Act). While workers must be working in a constitutionally covered business, the wide definition of worker provides broad access to orders to stop bullying beyond persons in an employer/employee relationship and relevantly includes contractors and volunteers.
33. The scope of the FWC's power to make 'any order it considers appropriate' (other than the payment of a pecuniary amount) to prevent bullying, also confers a broad discretion on the FWC to make orders which may apply to a wide range of parties including co-workers and other persons such as employee representatives.

## Unfair Dismissal

34. The Fair Work Act's unfair dismissal provisions are also a relevant consideration for an employer responding to instances of workplace sexual harassment, particularly when an employee's complaint of sexual harassment relates to a fellow employee.
35. The object of the unfair dismissal provisions is to ensure that a 'fair go all round' is accorded to both the employer and employee concerned<sup>xiv</sup> and the provisions confer a broad discretion on the FWC to assess whether an employee's dismissal is harsh, unjust or unreasonable in the particular circumstances, subject to certain eligibility criteria.
36. If the FWC is satisfied that a person has been unfairly dismissed, it may order the person's reinstatement or compensation,<sup>xv</sup> noting that reinstatement may not always be appropriate in instances of workplace sexual harassment by one employee to another employee.<sup>xvi</sup>
37. In considering whether a dismissal was harsh, unjust or unreasonable, the FWC must take into account a range of factors, including whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees) and a range of procedural fairness considerations, such as whether the person was given an opportunity to respond to any reasons.<sup>xvii</sup> The FWC must also take into account any 'other matters' it considers relevant.

38. Whether there is a valid reason for dismissal related to the employee's conduct is recognised as 'a very important consideration in any unfair dismissal case' and the FWC must be satisfied, on the balance of probabilities, that the conduct allegedly engaged in by the employee actually occurred.<sup>xviii</sup>
39. Perpetrating sexual harassment is generally considered to be conduct that constitutes a valid reason for dismissal.<sup>xix</sup> This includes sexual harassment that occurs outside the workplace if it has the potential to affect the person's employment.<sup>xx</sup> An employer may also respond to sexual harassment that comes to its attention, whether or not there has been a complaint.<sup>xxi</sup> Depending on the nature and severity of the sexual harassment, it may also be the case that the conduct amounts to serious misconduct which justifies the summary dismissal of the offending employee.
40. However, even if sexual harassment is established as a valid reason for dismissal, it is still possible that the dismissal may ultimately be held to be harsh, unjust or unreasonable due to the broad discretion afforded to the FWC in making this determination.<sup>xxii</sup> Relevant considerations that the FWC may take into account include:
- denial of natural justice in the dismissal process, such as an employer's failure to allow an employee to respond to allegations;<sup>xxiii</sup> and/or
  - other mitigating factors, such as the individual employee's personal circumstances (age, length of service etc.).<sup>xxiv</sup>
41. Specific to its assessment of unfair dismissal claims involving allegations of sexual harassment, the FWC has had regard to a number of matters, including:
- consistency in the application of any relevant employer policy;<sup>xxv</sup>
  - severity of the conduct;<sup>xxvi</sup>
  - whether the inappropriate behaviour was a single instance as opposed to a pattern of behaviour;<sup>xxvii</sup> and
  - delay in dealing with the conduct.<sup>xxviii</sup>
42. In relation to first matter being the incidence of relevant employer policies, the Workplace Gender Equality Agency (WGEA) collects annual data from various non-public sector employers that covers approximately 40 per cent of the Australian labour force. The WGEA data indicates that the vast majority of reporting organisations have a formal policy, including a grievance process, and that most provide sexual harassment training to their staff:
- formal policy or formal strategy on sex-based harassment and discrimination prevention: 97.9 per cent in 2018 compared to 96.1 per cent in 2014;
  - inclusion of a grievance process in any sex-based harassment and discrimination prevention policy or strategy: 97.4 per cent in 2018 compared to 96.2 per cent in 2014; and
  - provision of training for all managers on sex-based harassment and discrimination prevention: 86.2 per cent in 2018 compared to 77.6 per cent in 2014.<sup>xxix</sup>

