

Academic Evidence on the Causes, Manifestations and Responses to Workplace Sexual Harassment

Initial Submission to the Australian Human
Rights Commission's National Inquiry into
Sexual Harassment in Australian Workplaces

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This submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces has been compiled by Professor Paula McDonald (QUT) and Professor Sara Charlesworth (RMIT University). The combined expertise of the authors spans the disciplines of legal studies, management, organisational psychology, and employment relations. Bridging academic, regulatory and organisational contexts, we address the persistent and pervasive problem of workplace sexual harassment in Australian workplaces, drawing on our research and engagement.¹ Our ten-year program of research into workplace sexual harassment has had significant impact, directly informing innovative and cost-effective social and organisational policy responses. Please refer to the attached Appendix for a list of our relevant publications.

The purpose of this initial submission to the Inquiry is to canvas a wide array of relevant scholarly evidence on the causes of, and responses to, sexual harassment in the world of work in Australia. Given the likelihood that several legal experts will provide submissions to the Inquiry, we confine our discussion in this submission, insofar as the possibility of legal responses, to sexual harassment across the key jurisdictions of employment, worker health and safety (WH&S) and anti-discrimination regulation.

It is our strong view that in considering potential avenues of legal reform, and before settling on any final recommendations to government, the Australian Human Rights Commission should consider issuing an interim Discussion Paper. This Discussion Paper should set out possible regulatory options that can be further refined in consultation with workers, legal experts, complaint handling bodies, advocacy agencies/groups, unions and employer bodies.

Research on workplace sexual harassment has proliferated over the past 30 years since its recognition in the 1970s as a socio-legal phenomenon. This submission synthesizes and evaluates much of this accumulated knowledge as it is relevant to the National Inquiry Terms of Reference, highlighting important research findings and canvassing areas in need of reform.

The enduring problem of sexual harassment, most recently and compellingly revealed through the #MeToo movement, means that the need for reform to better prevent and redress sexual harassment and other gendered workplace conduct such as sex-based bullying, everyday sexism, and predatory behaviour, has never been more urgent. This can be achieved through reform of legal regulation and policy, external dispute resolution fora such as human rights commissions and worker health and safety regulators, and critically, organisational policy and practice.

The submission addresses Terms of Reference 2-6 of the National Inquiry and makes 18 recommendations.

¹ This research includes a three-year Australian Research Council (ARC) Discovery grant *Sexual Harassment in Australia: Causes Outcomes & Prevention* (DP1093442) and we acknowledge the support of the ARC in this work.

Term of Reference 2

Recommendation 1: Government agencies responsible for gender equality should support research on the under-studied area of sexual and sex-based harassment which involves the use of digital technologies, including social media.

Term of Reference 3

Recommendation 2: The Australian government should include sex, alongside race, sexual orientation and so on, as a characteristic protected by hate speech laws in order to address this manifestation of gendered violence which drives sexual harassment in the world of work.

Term of Reference 4

Recommendation 3: The Australian Government should devise and deliver a public education campaign which contributes to community awareness that the drivers of workplace sexual harassment are unequal power between men and women and rigid adherence to gender stereotypes, in contrast to individual aberrant behaviour. The public education campaign should highlight the experience of workers who are particularly vulnerable to sexual harassment, including women, migrant women, children and young people and precarious and insecure workers.

Recommendation 4: The Australian Human Rights Commission should draw on the combined experience of all Australian human rights commissions in sexual harassment training and document the most effective features and mode of sexual harassment training, evaluating their own and employer training for its effectiveness across a range of workplaces and industries.

Recommendation 5: The Australian Government and regulators in the fields of anti-discrimination, worker health and safety and employment, should educate employers on effective formal and informal models of grievance management that are victim-centric, timely, co-ordinated and deliver commensurate discipline when complaints are substantiated.

Recommendation 6: When a complaint of sexual harassment is received, employers should apply standard of proof principles that are commensurate with the civil sphere (viz, 'on the balance of probabilities') rather than criminal realm (viz, 'beyond all reasonable doubt').

Recommendation 7: Commonwealth, state and territory government anti-discrimination, worker health & safety (WH&S) and employment regulators should encourage employers to collect data on internal complaints including through interviews with those who experience sexual harassment to identify areas of risk and to refine and improve organisational prevention efforts and grievance processes.

- Recommendation 8:** Employers should develop complaint-handling processes that are consistent with a positive voice climate; that is, mature, expert, timely, sensitive and transparent and which include investigations that support complainants to feel safe in reporting their experiences.
- Recommendation 9:** Human Rights Commissions should conduct a survey to establish the extent, nature and consequences of workplace sexual harassment and gendered bullying for children and young adults aged 14-24.

Term of Reference 5

- Recommendation 10:** So that proposed reform to anti-discrimination, worker health and safety and employment laws and regulator practices can be fully evaluated, the AHRC should publish an interim Sexual Harassment Inquiry Discussion Paper to set out options on regulatory changes and on preventative action and complaint handling by regulators. Adequate time should be allowed for widespread consultation with unions, employer bodies, community legal services and community groups before any final recommendations on legal and practice reform are made by the AHRC.
- Recommendation 11:** Legal regulation should place clear obligations on employers to take preventative action to better protect workers from harassment and victimisation in the workplace and impose substantial financial penalties for failing to do so.
- Recommendation 12:** The Commonwealth, state and territory governments should resource and equip Human Rights Commissions to be able to follow up and monitor changes to policy and practice promised by organisations in settlement agreements with complaints.
- Recommendation 13:** Anti-discrimination, worker health and safety, and employment regulators should all be required to collect accurate, annual data on sexual harassment and other discrimination complaints on characteristics including age, sex, industry, occupation, employment status, country of birth of complainants, as well as on financial and other terms of settlements reached and make deidentified data available for information and research purposes.
- Recommendation 14:** The Australian government should support the adoption of the proposed ILO *Convention on Violence and Harassment in the World of Work* at the 2019 International Labour Conference.
- Recommendation 15:** National and state-based worker health and safety laws should be reformed to explicitly recognise gender-based violence, mandating positive action, prevention and complaint mechanisms to address it.

Term of Reference 6

Recommendation 16: That governments and regulators encourage the adoption by employers of clear evidence-based principles to underpin organisational sexual harassment policy and training to ensure a safe workplace for all workers.

Recommendation 17: Employers should support bystanders to be proactive in preventing and calling out sexual harassment as one component of broader systemic organisational change and recognising limitations in this onus of responsibility.

Recommendation 18: Employers should prepare for backlash where negative, hostile or aggressive reactions are likely to occur in response to initiatives designed to advance gender equality.

Introduction

Sexual harassment and related behaviours in the world of work,² such as sex-based harassment, gendered bullying and everyday sexism, are persistent, pervasive and damaging features of employment for many Australian workers. Recently, we have seen a tsunami of revelations of work-related sexual harassment – both recent and historical – across industry sectors in Australia and internationally. In Australia, other gender equality indicators are also lagging. Australia ranks 39th on a global index measuring gender equality, slipping from a high point of 15th in 2006.³ Further, the national gender pay gap currently stands at 14.6 per cent and has stubbornly remained between 14.6 per cent and 19 per cent for the past two decades.⁴

Sexual harassment is problematic in a unique and corrosive way in that it strips away an individual's identity, reduces the quality of working life, creates barriers to full and equal participation in employment across the life course and imposes costs on organisations. Experiencing sexual harassment often represents a turning point in the lives of workers, altering their progression through life-course sequences and hindering positive career and personal outcomes. Evidence indicates that sexual harassment continues to be experienced mainly by women, but also by some men, and that those who experience it are often reticent to report the problem or seek assistance. Organisational and regulatory strategies are fundamental in creating an organisational climate that discourages sexual harassment, however, to date, these strategies have been less than effective.

A lack of gender equality in organisations has significant negative implications for individual careers, future workplace practices and society more broadly. There is a need for a continued focus on the visible barriers and invisible biases in organisational processes that shape and perpetuate gender inequality in the everyday experiences of women and some men. Such processes may include job design, policy agendas, supervisory power, physical features of the workplace, and gendered identities. For organisations, the nature, extent, and consequences of these problems may be obscured, preventing the development of effective strategic interventions and the sustainability of these measures. Accordingly, there is a need for continued vigilance and lasting efforts to redress sex discrimination, sexual harassment, everyday sexism and sexual and gender-based violence in the world of work.

² We draw on the framing of the 'world of work' set out in the draft text of the proposed International Labour Organization's Convention on Violence and Harassment in the World of Work. This term covers situations occurring in the course of, linked with or arising out of work. https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_631807.pdf

³ World Economic Forum (2018) *The global gender gap report*, p. 10.

⁴ Workplace Gender Equality Agency (WGEA) (2018, August) *Australia's gender pay gap statistics*, p. 3.