43. What this data demonstrates is that Australian employers take their obligation to prevent and respond to instances of sexual harassment in the workplace very seriously, with the clear objective being a zero tolerance threshold of this behaviour. A similar zero tolerance approach is applied by employers, for example, in respect of drug and alcohol use in the workplace.
44. The universal opposition to and commitment to eliminate sexual harassment in Australian workplaces means the unfair dismissal framework in the Fair Work Act must facilitate and support employers to swiftly and decisively deal with any instances of harassing behaviour being perpetrated by their employees.
45. However, the broad discretion provided to the FWC in determining the fairness of a dismissal, particularly by reference to procedural matters and the threshold for establishing the nexus between the harassing behaviour and the workplace, may lead to the undesirable consequence that insufficient weight is afforded to the significant and detrimental implications of sexual harassment for the employee victim, their co-workers and the workplace environment more generally.
46. The case of *Keenan v Leighton Boral Amey NSW P/L* [2015] FWC 3156 demonstrates the tension that can arise when a strict approach is applied to assessing the nexus between the behaviour and the workplace. The applicant in that case was dismissed for alleged sexual harassment, inappropriate behaviour and language, bullying and intimidation of a number of fellow employees. Whilst some of the allegations concerning his behaviour were found to constitute a valid reason for dismissal, the applicant's conduct in suddenly kissing a colleague after the work Christmas function was not. Relevantly, the FWC considered that while it was 'abundantly clear' that the conduct constituted sexual harassment within the meaning of the Sex Discrimination Act, it did not have a sufficiently direct nexus with the workplace to amount to a valid reason for dismissal.<sup>xxx</sup> In addition, while the FWC in determining the fairness of the dismissal did have regard to any ongoing consequences for the workplace, it was not satisfied that dismissal was required in order to properly protect the victim in her ongoing employment.<sup>xxxi</sup>
47. Outcomes such as this may also have the undesirable effect of deterring victim employees from making sexual harassment complaints. The AHRC's 2018 National Survey found that the majority of people who were sexually harassed at work did not formally report their experience or seek support or advice, with many victims believing a formal complaint would be viewed as an overreaction or that it was easier to stay quiet. Fewer than one in five people (17 per cent) made a formal report or complaint in relation to workplace sexual harassment.
48. It is also the case that dismissals have been found to be unfair by the FWC because of procedural deficiencies, even when the offending conduct is egregious. In *Parker v Garry Crick's (Nambour) Pty Ltd as The Trustee for Crick Unit trust T/A Cricks Volkswagen* [2017] FWC 4120, the applicant was dismissed from his employment for inappropriate and offensive behaviour towards a female co-worker, in breach of the employer's sexual harassment policy. While the conduct was found to be a valid reason for dismissal, the FWC

ultimately concluded that the applicant was unfairly dismissed because of procedural deficiencies.

49. The conclusions expressed in these cases may not adequately reflect contemporary Australian community views and in particular, the primacy of protecting victims and the provision of safe workplaces free from sexual harassment. In addition, given that employers can be vicariously liable for the sexual harassment of their employees under anti-discrimination laws, and the consequences of workplace sexual harassment allegations for an organisation can be significant, both in terms of reputational implications and the possibility of significant monetary penalties, it is important that the unfair dismissal laws appropriately balance the rights of those involved.

## Anti-discrimination framework

50. The Commonwealth, states and territories have all enacted anti-discrimination legislation prohibiting sexual harassment in the workplace. There is a considerable degree of uniformity across the various regimes.

### Commonwealth Sex Discrimination Act 1984

51. The primary protection against sexual harassment in Commonwealth legislation is in Division 3 of Part II of the Sex Discrimination Act. Sexual harassment has been expressly prohibited since that Act was first introduced. Given the expertise and role of the AHRC under the Sex Discrimination Act, the Department has only summarised key relevant provisions to set the overall context of how sexual harassment is provided for in that statutory regime.
52. The framing of the original sexual harassment provisions in the Sex Discrimination Act were informed by jurisprudence which characterised sexual harassment as a form of discrimination on the basis of sex.<sup>xxxii</sup> Relevantly, one objective of the Sex Discrimination Act is 'to eliminate, so far as possible, discrimination involving sexual harassment in the workplace'.<sup>xxxiii</sup>
53. Sexual harassment in the employment context is unlawful under the Sex Discrimination Act. Sexual harassment by an employer of an employee (or person seeking to become an employee) is unlawful, as is sexual harassment by an employee of a fellow employee (or person seeking employment) with the same employer.<sup>xxxiv</sup>
54. Sexual harassment by various other workplace participants and customers, is also unlawful under the Sex Discrimination Act.<sup>xxxv</sup> It is also unlawful to victimise a person for making or proposing to make a complaint under the Sex Discrimination Act.<sup>xxxvi</sup>
55. As already noted, vicarious liability may also attach to employers for sexual harassment engaged in by their employees 'in connection with their employment',<sup>xxxvii</sup> unless the employer has taken all reasonable steps to prevent the employee from engaging in the unlawful conduct. Reasonable steps may include implementing a relevant policy and providing training to staff on their obligations not to engage in sexual harassment.

56. An employee who is experiencing sexual harassment in the workplace can make a complaint under the Sex Discrimination Act to the AHRC. The AHRC has the power to attempt to resolve the complaint through conciliation. If a complaint remains unresolved and is terminated by the AHRC, the complainant may proceed to have it determined by a relevant court.<sup>xxxviii</sup>
57. Section 10 of the Sex Discrimination Act concerns its operation and interaction with state and territory anti-discrimination law. The Sex Discrimination Act is not intended to exclude or limit the operation of the law of a state or territory, where that law is capable of operating concurrently with it.<sup>xxxix</sup> Like the Fair Work Act's multiple action provisions, where a person has made a complaint, instituted proceedings or taken any other action under a state or territory law in relation to certain conduct, they are precluded from making a complaint pursuant to the Sex Discrimination Act under the *Australian Human Rights Commission Act 1986* (Cth) in relation to that same conduct.<sup>xl</sup>

### State and territory anti-discrimination laws

58. State and territory anti-discrimination legislation also prohibits sexual harassment, including workplace sexual harassment.
59. The various statutory definitions of conduct that constitutes 'sexual harassment' are broadly consistent among the state and territory jurisdictions, although there are some differences in terminology and effect.
60. Remedies can also vary between jurisdictions, with some legislative regimes providing a cap on the damages that can be awarded to a complainant<sup>xli</sup>. Timeframes for lodging complaints and other procedural requirements also vary across jurisdictions.
61. There are some state and territory provisions dealing with multiple actions and common law issue estoppel principles will generally apply so that a person who alleges sexual harassment in the workplace in some cases may need to choose which jurisdiction they wish to prosecute their complaint. A number of factors may inform this decision, including the scope of the sexual harassment protection under the relevant law, the remedies available and time limits for making a complaint.

### Work Health and Safety framework

62. The model WHS laws are a further statutory framework intended to promote and provide safe workplaces that are free from sexual harassment. The model WHS laws were developed by Safe Work Australia (SWA) following the 2008 National Review into Occupational Health and Safety Laws and pursuant to a commitment by the Commonwealth, state and territory governments to harmonise WHS legislation and regulation across Australia.