Term of Reference 2: Online workplace-related sexual and sex-based harassment and the use of technology and social media to perpetrate workplace-related sexual and sex-based harassment

Defined internationally as virtual networks and communities that enable individuals to create, exchange and disseminate information and ideas, social media has become a pervasive feature of the contemporary employment relationship, fundamentally altering the reach, speed, and permanency of work-related conduct and expectations.^{5,6} At the same time, tensions around the dynamics of social media within the boundaries of the employment relationship are increasingly evident, with debates about what is considered appropriate, normative or legitimate being played out in the media and blogosphere, as well as in courts and employment tribunals.⁷

Extensive or in-depth empirical research that specifically addresses the display of offensive and sexually explicit visual material on computers, mobile phones and other electronic devices, especially as it is relevant to the world of work, is scarce. However, it seems clear that portable technologies allow harassers greater access to co-workers not only in the immediate location of the workplace, but outside of it, and beyond regular working hours.⁸ In Australia, sexual harassment legislation and case law provides for sexual harassment which occurs outside the immediate workplace (which may include online contexts) and Australian courts and tribunals have been found to take a broad interpretation in assigning vicarious liability in such circumstances.⁹

Sexual harassment via e-mail and mobile phones and other devices may appear on the face of it to be less threatening because it can occur without face-to-face contact. However, these forms of harassment may be at least as distressing as more physical forms, not least because they enable harassers to have greater access to co-workers.¹⁰ To the advantage of those who experience such sexual harassment, however, is the fact that these communications can often be traced and stored as evidence.

More empirically-driven research is needed to understand the phenomenon of the colonisation of cyberspace in the world of work, including how managers and workers may deploy digital technologies in the exercise of sexual power to harass, humiliate, discriminate against, marginalize and bully. Many key institutional actors, including employers and workers, as well as unions, employer associations and governments, have thus far taken a predominantly hands-off approach to tensions surrounding technology and social media in and beyond the workplace. This is despite the growing ambiguity, visibility and contestability of the issue in public, media and legal debates and the considerable penetration of social media into the world of work, including its capacity to alter conduct in employment in fundamental ways.⁵

⁵ Ellerbrok, A. (2010) Empowerment: Analysing technologies of multiple variable visibility. *Surveillance & Society*, 8(2), 200-220.

⁶ Jacobson, W. & Howle Tufts, S. (2013) To post or not to post: Employee rights and social media. *Review of Public Personnel Administration*, 33(1), 84-107.

⁷ McDonald, P. & Thompson, P. (2016) Social media(tion) and the reshaping of public/private boundaries in employment relations. *International Journal of Management Reviews*, 18(1), 69-84.

⁸ McDonald, P., Backstrom, S. & Dear, K. (2008) Reporting sexual harassment: claims and remedies. *Asia Pacific Journal of Human Resources*, 46(2), 173-195.

⁹ Easteal, P. & Saunders, S. (2008) Interpreting vicarious liability with a broad brush in sexual harassment cases. *Alternative Law Journal*, 33(2), 75-79.

¹⁰ McDonald, P., Backstrom, S. & Dear, K. (2008) Reporting sexual harassment: claims and remedies. *Asia Pacific Journal of Human Resources*, 46(2), 173-195.

Recommendation 1: Government agencies responsible for gender equality should support research on the under-studied area of sexual and sex-based harassment which involves the use of digital technologies, including social media.

Term of Reference 3: The use of technology and social media to identify both alleged victims and perpetrators of sexual harassment in the world of work

Social media has enabled many women to go public with accusations of sexual harassment and abuse, bypassing the gatekeepers who historically buried their stories. This includes the ‘formerly disregarded’; complainants who can no longer be assumed to be lying.¹¹ The #MeToo movement in particular, has broken a longstanding and deafening silence, exposing how those in senior, influential positions across all areas of society – politics, business, education, charities, the arts, sport and religion – and around the world, may exercise sexual power. Public awareness of the scale of gender-based violence and harassment and the links between sexual harassment and sex-based harassment have been raised where available data and the law could not do so.¹²

However, critics have raised concerns that #MeToo has turned into a ‘trial by Twitter’, where the legal principle of innocent until proven guilty has been turned on its head. Two widely discussed examples of unverified online accusations include the ‘Westminster dossier’,¹³ which contained the names of 40 UK ministers accused of various forms of misconduct, and a Google spreadsheet created by Moira Donegan in the US called “Shitty Media Men” which was active for only a few hours but which spread much further and much faster than the author had anticipated.¹⁴

Counter arguments however, suggest that accusations of a ‘witch hunt’ are a time honoured method of discrediting victims and claims that going public on social media violates the ‘innocent until proven guilty’ principle reveals an ignorance of the meaning and context of this legal principle.¹⁵ Clark¹⁶ argues that leaving aside the fact that some people on social media side with the accused, public discussion is not comparable to state punishment. She also asserts that those who are concerned about the failure of a legal principle in relation to #MeToo might better focus on that of justice for victims rather than an alleged perpetrators’ right to an untarnished reputation.

Another issue for those who allege sexual harassment on social media is that it takes place in public view, creating opportunities for various forms of backlash. For example, it allows men to watch, search for and intervene in feminist conversations, derailing feminism through harassment and redirecting their focus¹⁷. Laura Gianino writes for example: ‘I applaud these women and I also fear for them. I fear that they will be beaten down by the slut-shamers, and the victim-blamers, by

¹¹ MacKinnon, C. (2017) How litigation laid the ground for accountability after #MeToo. *The Guardian*, Dec 23.

¹² See 10

¹³ Robinson, M. & Frodsham, I. (2017) More Tory MPs are named in the ‘dirty dossier’ of alleged indiscretions as new sex claims emerge and the entire document is published in America. *The Daily Mail*, Oct 31.

¹⁴ Grady, C. (2018) Shitty media men list creator Moira Donegan on the year in #MeToo. *Vox*, Oct 16.

¹⁵ Clark, C. (2018). #MeToo exposed legal failure, but ‘trial by Twitter’ isn’t one of them. *The Conversation*, Mar 20

¹⁶ See 14

¹⁷ Megarry, J. (2017) Why #MeToo is an impoverished form of feminist activism, unlikely to spark change. *The Conversation*, October 30.

the internet trolls and the possible real-life trolls'.¹⁸ It is also the case that such trolls can escape punishment by hiding behind fake social media accounts.

In Australia, we have seen some positive steps in terms of legal protections in the online environment. For example, laws against so-called revenge porn passed the Australian Senate in 2015, with penalties of up to \$525,000 for corporations and \$105,000 for individuals set to be introduced for the non-consensual sharing of intimate images.¹⁹ However, despite the fact that Australia has hate speech laws across most anti-discrimination jurisdictions, making it a crime to publicly threaten or incite violence towards another person or group on the basis of race, sexual orientation, gender identity, intersex status and HIV/AIDS status, hate speech on the basis of sex is not prohibited.

Recommendation 2: The Australian government should include sex, alongside race, sexual orientation and so on, as a characteristic protected by hate speech laws in order to address this manifestation of gendered violence which drives sexual harassment in the world of work.

Term of Reference 4: The drivers of work-related sexual harassment, including whether some individuals are more likely to experience sexual harassment due to particular characteristics and whether some workplace characteristics and practices are more likely to increase the risk of sexual harassment

The central drivers of sexual harassment, sex-based bullying, everyday sexism, and predatory behaviour are unequal power between men and women and rigid adherence to gender stereotypes that is supported by structural and attitudinal barriers to gender equality. In a recent 'Open Statement on Sexual Harassment from Employment Discrimination Law Scholars', 10 principles to prevent and address sexual harassment in the US legal context are set out.²⁰ Many of these are relevant to the Australian context and applicable to understandings of sexual harassment at work both within the community and within organisations. Four of the most salient principles include:

- The problem with workplace harassment is sexism, not sexual desire
- Harassment includes many forms of sexism and abuse, not just sexual misconduct
- Sexual harassment is directly linked to sex segregation and inequality
- Prevention and remedies must move beyond punishing individual wrongdoers to encourage systemic institutional change

¹⁸ Gianino, L. (2017) I went public with my sexual assault. And then the trolls came for me. *Washington Post*, Oct 18.

¹⁹ Enhancing Online Safety (Non-consensual sharing of intimate images) Bill (2018) Parliament of Australia. See https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/s1113_ems_cd500e68-bf15-4da9-ba49-e7a6fb2c8226%22;src1=sm1

²⁰ Schultz, V. (2018) Open Statement on Sexual Harassment from Employment Discrimination Law Scholars. *Stan. L. Rev. Online*, 71, 17.

As we note throughout this submission, wide-ranging reforms are needed in Australia to both address the conditions in which sexual harassment flourishes *and* to make the operation of the legal framework that prohibits sexual harassment and provides for remedy far more proactive and responsive to workers than it currently is.

Drivers of sexual harassment in the world of work include attitudes which are violence supportive; conservative norms of gender or sexuality, including the sexualisation and subordination of women in traditionally feminine roles; celebrity status and entitlement and an associated lack of accountability for one's actions²¹; excessive consumption of drugs and especially alcohol which is a potential risk factor for sexual assault;²² little or no access to flexible work or career penalties associated with using them;²³ and hazing or abusive initiation ceremonies targeted at newcomers.²⁴

Overall, patterns of sexual harassment across different kinds of employment situations show many consistencies. However, idiosyncratic features of employment settings, including local policies and training, managerial interpretations of legal frameworks, leadership/management capacities, opportunities for employee voice, sex ratios of employees, and workplace norms of behaviour,²⁵ are also relevant to the particular circumstances of any particular sexual harassment 'case'.

For example, in policing, male bonding, including codes of mateship and loyalty in tightly knit male groups, may intensify sexism and encourage group loyalties to over-ride personal integrity. The *Review into Sexual Harassment, Sex Discrimination and Predatory Behaviour in Victoria Police*²⁶ revealed that what it means to be a police member closely mirrored gender-related social norms such as toughness, resilience, strength, aggressiveness, competitiveness and being unemotional. These characteristics are associated with stereotypes of heterosexual masculinity.

In contrast, an expert advisory group report to the Royal Australasian College of Surgeons revealed that the drivers of sexual harassment in that environment included authoritarian hierarchies and the patronage system of training where trainees depend on a small group of powerful senior (usually male) colleagues for entry into training, job opportunities and career progression.²⁷

Failure of employers to take preventative action and a failure of organisational complaint mechanisms

While today many larger employers have a suite of sexual harassment and gender equality policies and on-line training in place, few take what could be considered primary preventative action to ensure workers can work in an environment free of sexual harassment. Primary prevention strategies, as framed in the violence prevention literature, strive to circumvent violence, remove

²¹ Johnson, B. (2014) Bill Cosby drugged me. This is my story. *Vanity Fair*, Dec

²² Sonderlund, A., O'Brien, K., Kremer, P., Rowland, B., et al. (2014) The association between sports participation, alcohol use and aggression and violence: A systematic review. *Journal of Science and Medicine in Sport*, 17(1), 2-7.

²³ VEOHRC (2015) *Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police: Phase One Report - Dec 2015*

²⁴ Australian Human Rights Commission (2017) *Change the course: National report on sexual assault and sexual harassment at Australian Universities*. Sydney: AHRC.

²⁵ McDonald, P. (2016) Why is sexual harassment in the AFP systemic? And can the culture be changed? *The Conversation*, Aug 25.

²⁶ VEOHRC (2015) *Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police: Phase One Report - Dec 2015*.

²⁷ Expert Advisory Group on discrimination, bullying and sexual harassment Report to the Royal Australasian College of Surgeons (2015) Sep 8. See <https://www.surgeons.org/media/22045685/eag-report-to-racs-draft-08-sept-2015.pdf>

the causes or determinants of violence, prevent the development of risk factors associated with violence, and/or enhance protective factors against violence.²⁸ We set out some of the main elements of these prevention strategies in our response to Term of Reference 6 below.

It is worth noting that many state and territory human rights commissions provide sexual harassment training for employers and organisations and that the Australian Human Rights Commission provides employer resources on sexual harassment, including a code of practice. However, little is known about the effectiveness of different forms of training on the prevention of sexual harassment.

The failure of employers to take preventative action further undermines the effective operation of organisational complaint mechanisms by shifting the risk onto workers who experience sexual harassment. Research has consistently demonstrated that despite significant negative consequences, those who experience sexual harassment often respond passively, at least initially, such as by avoiding the harasser, minimising the behaviours, or denying them altogether.²⁹ This is because although those who experience sexual harassment want the behaviour to cease, they also try to avoid reprisals by the harasser and to maintain their status and reputation in the work environment.

Several studies have suggested that women, and young women in particular, are often reluctant to report sexual harassment to their employers because they have come of age in a world saturated by 'backlash politics' where they seek to distance themselves from negative characterisations of feminists and to disavow any disadvantages that arise from being female.^{30,31}

An analysis of Australian legal decisions revealed that claimants' responses to sexual harassment may however proceed from initially passive, such as avoiding the harasser or using body language to communicate unwanted behaviour, to more assertive responses as the harassment escalates or becomes more frequent or threatening.³² This escalation can include making a formal complaint through organisational channels.

International research has estimated that only between 5% and 30% of those who experience sexual harassment file formal complaints with their employer.^{33,34} Rather, victims more often than not, deal with the problem in isolation or with the assistance of friends or co-workers, or by tolerating the behaviours, leaving the organisation or resisting in other informal ways. The 2008 AHRC Sexual Harassment Prevalence survey showed that less than one in six survey respondents who had experienced sexual harassment actually reported it. A further analysis of the survey data

²⁸ Chamberlain, L. (2008) *A prevention primer for domestic violence: Terminology, tools, and the public health approach*. The National Online Resource Center on Violence Against Women, Harrisburg, PA.

²⁹ Bowes-Sperry, L. & O'Leary-Kelly, A. (2005). To act or not to act: The dilemma faced by sexual harassment observers. *Academy of Management Review*, 30(2), 288-306.

³⁰ Wear, D., Aultman, J. & Borgers, N. (2007). Rethorising sexual harassment in medical education: women students' perceptions at five US medical schools. *Teaching and Learning in Medicine*, 19(1), 20-29.

³¹ Hunter, R. (2002). Talking up equality: women barristers and the denial of discrimination. *Feminist Legal Studies*, 10(2), 113-130.

³² McDonald, P., Graham, T. & Martin, B. (2010). Outrage management in cases of sexual harassment as revealed in judicial decisions. *Psychology of Women Quarterly*, 34(2), 165-180.

³³ Firestone, J. & Harris, R. (2003) Perceptions of effectiveness of responses to sexual harassment in the US military, 1988 and 1995. *Gender, Work & Organization*, 10(1), 42-64.

³⁴ Wayte, T., Samra, J., Robbenolt, J., Heuer, L & Koch, W. (2002) Psychological issues in civil law. In J. Ogloff (Ed.), *Taking psychology and law into the twenty-first century* (pp. 323-369). New York: Springer.

also demonstrated that women were around twice as likely to use grievance procedures (either internally or externally) than men.³⁵ Men who do complain may be believed less, liked less and punished more than women who complain, arguably because the expectations of observers lead to negative evaluations of men who do not conform to expected gender roles.³⁶

Women, compared to men, may be more likely to make complaints of sexual harassment because they have been found to be significantly more offended and significantly more intimidated by sexual harassment than men.³⁷ Overall, women are less accepting than men of sexual behaviour at work and view unwanted sexual attention and sexual coercion as more serious.^{38,39}

Reasons for not reporting sexual harassment include a lack of faith in the complaints process, a fear of negative impacts or that they will not be believed, or because they 'took care of the problem themselves'. Research has found that women often complain only about the most serious or most concerning forms of sexual conduct.⁴⁰

Those who experience workplace sexual harassment are often caught in a bind when deciding on the timing of making a complaint to their employer. When they report the behaviour immediately, observers perceive them as more credible and the harasser as more responsible.⁴¹ Yet for an individual to reach a point where they are ready to make a complaint, they must first process what has happened to them, weigh up the available options open to them, and determine the possible detriments that may result from making a complaint. Consequently, there can be a significant, yet legitimate delay between experiencing sexual harassment and reporting it, if indeed it ever gets reported.

Reporting harassment experiences often does not improve, or may worsen outcomes for workers. Research has shown that raising a complaint frequently results in a deterioration of workplace relationships and a consequent negative impact on the complainant.^{42,43} The detriments associated with making a complaint are additional to the negative effects of sexual harassment per se; the latter which includes absenteeism, lower job satisfaction, commitment and productivity, and employment withdrawal.^{44,45} In the 2008 AHRC prevalence study and also our published, peer-reviewed study using this AHRC data, around one third of those who made a complaint to their

³⁵ Charlesworth, S., McDonald, P. & Cerise, S. (2011) Naming and claiming workplace sexual harassment in Australia. *Australian Journal of Social Issues*, 46(2), 141-161.

³⁶ Madera, J., Podratz, K., King, E. & Hebl, M. (2007) Schematic responses to sexual harassment complainants: the influence of gender and physical attractiveness. *Sex Roles*, 56(3/4), 223-230.

³⁷ McDonald, P., Charlesworth, S. & Cerise, S. (2011) Below the 'tip of the iceberg': Extra-legal responses to workplace sexual harassment. *Women's Studies International Forum*, 34(4), 278-289.

³⁸ Berdahl, J. & Moore, C. (2006) Workplace harassment: Double jeopardy for minority women. *Journal of Applied Psychology*, 91(2), 426-436.

³⁹ Gallivan Nelson, C., Halpert, J. & Cellar, D. (2007) Organizational responses for preventing and stopping sexual harassment: Effective deterrents or continued endurance? *Sex Roles*, 56(11/12), 811-822.

⁴⁰ Marshall, A. (2005). *Confronting sexual harassment: The law and politics of everyday life*. Aldershot: Ashgate.

⁴¹ Balogh, D., Kite, M., Pickel, K., Canel, D. & Schroeder, J. (2003) The effects of delayed report and motive for reporting on perceptions of sexual harassment. *Sex Roles*, 48(7/8), 337-348.

⁴² McDonald, P. & Charlesworth, S. (2013) Settlement outcomes in sexual harassment complaints. *Australasian Dispute Resolution Journal*, 24(4), 259-269.

⁴³ McDonald, P., Backstrom, S. & Dear, K. (2008) Reporting sexual harassment: claims and remedies. *Asia Pacific Journal of Human Resources*, 46(2), 173-195.

⁴⁴ Chan, D., Chun, B., Chow, S. & Cheung, S. (2008) Examining the job-related, psychological and physical outcomes of workplace sexual harassment: a meta-analytic review. *Psychology of Women Quarterly*, 32(4), 362-376.