63. These model laws are the central plank of Australia’s harmonised legislative WHS framework and all jurisdictions, except Victoria and Western Australia, have enacted laws based on the model legislation. The Victorian and Western Australian legislation is similar to the model laws and each jurisdiction has its own regulator to monitor and enforce compliance with their laws.
64. Like the anti-bullying protections in the Fair Work Act, WHS laws have a broader application than the traditional employer-employee relationship. The model WHS laws cover ‘persons who conduct a business or undertaking’ (PCBUs) and extend to persons who carry out work in any capacity for a PCBU, including contractors, subcontractors, self-employed persons, outworkers, and volunteers. The laws also cover ‘other persons’, such as visitors and customers, and adopt a broad definition of the ‘workplace’ to include any place a worker goes, or is likely to go, while at work.
65. The primary legislation for the Commonwealth WHS jurisdiction is the Commonwealth WHS Act, which is based on the model WHS laws and applies to Commonwealth workers, those working at Commonwealth workplaces and other persons at Commonwealth workplaces.

### **Workplace health and safety duties**

66. The model WHS laws impose a ‘primary’ duty on PCBUs to ensure the health and safety of their workers, and other persons, so far as is reasonably practicable.<sup>xliii</sup> The laws define ‘health’ to include both physical and psychological health.<sup>xliii</sup> This duty requires PCBUs to eliminate or otherwise minimise health and safety risks so far as is reasonably practicable.
67. Integral to this process is the requirement for PCBUs to actively identify, assess and control work hazards that may affect the physical and/or psychological health and safety of workers. The risk of being subjected to sexual harassment in the workplace is one such risk.
68. Hazards in the workplace may be identified by physically inspecting the workplace, consulting workers, identifying previous incidents and reviewing available information (for example, information from WHS regulators, industry associations or professional bodies). This list is not exhaustive and the methods and resources available to respond to instances of sexual harassment in the workplace will depend on the particular circumstances.
69. The model WHS laws also require PCBUs to work in consultation with their workers to actively identify and control risks. Consultation with workers is core to the process and can provide insight into the risks in the workplace and how they can be managed. The WHS Act requires PCBUs to consult workers on any matter directly affecting their work health or safety, and this consultation can extend to issues concerning workplace sexual harassment.<sup>xliiv</sup>
70. An officer of a PCBU has a duty to exercise due diligence to ensure that the PCBU complies with its duties. Due diligence requires officers to take a proactive role in ensuring that their business complies with its duties and has systems and procedures in place to meet its WHS obligations. Failure to exercise due diligence may attract significant personal liability for the officer (including the possibility of a maximum penalty of 5 years’ imprisonment) in certain circumstances.<sup>xliv</sup>

71. Other complementary statutory obligations also apply. In the Commonwealth WHS Act, duties attach to workers and others to:
- take reasonable care of their own health and safety;
  - take reasonable care that their acts or omissions do not adversely affect the health and safety of others; and
  - comply so far as they are reasonably able with any reasonable instruction of the PCBU.<sup>xlvi</sup>
72. Workers also have a duty to co-operate with any reasonable policy or procedure of the PCBU that has been notified to them.<sup>xlvii</sup>
73. Relevantly, in June 2018, SWA published the first national guide on [Work-related psychological health and safety: A systematic approach to meeting your duties](#). This guide describes how well-established risk management tools and processes can be applied to manage psychological risks, including sexual harassment. The model Code of Practice: [How to manage Work health and safety risks](#) also provides guidance on the risk management process which can be applied to any risk, including sexual harassment in the workplace.