⁴⁵ Hayes, P. (2004) *Taking it seriously: Contemporary experiences of sexual harassment in the workplace*. Research Report. Melbourne: Working Against Sexual Harassment.

employer reported a negative, job-related impact, including being disciplined, dismissed or transferred, or having no choice but to resign.⁴⁶ Other work-related outcomes of making a complaint identified in the AHRC 2012 prevalence survey include being labelled a troublemaker, having shifts changed, and being ostracised, victimised or ignored by colleagues.⁴⁷

Other studies report complainants being ignored, victimised or defamed when they report sexual harassment or that the perpetrator's behaviour was minimised, reframed or rationalised as being the result of the complainant themselves, such as poor performance or a consequence of factors outside the workplace.^{48,49} Quinn argues that reinterpretation of sexual harassment suppresses empathy towards women.⁵⁰ Management may also collude with harassers' actions, diminishing the possibility of successful action.⁵¹ Complainants may also be isolated, discredited and subjected to open hostility by colleagues and managers⁵², suggesting that victimisation remains a common problem. A study of US management personnel who handle EEO complaints found that discrimination complaints were frequently recast by managers as personality clashes or interpersonal difficulties, eroding employee trust in grievance procedures.⁵³ This may also reflect a limited understanding of sexual harassment in the general population.⁵⁴ Our own study of complaints lodged with Australian human rights commissions also highlights that a frequent response of employers to formal complaints of sexual harassment is to deny the facts or dispute the interpretation of the facts alleged by the complainant.⁵⁵

Since the overwhelming majority of sexual harassment complaints do not get lodged with external agencies, the internal management of grievances determines, to some extent, *de facto* employment rights. While organisations may conduct a formal investigation into allegations of sexual harassment, our research findings suggest that in many internal investigations a criminal burden of proof is applied before a finding is made that sexual harassment has occurred. Where investigations cannot establish sexual harassment beyond a reasonable doubt the complainant is often left hanging without any clear outcome being reached. It is notable that where complaints are made to human rights commissions that the substance of the complaint is often as much about the failure of internal complaint-handling procedures as about the sexual harassment.

⁴⁶ McDonald, P., Charlesworth, S. & Cerise, S. (2011) Below the 'tip of the iceberg': Extra-legal responses to workplace sexual harassment. *Women's Studies International Forum*, 34(4), 278-289.

⁴⁷ AHRC (2012) Working without fear: Results of the sexual harassment national telephone survey. Sydney: AHRC.

⁴⁸ Handy, J. (2006) Sexual harassment in small-town New Zealand: A qualitative study of three contrasting organisations. *Gender, Work & Organization*, 13(1), 1-24.

⁴⁹ Charlesworth, S. (2006) A snapshot of sex discrimination in employment: Disputes and understandings. In S. Charlesworth, K. Douglas, M. Fastenau & S. Cartwright (Eds.), *Women and work 2005: Current RMIT University Research*. Melbourne: RMIT Publishing, 81-98

⁵⁰ Quinn, B. (2002) Sexual harassment and masculinity: the power and meaning of 'girl watching', *Gender and Society*, 16(3), 386-402.

⁵¹ Handy, J. (2006) Sexual harassment in small-town New Zealand: A qualitative study of three contrasting organisations. *Gender, Work & Organization*, 13(1), 1-24.

⁵² McDonald, P., Backstrom, S. & Dear, K. (2008) Reporting sexual harassment: Claims and remedies. *Asia Pacific Journal of Human Resources*, 46(2), 173-195.

⁵³ Edelman, L., Erlanger, H. & Lande, J. (1993) Internal dispute resolution: the transformation of civil rights in the workplace. *Law and Society Review*, 27(3), 497-534.

⁵⁴ AHRC (2014) *Ending workplace sexual harassment: A resource for small, medium and large employers*. Sydney: AHRC.

⁵⁵ Charlesworth, S., McDonald, P., Worley, A., Graham, T., and Lykhina, A. (2012) *Formal Complaints of Workplace Sexual Harassment Lodged with Australian Human Rights and Equal Opportunity Commissions: 1 July 2009 – 31 December 2009*, Adelaide: Centre for Work + Life, University of South Australia.

Where a choice of sanction for a harasser is available, it is common for the least stringent to be selected, such as a formal or informal warning without further action.^{56,57} These organisational responses deflect managerial or broader organisational responsibility for discrimination and indicate a climate of tolerance where the burden is placed on the person/s who experienced the sexual harassment. Complaints are less likely to be effective against a harasser who has a senior position or who has powerful connections in the organisation.⁵⁸

Vulnerable groups

Women

Precise estimates of the prevalence of workplace sexual harassment reported in the international empirical literature varies across studies due to differences in the research method employed, including variations in sample size and diversity, whether the surveys were randomly generated or targeted in certain industries/sectors, the definition and categorisation of sexual harassment utilised, and the time frame specified.⁵⁹ Consistently however, a large body of international and Australian evidence demonstrates that women are more likely than men to experience sexual harassment. The 2018 Australian Human Rights Commission prevalence study revealed that around 39% of women and 26% of men reported having experienced sexual harassment in the workplace in the past five years, where four out of every five harassers in the workplace were men.⁶⁰

Young women, including youth aged 15-17 years, are particularly susceptible to sexual harassment and tend to be younger than men who experience sexual harassment. It is of particular concern then that this group are the least likely to be aware about what constitutes sexual harassment.⁶¹

The 2018 AHRC prevalence study was conducted in English only so it is not surprising that there was no significant difference found in the prevalence of sexual harassment based on the main language spoken at home. Nevertheless there is strong international evidence that migrant status is a source of additional vulnerability in respect to sexual harassment especially for women,⁶² with migrant workers named as a vulnerable group in the proposed text of an ILO Convention on Violence and Harassment in the World of Work.⁶³ Recent Australian evidence suggests workers on temporary visas are especially vulnerable to sexual harassment and also face considerable practical barriers in making a complaint.^{64 65}

⁵⁶ Salin, D. (2007) Organizational responses to workplace harassment. An exploratory study. *Personnel Review*, 38(1), 26-44.

⁵⁷ European Commission (1999) *Sexual harassment at the workplace in the European Union*. Luxembourg: Office for Official Publication of the European Communities.

⁵⁸ McDonald, P., Graham, T. & Martin, B. (2010) Outrage management in cases of sexual harassment as revealed in judicial decisions. *Psychology of Women Quarterly*, 34(2), 165-180.

⁵⁹ Cagin, J. & Fish, A. (2007) Managing sexual harassment more strategically: An analysis of environmental causes. *Asia Pacific Journal of Human Resources*, 45(3), 333-352.

⁶⁰ Australian Human Rights Commission (2018) *Everyone's business: 2018 sexual harassment survey*. Sydney: AHRC.

⁶¹ Australian Human Rights Commission (2018) *Everyone's business: 2018 sexual harassment survey*. Sydney: AHRC, 23.

⁶² See Moyce, S. C., & Schenker, M. (2018) Migrant workers and their occupational health and safety. *Annual review of public health*, 39, 351-365.

⁶³ See https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_631316.pdf

⁶⁴ Howe, J. (2016). Examining a temporary migrant worker's ability to make a complaint of sexual harassment. *Alternative Law Journal*, 41(2), 102-104.

⁶⁵ Corr, R. (2016) Legal Studies: Sexual harassment and temporary migrant workers. *Alternative Law Journal*, 41(2), 133.

Although women are more likely than men to experience all forms of sexual harassment, women are far more likely to experience more frequent sexual harassment and harassment that is seen as more serious, including experiences of unwanted sexual attention and sexual coercion.^{66,67} Women are more likely to report being subjected to physical forms of sexual harassment than men. In the 2018 AHRC prevalence study, 54% of women and 23% of men reported inappropriate physical contact in their lifetime.⁶⁸

Overall, sexual harassment has a greater impact on women's safety and security in the workforce and their ability to participate in employment on an equal basis with men.

Men who do not conform to traditional male stereotypes

Men who experience sexual harassment are far more likely to be targeted by other men than by women. Our study of 282 formal complaints made in 2009 to all Australian anti-discrimination commissions for example, revealed that although 16% of the complaints were made by men, 89% of their alleged harassers were men.⁶⁹ Many of the experiences described by complainants in the male-to-male group were characterized by taunts about apparently unmasculine conduct and appearance and insinuations that the complainants were gay. Men who do not conform to dominant standards of masculinity may be singled out for demeaning, hostile and even violent sexual conduct, usually by other men, but sometimes by women. Furthermore, men who report sexual harassment effectively violate expectations of what men usually do and are consequently disbelieved or criticized.

Explanations of same-sex sexual harassment support the idea that the conduct is 'heterosexist',⁷⁰ through the punishment of deviance from heterosexual norms. Generally applied, the heterosexist perspective suggests that where employment is organized according to dominant masculine norms, workers are schooled into gender-appropriate behaviours, where individuals, men in particular, are punished for deviating from their prescribed gender role, via homophobic, antigay biases and gender hostility.⁷¹ The expression of such hostility 'becomes a powerful means to keep discipline and to sustain male bonding in ways that help to secure a stable masculine identity'.⁷² This framing appears to provide powerful explanatory value for the sexual harassment of men by other men.

Children and young people

Successive studies of sexual harassment of adult workers have revealed the scale and nature of the problem, and the increased risk for young women in particular, in experiencing the conduct and the psychological harms that may follow. However, with the exception of the recent AHRC prevalence study, which included 15-17 year olds, children under 18 years of age are consistently

⁶⁶ Cortina, L. et al (2002) What's gender got to do with it? Incivility in the federal courts. *Law and Social Inquiry*, 27(2), 235-270.

⁶⁷ Fitzgerald, L., Drasgow, F. & Magley, V. (1999) Sexual harassment in the armed forces: a test of an integrated model. *Military Psychology*, 11(3), 329-343.

⁶⁸ AHRC (2012). Working without fear: Results of the sexual harassment national telephone survey. Sydney: AHRC.

⁶⁹ McDonald, P. & Charlesworth, S. (2016) Workplace sexual harassment at the margins. *Work, Employment & Society*, 30(1), 118-134.

⁷⁰ Epstein, D. (1997) Keeping them in their place: hetero/sexist harassment, gender and the enforcement of heterosexuality. In: Thomas A and Kitzinger C (eds) *Sexual Harassment: Contemporary Feminist Perspectives*. Buckingham: Open University Press, 154-71.

⁷¹ Knights, D. and Tullberg, M. (2012) Managing masculinity/mismanaging the corporation. *Organization* 19(4), 385-404.

⁷² Knights, D. and Tullberg, M. (2012) Managing masculinity/mismanaging the corporation. *Organization* 19(4): 385-404.

excluded from many such studies. This means that Australia lacks any in-depth evidence about the nature and extent of sexual harassment and sex-based bullying experienced by children and young adults in the workplace, and its consequences.

This is despite the fact that the majority of Australian high school children participate in paid work in industries such as retail, hospitality and fast food, and in unpaid work placements, practicums and internships. Depending on state legislation, children as young as 13 can be employed in the world of work.

Children and young adults are inherently vulnerable to adverse experiences including sexual harassment due to their age, sex, and unequal power in employment relationships, and it is important to ensure that workplaces have adequate protections and response mechanisms in place. In short, although it is known that women and younger employees are at greater risk of workplace sexual harassment, we have no evidence of the scale or contours of the problem for children and young adults in particular, nor of its consequences, or of how it might best be prevented and redressed.

Precarious and insecure workers

Precarious and insecure work is increasing in Australia. While the rate of casual employment remains at around 25% for women, 'permanent' part-time employment is becoming less secure and predictable. In feminised occupations where there is significant employment growth, such as in aged care and disability, there has been an increase in casualisation and so-called 'self-employment' through uber-like online platforms.⁷³ Women with irregular, contingent or precarious employment contracts are more susceptible to sexual harassment than those with more secure employment arrangements.⁷⁴

In the most recent AHRC Sexual Harassment Prevalence survey, casual workers do not appear any more likely than other workers to experience sexual harassment in the workplace.⁷⁵ However in our study of formal complaints made in 2009 to all Australian human rights commissions we found that despite comprising 25% of the Australian workforce, only 17% of complainants were employed on a casual basis.⁷⁶ This suggests casual workers are less likely to complain externally when they experience sexual harassment than those employed in more secure forms of work.

Recommendation 3: The Australian Government should devise and deliver a public education campaign which contributes to community awareness that the drivers of workplace sexual harassment are unequal power between men and women and rigid adherence to gender stereotypes, in contrast to individual aberrant behaviour. The public education campaign should highlight workers who are particularly vulnerable to sexual harassment, including women, migrant women, children and young people and precarious and insecure workers.

⁷³ See for example National Disability Services (2018) *Australian Disability Workforce Report 3rd edition - July 2018*, NDS, Sydney; David, C., & West, R. (2017). 'NDIS Self-Management Approaches: Opportunities for choice and control or an Uber-style wild west?'. *Australian Journal of Social Issues*, 52(4), 331-346.

⁷⁴ Takao, S. (2001). Increasingly less equal. *Japan Quarterly*, 48, 24-30.

⁷⁵ Australian Human Rights Commission (2018). *Everyone's business: 2018 sexual harassment survey*. Sydney: AHRC.

⁷⁶ Charlesworth S, McDonald P, Worley, A, Graham T & A Lykina (2012) *Formal complaints of workplace sexual harassment lodged with Australian Human Rights and Equal Opportunity Commissions 1 July 2009-31 Dec 2009*. Adelaide: Centre for Work + Life. Available at <http://www.sexualharassmentinaustralia.org/wp-content/uploads/2012/04/SH-Report.pdf>

Recommendation 4: The Australian Human Rights Commission should draw on the combined experience of all Australian human rights commissions in sexual harassment training and document the most effective features and mode of sexual harassment training, evaluating their own and employer training for its effectiveness across a range of workplaces and industries.

Recommendation 5: The Australian Government, anti-discrimination, worker health and safety and employment regulators should educate employers on effective formal and informal models of grievance management that are victim-centric, timely, co-ordinated and deliver commensurate discipline when complaints are substantiated.

Recommendation 6: When a complaint of sexual harassment is received, organisations should apply standard of proof principles that are commensurate with the civil sphere (viz, ‘on the balance of probabilities’) rather than criminal realm (viz, ‘beyond all reasonable doubt’).

Recommendation 7: Governments, anti-discrimination, work health and safety and employment regulators should encourage employers to collect data on internal organisational complaints, including through interviews with those who experience sexual harassment, to identify areas of risk and to refine and improve organisational prevention efforts and grievance processes.

Recommendation 8: Employers should develop complaint-handling processes that are consistent with a positive voice climate; that is, mature, expert, timely, sensitive and transparent and which include investigations that support complainants to feel safe in reporting their experiences.

Recommendation 9: Human Rights Commissions should conduct a survey to establish the extent, nature and consequences of workplace sexual harassment and gendered bullying for children and young adults aged 14-24.

Term of Reference 5: The current legal framework with respect to sexual harassment

As a fundamental issue of public policy, it is essential to reconsider the current regulatory approach to sexual harassment. Leading scholars maintain sexual harassment is “the last great open secret” and despair at intractable legal problems.^{77,78} Legal rules and complaints mechanisms in anti-discrimination jurisdictions have long been criticised as ineffective, particularly in placing the onus on those who experience sexual harassment to pursue individual remedies. To date these legal rules and complaint mechanisms remain substantially unreformed.

Proposals for positive action have been put forward in previous reviews of anti-discrimination regulation to rebalance the reliance on individuals to pursue individual remedies. Coming out of 2007/2008 Review of the Victorian *Equal Opportunity Act 1995*, a proposal for a positive duty to

⁷⁷ Fitzgerald, L. (2017) Still the last great open secret: Sexual harassment as systemic trauma. *Journal of Trauma & Dissociation*, 18(4), 483-489.

⁷⁸ Quick, J., et al. (2016) Sexual Harassment: Have We Made Any Progress? *Journal of Occupational Health and Psychology*, 22(3), 286-298.

eliminate discrimination, based on the worker health and safety legislative duty of promoting a safe work environment,⁷⁹ was incorporated in the *Equal Opportunity Act 2010*. A positive duty was also canvassed in the proposed harmonisation of the federal statutes in respect of age, race, disability and sex discrimination by Discrimination Law Experts Group. For example, the Discrimination Law Experts Group supported conferring wider regulatory powers on the AHRC to challenge discrimination and harassment including issuing compliance notices, conducting audits and accepting enforceable undertakings, powers given to consumer and competition law and occupational health and safety regulators,⁸⁰ and, we note, to the Fair Work Ombudsman in the area of industrial relations regulation.

Amending the *Sex Discrimination Act 1986* to ensure a positive duty to eliminate discrimination, including sexual harassment, is an important legislative amendment that needs to be considered by the current AHRC Inquiry. We note, however, that without substantial additional resourcing and clear own motion inquiry powers provided to the AHRC, a positive duty in respect of sexual harassment might remain an empty shell.

In the Australian context, formal complaints of sexual harassment have been dealt with overwhelmingly in the nine state, territory and federal anti-discrimination jurisdictions. It is possible for complaints of sexual harassment to be raised in the federal industrial relations jurisdiction under the *Fair Work Act 2009* (the FW Act). To date, however, the evidence suggests that sexual harassment issues are only likely to be considered where either the complainant alleges sexual harassment was a reason for her dismissal,⁸¹ or, far more frequently, where the alleged harasser lodges a complaint of unfair dismissal after he has been dismissed because of the sexual harassment.⁸² This is perhaps not surprising, as sexual harassment is not named as a prohibited form of discrimination under the FW Act, unlike sex discrimination.

We note that while in an earlier version of its litigation policy the employment regulator, the Fair Work Ombudsman (FWO), had stated that ‘sex discrimination’ included sexual harassment, any mention of sexual harassment is no longer present in the current litigation policy nor on the FWO website. Victoria Legal Aid (VLA) has noted that the lack of clear legislative protection from sexual harassment in the FW Act discourages employees from lodging claims under the general protection provisions⁸³. In 2015, the VLA proposed the FW Act should be amended to explicitly recognise that sexual harassment is a form of discrimination on the basis of sex and that sexual harassment may constitute adverse action by a person by reason of the person’s sex.⁸⁴ We would endorse that recommendation but note that to be effective in practice any such reform would also need to be

⁷⁹ *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* State of Victoria, Department of Justice 2008.

⁸⁰ Discrimination Law Experts Group (2012) Submission to the Senate Legal & Constitutional Affairs Committee *Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/submissions, 38.

⁸¹ See for example *Crawford v Steadmark Pty Ltd* (No.2) [2015] FCCA 2697 (8 October 2015).

⁸² See for example *Luke Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174 (9 February 2018); *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156 (26 June 2015).