### Sexual harassment as a work health and safety issue

74. The WHS framework provides a systematic approach to managing risks, including sexual harassment, throughout organisations at all levels. In practice, measures to address sexual harassment usually rely heavily on administrative controls, such as policies detailing appropriate behaviour and complaints processes. While administrative controls are necessary, they must support effective control measures. For example, a PCBU should foster a ‘no sexual harassment-tolerated’ work culture, promote good work relationships, provide support for workers and develop good managers who are confident in dealing with workplace issues.
75. Information about less tangible WHS hazards and risks, such as sexual harassment, and how to control them is continuing to evolve, most particularly to respond to technological advances and the risks it can present (e.g. social media). Sexual harassment presents a clear risk to workers’ health and safety, and in order to implement effective control measures, timely research is required to respond to emerging issues so that the risk of harm can be eliminated as far as possible.
76. Research about the drivers of sexual harassment and the best way to prevent and address harassment is also still developing. The majority of available literature to date focuses on responses to sexual harassment complaints, rather than prevention. Relevantly, studies going back to the early 1990s have identified that administrative control measures alone do not work and that successfully reducing sexual harassment requires a different approach.<sup>xlviii</sup>
77. The literature also distinguishes between unwanted sexual attention (where the perpetrator has a genuine desire for a sexual relationship), inappropriate exercise of power to gain some kind of sexual favour (sexual coercion) and behaviour of a sexual nature intended to humiliate, offend or intimidate the victim (similar to bullying).<sup>xlix</sup> This distinction may be useful in identifying ways these behaviours can be eliminated.

78. The literature<sup>1</sup> also identifies a number of potential hazards which could be used to inform the WHS risk management of sexual harassment in the workplace, including:
- power imbalance between workers;
  - traditionally gendered work;
  - perceived acceptance of sexual harassment by senior managers (e.g. not acting on inappropriate behaviour);
  - sexualised uniforms (e.g. dresses which are not practical for the work, such as cleaning);
  - isolated working conditions (e.g. hotel rooms);
  - forced physical proximity; and
  - perceived power of customers over workers.
79. Further research specifically considering sexual harassment from a WHS perspective may assist in identifying other hazards, so that appropriate risk management and more effective control measures can be implemented. Tailored guidance for PCBUs and workers on managing sexual harassment as a work health and safety risk could also be developed.

## Workers' compensation framework

80. The final piece of statutory regulation that has application to sexual harassment in the workplace is the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). The SRC Act establishes the Commonwealth workers' compensation scheme (the Comcare scheme) and applies to employees of:
- Commonwealth government agencies and statutory authorities;
  - Australian Capital Territory government agencies and authorities; and
  - corporations that hold a licence to self-insure and manage claims under the SRC Act.
81. The SRC Act provides rehabilitation and compensation to employees who suffer a work-related injury or disease, including those resulting from work-related harassment and/or workplace bullying. In the sexual harassment context, compensation for injury extends to psychological injuries.
82. Compensation may include medical expenses, incapacity payments, household services and attendant care services. Compensation for reasonable medical treatment is also payable for as long as such treatment is reasonably required. Incapacity payments can be paid until the Age Pension qualifying age or, in certain cases, for a period of up to two years afterwards.
83. Rehabilitation under the SRC Act may include providing structured activities and services under a rehabilitation program to assist an injured employee to stay at, or return to, work and to maintain or improve their ability to undertake activities. Where an employee is undertaking, or has completed, a rehabilitation program, the SRC Act also provides that the relevant employer must take all reasonable steps to provide the employee with suitable employment or help finding suitable employment.

## International context

84. The United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women recognises that 'equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace'.
85. The prohibition on sexual harassment in the Sex Discrimination Act gives effect to Australia's international human rights obligations in relation to sexual harassment, along with regulation of workplace sexual harassment through state and territory anti-discrimination laws, WHS laws and relevant provisions in the Fair Work Act.
86. The Department represents the Australian Government at the International Labour Organization (ILO), a specialised agency of the UN. The ILO is developing new labour standards on Ending Violence and Harassment in the World of Work.
87. The impetus for the new standards was a resolution adopted by the ILO Conference at its 98th Session (2009) calling for the prohibition of gender-based violence in the workplace and for policies, programs, legislation and other measures to be implemented to prevent it.
88. The proposed new standards would place obligations on ratifying member states to ensure that domestic laws and policies prohibit all forms of violence and harassment in the world of work, including gender-based violence and harassment. The Australian Government has supported sexual harassment being included within the scope of the proposed new standards (a Convention and a Recommendation).
89. The first standard-setting discussion was held at the ILO's International Labour Conference (ILC) in June 2018. The second standard-setting discussion will be held at ILC in June 2019, where the new labour standards are expected to be adopted.

## Conclusion

90. The various statutory frameworks outlined in this submission demonstrate that there are a suite of potential mechanisms that can apply to instances of workplace sexual harassment. The challenge is to ensure that the various and complementary legislative schemes are effective in meeting the objective of delivering workplaces free from harassment.
91. Looking at the issue of sexual harassment through the prism of WHS has the advantage of promoting behavioural change at an organisational level, by focusing on risk management and prevention. As the duties under the WHS framework apply to all parties in the workplace regardless of the employment relationship, there is broad scope to manage psychosocial risks and hazards and instil a workplace culture that does not tolerate sexual harassment.

92. The prevention of sexual harassment before it occurs is always preferable to dealing with the behaviour once it has occurred. Having the workplace systems and processes in place to promote a culture where victims are empowered to report instances of sexual harassment, and appropriate procedures are available to resolve disputes, can promote early intervention and a swift response to incidents of workplace sexual harassment.
93. The potential for criminal penalties to be applied under WHS laws where the duty to manage the risk of sexual harassment in the workplace is not being met can also act as a deterrent against organisations and individuals not taking an appropriately serious and proactive approach to combating this issue.
94. There are also a range of tools available to ensure compliance with WHS laws that could be applied by WHS regulators if sexual harassment is regarded as a WHS issue. These tools include education and training activities, audits and inspections of workplaces, investigations into alleged contraventions and bringing prosecutions under the WHS Act. These options provide a broad mix of positive motivators, compliance monitoring and deterrents to encourage and secure the highest possible levels of compliance with WHS laws.
95. It is important to note, however, that the utilisation of WHS laws to address sexual harassment in the workplace is largely untested, given that the issue is more commonly dealt with under anti-discrimination laws in Australia. For example, since 2012, only 13 incident notifications relating to sexual harassment have been reported to Comcare.
96. Where sexual harassment does occur in the workplace, the remedial mechanisms available to victims should be quick, simple and easy for the lay person to navigate. The various and sometimes overlapping jurisdictions in the anti-discrimination laws and the Fair Work Act may benefit from a review to ensure that this objective is being met.
97. In addition, the various statutory obligations imposed on employers when responding to instances of workplace sexual harassment, particularly when an employee's complaint of sexual harassment relates to a fellow employee, can sometimes be difficult to navigate, most particularly in the unfair dismissal context.
98. This may be attributable in part to the broad discretion afforded to the FWC in determining unfair dismissal cases. While there is no doubt that perpetrating sexual harassment can currently constitute a valid reason for dismissal having regard to the nature and seriousness of the conduct, the above discussion demonstrates that other considerations, including procedural matters, may nevertheless render the dismissal unfair.
99. Given the prevalence and significant and detrimental consequences that can flow from sexual harassment in the workplace, it may be desirable to reconsider how the unfair dismissal provisions should operate in this context. It is important that the unfair dismissal provisions appropriately balance the rights of the person who is the victim of sexual harassment with those of the perpetrator to ensure that employers are appropriately supported and enabled to deliver Australian workplaces that are free from harassment.

100. If procedural considerations assume greater importance in the unfair dismissal context than the community expects, they may operate to undermine the objectives and effective enforcement of workplace sexual harassment policies and fail to deter inappropriate behaviour. The Department notes that other submissions to the Inquiry have also discussed this issue.

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## End notes

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<sup>i</sup> AHRC's fourth national survey on sexual harassment in Australian workplaces (<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/everyone-s-business-fourth-national-survey-sexual>) (viewed 29 March 2019).

<sup>ii</sup> *Fair Work Act 2009* (Cth) s 340.

<sup>iii</sup> *Fair Work Act 2009* (Cth) s 351.