⁸³ Victoria Legal Aid (2015) Submission to the Productivity Commission Inquiry into the Workplace Relations Framework. Available at: <https://www.pc.gov.au/inquiries/completed/workplace-relations/submissions>, 12.

⁸⁴ Victoria Legal Aid (2015) Submission to the Productivity Commission Inquiry into the Workplace Relations Framework. Available at: <https://www.pc.gov.au/inquiries/completed/workplace-relations/submissions>, 12.

accompanied by training of Fair Work Commissioners and of FWO inspectors and complaint handlers about the harm caused by sexual harassment.

While an anti-bullying jurisdiction exists under the FW Act, it is widely held to be inadequate.^{85 86} A further disadvantage of protections under the FW Act is that they only extend to employees and not all workers, unlike anti-discrimination regulation. Thus, any amendments to the FW Act to explicitly recognise sexual harassment as a breach of employment rights would be limited by this narrow scope.

In principle, sexual harassment, a form of violence in the world of work, should also be considered a breach of worker health and safety (WH&S) laws. A central animating principle of WH&S regulation is a worker's right to 'quiet enjoyment' of their workplace. A feature of WH&S legal frameworks is the regulatory tools provided for the prevention of violence,⁸⁷ 'prevention being the primary objective of occupational health and safety statutes'.⁸⁸ While there are differences between the various Australian state and federal WH&S jurisdictions both in terms of regulation and practice by regulators, it does not currently appear that WH&S regulators are equipped to deal with sexual harassment either by the way of encouraging preventive action by employers or in assisting workers who have been sexually harassed to seek effective redress.

Various options for the reform of legal provisions and complaint mechanisms in Australia to both prevent sexual harassment and respond to it effectively where it occurs will be canvassed by submissions to the Inquiry and presumably by investigations undertaken by the Inquiry. What is clear is that legal regulation should place clear obligations on employers to take preventative action to better protect workers from harassment and victimisation in the world of work and impose substantial financial penalties for failing to do so. It is our strong view that all three forms of employment regulation (anti-discrimination, worker health and safety and industrial relations) and the powers of their linked regulators must be reformed so as to prevent and respond effectively to sexual harassment in the world of work.

Each forum offers a different set of options for both preventative action and for redress for those who experience sexual harassment at work. So that various reform options in these three jurisdictions can be properly evaluated by the vast range of organisations and advocates working on sexual harassment we recommend that the AHRC publish an interim Discussion Paper to set out what options might exist both in terms of regulation and preventative action and complaint handling by regulators. Adequate time should then be allowed for widespread consultation with unions, community legal services and community groups before any final recommendations on legal and practice reform are made by the AHRC.

There is also a pressing need for all legal frameworks to consider contemporary technologies, which present complex issues unanticipated by old legal models⁸⁹ such as where texts, Facebook

⁸⁵ Ballard, A., & Easteal, P. (2018) The Secret Silent Spaces of Workplace Violence: Focus on Bullying (and Harassment). *Laws*, 7(4), 35.

⁸⁶ Worth, R., & Squelch, J. (2015) Stop the bullying: The anti-bullying provisions in the fair work act and restoring the employment relationship. *UNSWLJ*, 38(3), 1015.

⁸⁷ See CCH Commentary: *Australian Managing Work Health and Safety* at [35-300], which includes sexual harassment in its definition of workplace violence.

⁸⁸ Lippel, K. (2016) Addressing *occupational violence: an overview of conceptual and policy considerations viewed through a gender lens*, International Labour Office – Geneva: ILO.

⁸⁹ Henry, N., & Powell, A. (2016) Sexual violence in the digital age. *Social & Legal Studies*, 25(4), 397-418.

and other communications via social media are the norm, and the legal boundaries of what has been seen as the “workplace” are increasingly fluid.⁹⁰

In the sections below, we focus our commentary on the anti-discrimination jurisdictions, which as noted, have provided the primary forum for complaints of sexual harassment and for the education of employers about their obligations to workers. We conclude this section by noting the need for WH&S regulation to explicitly include the prevention of and response to sexual harassment and gender-based violence in employment.

Complaint processes in Human Rights Commissions

Complaint processes in Australia’s human rights/anti-discrimination commissions (hereafter Commissions) warrant attention. The number of complaints of workplace sexual harassment made to these external bodies, in contrast to the number of individuals who experience the problem, has been referred to as ‘the tip of the iceberg’.⁹¹ Further, it has been estimated that fewer than 1% of complainants participate in formal legal proceedings.⁹² There are a number of powerful disincentives to making formal complaints to external agencies, including the nature of conciliation process which potentially fails to deal with power imbalances between complainants and respondents and which may make complainants vulnerable to accepting lesser remedies than they might deserve.⁹³ Those who experience sexual harassment also fear negative impacts on their employment if they make a formal complaint.

Such fears are not unfounded. Our 2012 study of all formal complaints in Australian Human Rights and Equal Opportunity Commissions lodged over a six-month period in 2009 found that as a proportion of the cases examined, between one-third and one-half of those who experienced sexual harassment were dismissed or constructively dismissed at some stage following the making of a complaint.⁹⁴

It appears that, over time, men may be more willing to engage with external complaint processes compared to women. Our 2012 study showed that only one-sixth of the total number of complaints were lodged by men.⁹⁵ This study also showed that complaints made by men were more difficult to resolve (were successfully conciliated less often) in a formal jurisdiction, possibly because they may be less well understood by anti-discrimination agencies or seen as more transgressive or unexpected. Other international research published in the early 2000s also suggests that men are in the minority of formal complainants, with around 85% of complaints filed

⁹⁰ Franks, M. (2012) Sexual Harassment 2.0. *Maryland Law Review*, 71 (3), 655-704.

⁹¹ McDonald, P., Charlesworth, S. & Cerise, S. (2011) Below the ‘tip of the iceberg’: Extra-legal responses to workplace sexual harassment. *Women’s Studies International Forum*, 34(4), 278-289.

⁹² Wayte, T., Samra, J., Robbennolt, J., Heuer, L & Koch, W. (2002) Psychological issues in civil law. In J. Ogloff (Ed.), *Taking psychology and law into the twenty-first century* (pp. 323-369). New York: Springer.

⁹³ Thornton, M. (1991) The public/private dichotomy: Gendered and discriminatory. *Journal of Law & Society*, 18(4), 448-463.

⁹⁴ Charlesworth, S., McDonald, P., Worley, A, Graham, T. & Lykhina, A. (2012) *Formal complaints of workplace sexual harassment lodged with Australian Human rights and Equal Opportunity Commissions 1 July 2009 – 31 December 2009*. Adelaide: University of South Australia.

⁹⁵ McDonald, P. & Charlesworth, S. (2016) Workplace sexual harassment at the margins. *Work, Employment & Society*, 30(1), 118-134

by women and around 15% by men (where, again many harassers are also male).^{96,97} In contrast, the 2018 AHRC prevalence study showed that 9% of men and only 4% of women had their complaint finalised by a Commission or anti-discrimination agency.⁹⁸

Our 2012 study also revealed that the process of reporting sexual harassment to an external body often has a highly deleterious effect on the employment circumstances of the complainant.⁹⁹ Indeed, around two-thirds of complainants named the employer respondent as a *former* employer, indicating that the employment relationship had broken down prior to the complaint being lodged. Other complainants were on sick or stress leave from the organisation.

Some employment-related 'wins' for the complainant included reinstatement, a statement of service, a reference or a job offer. However, the number of complainants who achieved these gains was relatively small¹⁰⁰. A frequently sought outcome was a genuine apology from the alleged harasser and/or the respondent organisation. However, overwhelmingly, any apologies that were offered were phrased in such a way as to avoid liability and as regret for how the (unintended) behaviour was perceived by the complainant, rather than as taking responsibility or apologising for the behaviour itself. Finally, complainants often sought a change to organisational practices through the conciliation process as a way to ensure the problem did not happen to others. However, even if changes to policy and practice were included in formal deeds of settlement, there was scepticism by both complainants and conciliators that they would be implemented because they are not enforceable or monitored by anti-discrimination agencies.

Further severely curtailing the goal of systemic change at the workplace level is that anti-discrimination commissions in Australia do not have a statutory role to monitor compliance with settlement terms. This limitation is at the heart of concerns about the extent to which settlement terms detailing policy changes at the organisational level are adhered to in the longer term. Hence, there is a need to expand upon the statutory roles of Australian commissions in order to monitor compliance with settlement terms such as the development of sexual harassment policies, the implementation of appropriate training, and changes to complaint handling procedures.

Systemically, such measures are necessary for addressing many of the gendered organisational practices that lie at the heart of sexual and sex-based harassment and which disadvantage women and some men. This statutory authority is consistent with the roles of bodies in other countries such as the Advisory, Conciliation and Arbitration Service in the United Kingdom and the Equal Employment Opportunity Commission in United States, where settlement agreements secured during conciliation and mediation are actively monitored and followed up. In the shorter term, Australian anti-discrimination commissions need to be resourced to follow up and monitor settlement outcomes. This more proactive function would go some way towards achieving the potential broader effect of conciliation even under individualised anti-discrimination laws, with

⁹⁶ Firestone, J. & Harris, R. (2003) Perceptions of effectiveness of responses to sexual harassment in the US military, 1988 and 1995. *Gender, Work & Organization*, 10(1), 42-64.