<sup>iv</sup> *Fair Work Act 2009* (Cth) s 342.

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<sup>v</sup> *Fair Work Act 2009* (Cth) s 361.

<sup>vi</sup> *Fair Work Act 2009* (Cth) s 366.

<sup>vii</sup> *Fair Work Act 2009* (Cth) Part 6-1.

<sup>viii</sup> *Kassis v Republic of Lebanon* [2014] FCCA 155.

<sup>ix</sup> *Fair Work Act 2009* (Cth) s 351 (2)(a).

<sup>x</sup> *Elliot v Nanda & Commonwealth* [2001] FCA 418.

<sup>xi</sup> *Wroughton v Catholic Education Office Diocese of Parramatta* [2015] FCA 1236; *Birch v Wesco Electrics (1966) Pty Ltd* [2012] FMCA 5.

<sup>xii</sup> *Morton v CSIRO* (QUD234/2017).

<sup>xiii</sup> *Roberts v VIEW Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston; Ms Lisa Bird; Mr James Bird* [2015] FWC 6556; *Sharon Bowker, Annette Coombe and Stephen Zwarts v DP World Melbourne Limited T/A DP World; Maritime Union of Australia, The, Victorian Branch and Others* [2015] FWC 7312.

<sup>xiv</sup> *Fair Work Act 2009* (Cth) s 381(2).

<sup>xv</sup> *Fair Work Act 2009* (Cth) s 390.

<sup>xvi</sup> *Keenan v Leighton Boral Amey NSW P/L* [2015] FWC 3156.

<sup>xvii</sup> *Fair Work Act 2009* (Cth) s 387.

<sup>xviii</sup> *Parmalat Food Products Pty Ltd v Wililo* [2011] FWA 1166.

<sup>xix</sup> *George Talevski v Chalmers Industries Pty Ltd* [2018] FWC 1807; *Tom Krzywicki v Boeing Aerostructures Australia Pty Ltd trading as Boeing Aerostructures Australia* [2014] FWC 6489.

<sup>xx</sup> *Oliver Bridgewater v Healthscope Operations Pty Ltd T/A Prince of Wales Hospital* [2018] FWC 3921; *Rose v Telstra Corporation Limited* [1998] AIRC 1592.

<sup>xxi</sup> *Luke Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174.

<sup>xxii</sup> The Full Bench in *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191 at [58] stated “Reaching an overall determination of whether a given dismissal was ‘harsh, unjust or unreasonable’ notwithstanding the existence of a ‘valid reason’ involves a weighing process. The Commission is required to consider all of the circumstances of the case, having particular regard to the matters specified in s.387, and then weigh: (i) the gravity of the misconduct and other circumstances weighing in favour of the dismissal not being harsh, unjust or unreasonable; against (ii) the mitigating circumstances and other relevant matters that may properly be brought to account as weighing against a finding that dismissal was a fair and proportionate response to the particular misconduct.” In this case, the dismissal was found to be unfair because of the ‘softcore’ nature of the pornography, the culture at the workplace, the absence of relevant warnings and disparate treatment received by employees compared to some managers.

<sup>xxiii</sup> In *Flanagan, Hogan, Pitches v Thales* [2012] FWA 6291 the FWC stated at [94] that the rule that no person be condemned unless they have had a fair opportunity to be heard is a basic principle of natural justice. In this case, an opportunity for the employee was provided, but truncated in the sense that the employees were not given a period in which to digest the allegations put to them, seek advice and respond in a more informed manner.

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<sup>xxiv</sup> In *McArthur Coal v Jodie Goodall* [2016] FWCFB 5492, the Full Bench ordered the reinstatement of the employee despite the lewd and inappropriate remarks being found to be a valid reason for the dismissal and there being no procedural deficiencies in the dismissal. Several mitigating factors were noted including that the termination was disproportionate to the conduct, fatigue and the employee's service record.