⁹⁷ Samuels, H. (2003) Sexual harassment in the workplace: a feminist analysis of recent developments in the UK. *Women's Studies International Forum*, 26(5), 467-482.

⁹⁸ Australian Human Rights Commission (2018). *Everyone's business: 2018 sexual harassment survey*. Sydney: AHRC

⁹⁹ Charlesworth, S., McDonald, P., Worley, A, Graham, T. & Lykhina, A. (2012) *Formal complaints of workplace sexual harassment lodged with Australian human rights and Equal Opportunity Commissions 1 July 2009 – 31 December 2009*. Adelaide: University of South Australia.

¹⁰⁰ McDonald, P. & Charlesworth, S. (2013) Settlement outcomes in sexual harassment complaints. *Australasian Dispute Resolution Journal*, 24(4), 259-269.

Commissions acting as an intermediary integrating both individual and more systemic organisational change.

Data Collection and Analysis

In order to develop remedies for an intractable problem such as sexual harassment in employment, the issue needs to be fully understood. Access to complaints data in particular is a crucial means through which organisations and researchers can generate strategies to address gender-based violence.

There is an urgent need for Australian human rights commissions to routinely collect comprehensive and nuanced data on complaints of sexual harassment and other forms of discrimination lodged with them. At a minimum, this includes the characteristics of the complainant (sex, age, birthplace, occupation, employment status); the characteristics of the respondent (industry, size of workplace); and the characteristics of the harassment itself.

Such data would assist with monitoring and responding to 'hot spots' more effectively. For example, the collection of data on complaints by industry (using ABS ANZSIC categories) would enable the identification of over- and under-reporting within particular industries, and subsequent proactive systemic action targeted at industry stakeholders such as employer peak bodies and trade unions. Likewise, collecting data on the prevalence of sexual harassment in specific occupational groups (using ABS ANZSCO categories) would enable the development of educational material that could be targeted at industry associations and trade unions where certain occupations are over- or under-represented in the complaints.

Similarly, there has been little systematic data collection or monitoring of the financial or other terms of settlement of discrimination complaints.¹⁰¹ As is the case internationally, while the outcomes of some court and tribunal decisions in some sexual harassment cases have attracted significant media attention, there is little publicly available data and only infrequent research that has addressed the outcomes of conciliation processes. Studies that do exist tend to focus on a single jurisdiction and/or are limited by small sample sizes.

The hidden nature of conciliation limits understanding of the processes involved and the nature of outcomes achieved. Even de-identified settlement data are rarely systematically evaluated or published; a fact that prevents complainants from acquiring relevant information that could be used to guide their expectations or claims, evaluate the fairness of their settlements, or provide a deterrent for individuals and workplaces. Indeed, although some Australian human rights commissions have published limited selected vignettes providing brief details about successfully conciliated complaints and their outcomes, it is hardly surprising that complainants come to the complaints process uncertain about what outcomes are possible or realistic. This lack of transparency is the reason why critics of alternative dispute resolution argue that it erodes the public realm.¹⁰²

¹⁰¹ McDonald, P. & Charlesworth, S. (2013). Settlement outcomes in sexual harassment complaints. *Australasian Dispute Resolution Journal*, 24(4), 259-269.

¹⁰² Luban D, (1995) Settlements and the Erosion of the Public Realm, *Georgetown Law Journal* 83(7), 2619-2662.

Legal processes in courts and tribunals

As we asserted in our 2011 study of extra-legal strategies in sexual harassment claims,¹⁰³ the legal proscription of sexual harassment in Australia has been important for raising the visibility of sexual harassment as a gendered harm.¹⁰⁴ The law has significant symbolic functions. These extend well beyond merely judicial pronouncements from the courts, but rather constitute powerful symbolic resources and practices that shape culture, politics and social relations.¹⁰⁵ Laws are also an important precondition to opportunities for effective internal corporate regulation of sexual harassment,¹⁰⁶ including the way organisational decision-makers are obliged to manage grievances and implement law.^{107, 108}

However, when conciliation is unsuccessful, and cases are taken to a hearing, a major disadvantage is the provision of inadequate legal assistance and the high costs involved, especially in the Federal jurisdiction where in anti-discrimination cases, but not cases under the FW Act, costs follow the outcome. This presents a significant barrier to seeking redress through the courts, given individuals may be opposed by large and very well-resourced corporate players.^{109 110} Hunter¹¹¹ also notes that a strong disincentive to legal strategies is the extremely lengthy duration of court proceedings. In her study, respondents spent an average of four days in the witness box.

Other limitations of legal frameworks include the positioning of sexual harassment as individual, aberrant behaviour rather than a systemic expression of gender inequality, the de-contextualizing of discrimination complaints in formal proceedings, the judicial reluctance to transcend traditional gendered assumptions in decisions and the low level of compensation awarded to those claims that are upheld.^{112, 113, 114}

Supporting the argument that legal cases are the ‘tip of the iceberg’ compared to the prevalence of sexual harassment, our unpublished analysis reveals that between 2009 and 2014, there were only 41 substantive legal determinations relating to claims of sexual harassment in employment in Australian courts and tribunals (mean 6.8 per year; 34 women, 7 men). Of these cases 32 were determined in state and territory anti-discrimination jurisdictions with the remaining nine cases determined in the federal jurisdiction. When compared with an earlier study that found there had

¹⁰³ McDonald, P., Charlesworth, S. & Cerise, S. (2011) Below the ‘tip of the iceberg’: Extra-legal responses to workplace sexual harassment. *Women’s Studies International Forum*, 34(4), 278-289.

¹⁰⁴ Gaze, Beth (2004) The Sex Discrimination Act after twenty years: Achievement, disappointment, disillusionment and alternatives. *UNSW Law Journal*, 27(3), 914–921.

¹⁰⁵ Marshall, A. (2005) *Confronting sexual harassment: The law and politics of everyday life*. Aldershot: Ashgate.

¹⁰⁶ Parker, C. (1999) Public rights in private government: Corporate compliance with sexual harassment legislation. *Australian Journal of Human Rights*, 5(1), 159–193.

¹⁰⁷ Cahill, M. (2001) *The social construction of sexual harassment law: The role of the national, organizational and individual context*. Aldershot: Ashgate.

¹⁰⁸ Edelman, L., Erlanger, H. & Lande, J. (1993) Internal dispute resolution: The transformation of civil rights in the workplace. *Law & Society Review*, 27(3), 497–534.

¹⁰⁹ Gaze, B. (2004) The Sex Discrimination Act after twenty years: Achievement, disappointment, disillusionment and alternatives. *UNSW Law Journal*, 27(3), 914–921.

¹¹⁰ Hunter, R. (2002) Border protection in law's empire: Feminist explorations of access to justice. *Griffith Law Review*, 11(2), 263–285.

¹¹¹ See 113

¹¹² Easteal, P. & Feerick, C. (2005) Sexual assault by male partners: Is the license still valid? *Flinders Journal of Law Reform*, 8(2), 185–207.

¹¹³ Fredman, S. (2002) *Discrimination law*. New York: Oxford University Press.

¹¹⁴ Thornton, M. (2002) Sexual harassment losing sight of sex discrimination. *Melbourne University Law Review*, 26(2), 422–444.

been 68 determinations in Australian courts between 2005 and 2010, it is evident that the numbers of sexual harassment court and tribunal decisions are declining.¹¹⁵ In our study of the 41 sexual harassment decisions, just over half of the claims made were upheld. Cases where claimants alleged physical forms of sexual harassment were twice as likely to be upheld compared to those who alleged non-physical forms of sexual harassment.

This suggests that while the most frequent form of sexual harassment experienced in employment, courts and tribunals may not take non-physical sexual harassment as seriously. There also appears to be little consistency in financial remedies awarded in successful cases. Awards ranged very widely from \$1000 in the case of *Paterson v Clarke 2009* (ACT Anti-discrimination Tribunal), where a restaurant waitress was subject to verbal and physical sexual harassment by the restaurant's director, to \$476,000 in the case of *Edwin v Vergara 2013* (Ewin v Vergara (No 3) - [2013] FCA 1311) where a female accountant was verbally sexually harassed for several days before being sexually assaulted by a co-worker after a work function. The mean of financial remedies made in the 24 successful cases was \$26,795 and the median approximately \$10,000. The scale of such remedies offers a sobering reminder of why so few of those who are sexually harassed pursue formal legal avenues. The costs of legal representation, even where successful, may also offer an additional barrier given in the state and territory jurisdictions claimants normally bear their own legal costs.

Explicit inclusion of sexual harassment and gender-based violence in worker health and safety regulation

The urgent need to provide safe workplaces free of all forms of gender-based violence has been taken up internationally in a proposed International Labour Organization (ILO) Convention on violence and harassment in the world of work. The draft Convention text emphasises a *collective* worker health and safety (WH&S) approach to preventing and responding to all forms of gender-based violence.¹¹⁶ The draft text sets out prevention measures, which include identifying the sectors, occupations and work arrangements where workers are more vulnerable in consultation with employers and workers organisations. It also sets out provisions addressing government and employer obligations in terms of enforcement monitoring and victim support placing an emphasis on consultation with workers and their representatives.