<sup>xxv</sup> In *Wake v Queensland Rail* [2006] AIRC 663, the applicant's employment was terminated for sending and storing sexually-related, pornographic and violent images, in breach of the employer's policy and code of conduct. The Commission found that the employer had made sustained efforts to make employees aware of its policy and the consequences of breaching the policy. Despite those efforts and repeated warnings, the employee breached the policy in a substantial way and on a number of occasions. The Commissioner dismissed the application.

<sup>xxvi</sup> *Peter Heesom v Vegco Pty Ltd t/a One Harvest* [2019] FWC 1664.

<sup>xxvii</sup> *McDonald v TNT Australia* [2014] FWC 4246.

<sup>xxviii</sup> *Flanagan, Hogan, Pitches v Thales* [2012] FWA 6291.

<sup>xxix</sup> Workplace Gender Equality Agency Data Explorer ([http://data.wgea.gov.au/industries/1#sh\\_content](http://data.wgea.gov.au/industries/1#sh_content)) (viewed 19 March 2019).

<sup>xxx</sup> *Keenan v Leighton Boral Amey NSW P/L* [2015] FWC 3156 at [83].

<sup>xxxi</sup> *Keenan v Leighton Boral Amey NSW P/L* [2015] FWC 3156 at [129].

<sup>xxxii</sup> Mason, G and Chapman, A., 2003. 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' 31(1) *Federal Law Review* 195.

<sup>xxxiii</sup> *Sex Discrimination Act 1984* (Cth) s 3(c).

<sup>xxxiv</sup> *Sex Discrimination Act 1984* (Cth) s 28B

<sup>xxxv</sup> *Sex Discrimination Act 1984* (Cth) s 28B; s28G.

<sup>xxxvi</sup> *Sex Discrimination Act 1984* (Cth) s 94.

<sup>xxxvii</sup> *Sex Discrimination Act 1984* (Cth) s 106.

<sup>xxxviii</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46PO

<sup>xxxix</sup> *Sex Discrimination Act 1984* (Cth) s 10(3).

<sup>xl</sup> *Sex Discrimination Act 1984* (Cth) s 10(4).

<sup>xli</sup> *Anti-Discrimination Act 1977* (NSW) s 108, damages not exceeding \$100,000 by way of compensation; *Equal Opportunity Act 1984* (WA) s 127, damages not exceeding \$40,000 by way of compensation.

<sup>xlii</sup> *Work Health and Safety Act 2011* (Cth) s 19.

<sup>xliii</sup> *Work Health and Safety Act 2011* (Cth) s 4.

<sup>xliiv</sup> *Work Health and Safety Act 2011* (Cth) s 44.

<sup>xliv</sup> In broad terms, an officer is an individual who makes, or participates in making, decisions that affect the whole, or a substantial part of, a business or undertaking (for example, a director of a company, a chief executive officer or a chief financial officer).

<sup>xlvi</sup> *Work Health and Safety Act 2011* (Cth) s 29; 29.

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<sup>xlvii</sup> *Work Health and Safety Act 2011 (Cth) s 28.*

<sup>xlviii</sup> Lee, C., 1992. 'Sexual harassment: After the Headlines' *Training*, 29(3).

<sup>xlix</sup> Konik, J. a. C. L. M., 2008. 'Policing Gender at Work: Intersections of Harassment Based on Sex and Sexuality' *Social Justice Research*, 21(3).

<sup>l</sup> Bortha, D., 2016. 'Women in mining still exploited and sexually harassed' *SA Journal of Human Resource Management*, 14(1); Kensbock, S. B. J. J. G. a. P. A., 2015. 'Sexual Harassment of Women Working as Room Attendants within 5-Star Hotels' *Gender, Work & Organization*, 22(1); McCabe, M. P. a. H. L., 2005. 'Attitudes and Perceptions of Workers to Sexual Harassment' *The Journal of Social Psychology*, 145(6).