ILO Conventions have a normative force – they are an international 'naming' of what are considered to be basic labour standards for all workers. They can be used to raise community and political awareness of issues such as sexual harassment and gender-based violence and also provide guidance in terms of regulatory 'asks' by community and advocacy groups. As we have seen in Australia with respect to ILO 156 Convention on Workers with Family Responsibilities, where they are ratified, ILO Conventions shape national legislation and government, union and employer action.

¹¹⁵ Easteal, P., Saunders, S., Judd, K., & Arnold, B. (2011) Sexual harassment on trial: The DJs case. *Alternative Law Journal*, 36(4), 230-235.

¹¹⁶ International Labour Conference [ILC] (2018) *Fifth item on the agenda: Violence and harassment against women and men in the world of work Reports of the Standard-Setting Committee: Resolution and proposed Conclusions submitted for adoption by the Conference*, Provisional Record 8A 107th Session, Geneva, May–June 2018, Geneva.

While the proposed Convention provides a useful framework for action, much of Australia's current WH&S regulation does not provide the basis for proactive and collective action to prevent and redress gender-based violence, including sexual harassment. Although physical and non-physical violence in the workplace, such as verbal threats, fall within the remit of WH&S regulation, if that same violence reflects gendered hostility or has a sexualised dimension, WH&S protections are much more difficult to mobilise.

In the absence of responsive WH&S provisions, those who experience gender-based violence are left with the burden of seeking remedies through anti-discrimination mechanisms. Such approaches have significant limitations as noted above, individualising the harms caused by sexual harassment and sex-based harassment and contributing little to changing organisational structures that underpin gender-based violence or providing broader systemic responses to workplace gender inequality.¹¹⁷

There are growing calls in Australia for workplaces to share the responsibility of monitoring and addressing gendered violence in a proactive, collective and systemic way through WH&S regulation. We also need explicit provisions in WH&S regulation that acknowledge sexual harassment and other forms of gender-based violence as a serious risk, like other types of occupational violence, with mechanisms that support prevention and allow workers to pursue injury claims that arise from such hazards.

Recommendation 10: So that proposed reform to anti-discrimination, worker health and safety and employment laws and regulator practices can be fully evaluated, the AHRC should publish an interim Sexual Harassment Inquiry Discussion Paper to set out options on regulatory changes and on preventative action and complaint handling by regulators. Adequate time should be allowed for widespread consultation with unions, employer bodies, community legal services and community groups before any final recommendations on legal and practice reform are made by the AHRC.

Recommendation 11: Legal regulation should place clear obligations on employers to take preventative action to better protect workers from harassment and victimisation in the workplace and impose substantial financial penalties for failing to do so.

Recommendation 12: The Commonwealth, state and territory governments should resource and equip Human Rights Commissions to be able to follow up and monitor changes to policy and practice promised by organisations in settlement agreements with complaints.

Recommendation 13: Anti-discrimination, worker health and safety, and employment regulators should all be required to collect accurate, annual data on sexual harassment and other discrimination complaints on characteristics including industry, occupation, employment status, country of birth of complainants, as well as on financial and other terms of settlements reached and make deidentified data available for research purposes.

¹¹⁷ McDonald, P & Charlesworth, S (2013) Settlement outcomes in sexual harassment complaints. *Australasian Dispute Resolution Journal*, 24(4), 259-269.

Recommendation 14: The Australian government should support the adoption of the proposed ILO *Convention on Violence and Harassment in the World of Work* at the 2019 International Labour Conference.

Recommendation 15: National and state-based worker health and safety laws should be reformed to explicitly recognise gender-based violence, mandating positive action, prevention and complaint mechanisms to address it.

Term of Reference 6: Existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment

Workplace Reviews

A number of major independent workplace reviews have been undertaken in Australia in recent years that address both sexual harassment and gender-based violence within the context of systemic gender inequality. These reviews examine in detail, through the collection of robust qualitative and quantitative data sources, the factors that support or undermine gender equality within the organisation to develop findings and targeted recommendations. These recommendations address a broad range of organisational issues, including leadership; enhancing the recruitment and retention of women; education and knowledge development; supporting local managers and supervisors; ensuring workplace safety and welfare; addressing barriers to reporting and disclosure; and improving actions and outcomes of formal processes.

The value of these reviews are in 1) the fact that they are undertaken by an independent agency external to the organisation being reviewed; 2) the comprehensive, holistic and systematic nature of data collection and analysis undertaken as part of the review; 3) the ability to investigate the nature of a range of gendered workplace conduct that often co-exists including sexual harassment, sex-based harassment, sex discrimination, sex-based bullying and sexual assault; and 4) the organisation-specific recommendations that enable changes appropriate to the particular structural, regulatory and cultural context in question.

Examples of such reviews include those for the Royal Australasian College of Surgeons,¹¹⁸ Universities Australia,¹¹⁹ the Australian Defence Force,¹²⁰ Victoria Police,¹²¹ South Australian

¹¹⁸ *Expert Advisory Group on discrimination, bullying and sexual harassment Report to the Royal Australasian College of Surgeons* (2015) Sep 8.

¹¹⁹ Australian Human Rights Commission (2017) *Change the course: National report on sexual assault and sexual harassment at Australian Universities*. Sydney: AHRC.

¹²⁰ AHRC (2012) Report on the Review into the Treatment of Women in the Australian Defence Force.

¹²¹ VEOHRC (2015) Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police: Phase One Report - Dec 2015

Police,¹²² Australian Federal Police,¹²³ and Victorian Country Fire Authority and Metropolitan Police Brigade.¹²⁴

Workplace Policies & Prevention Strategies

As noted above, many organisations have developed policies on sexual harassment. Such policies often include a statement defining and detailing sexual harassment, a complaints procedure, remedial measures, training and monitoring and evaluation.¹²⁵ Critics argue that policies and grievance procedures do more to protect employers from liability than to protect or assist complainants. For example, the very existence of a policy may protect an employer from liability and by allowing grievances to be remedied internally they may prevent complainants from making the complaint more publicly.^{126,127}

Notwithstanding these limitations, policies, and the management systems that support them, have a greater capacity to change attitudes and behaviour than relying on legal protections alone. Such workplace 'regulation' can make a difference to the everyday lives of many women and some men who would never invoke their rights in a public or legal forum. The creation of a sexual harassment policy is generally considered a minimum benchmark for primary prevention. This is because policies, and associated practices, are designed to create respectful and hospitable work environments that do not demean workers on the basis of sex¹²⁸ and there is evidence that paper policies have translated into real change in corporate culture, as judged by women themselves.¹²⁹

However, it is important to note that even in the context of extensive sexual harassment policies and appropriate training, opportunities for those who experience sexual harassment to seek advice and to seek and receive remedy can be discouraged or thwarted.^{130,131,132} Hence, for policies to be effective, they should be visible and widely disseminated through multiple communication channels; include a statement of intent to enforce seriously and promptly; be developed through consultation rather than 'top-down'; and include a commitment to broader gender equality goals.¹³³

¹²² South Australian Equal Opportunity Commission (2016) Independent review into sex discrimination and sexual harassment, including predatory behaviour.

¹²³ Elizabeth Broderick & Co. (2016) Cultural Change: Gender Diversity and Inclusion in the Australian Federal Police.

¹²⁴ Appeal court hands down decision on the Independent Equity and Diversity Review into CFA and MFB. See <https://www.humanrightscommission.vic.gov.au/home/news-and-events/commission-news/item/1752-appeal-court-hands-down-decision-on-the-independent-equity-and-diversity-review-into-cfa-and-mfb>

¹²⁵ McCann, D. (2005) *Sexual harassment at work: National and international responses*. Geneva, Switzerland: International Labour Office.

¹²⁶ Parker, C. (1999) Public rights in private government: corporate compliance with sexual harassment legislation. *Australian Journal of Human Rights*, 5(1), 159-193.

¹²⁷ Charlesworth, S. (2002) 'Risky Business: Managing Sexual Harassment at Work', *Griffith Law Review*, 11(2), 353-376.

¹²⁸ Berdahl, J. & Moore, C. (2006) Workplace harassment: Double jeopardy for minority women. *Journal of Applied Psychology*, 91(2), 426-436.

¹²⁹ Still, L. (1997) *Glass floors and sticky ceilings: Barriers to the careers of women in the Australian finance industry*. Sydney: Human rights and Equal Opportunity Commission.

¹³⁰ McDonald, P., Charlesworth, S. & Cerise, S. (2011) Below the 'tip of the iceberg': Extra-legal responses to workplace sexual harassment. *Women's Studies International Forum*, 34(4), 278-289.

¹³¹ Bell, M., Cycyota, P. & Quick, J. (2002) Assessment and prevention of sexual harassment of employees: An applied guide to creating health organizations. *International Journal of Selection and Assessment*, 10(1/2), 160-167.

¹³² Masters, M. & Albright, R. (2002) *The complete guide to conflict resolution in the workplace*. American Management Association, New York.

¹³³ Thomas, A. (2004) Politics, policies and practice: Assessing the impact of sexual harassment policies in UK universities. *British Journal of Sociology of Education*, 25(2), 143-160.

Unfortunately, even when employers receive complaints of sexual harassment, many do not respond by enacting or upholding policies and taking other primary prevention strategies. In our three-year Australian Research Council project on sexual harassment which involved interviews with a range of individuals who had been sexually harassed at work, with organisations, with community legal services including working women's centres, with unions as well as lawyers and consultants who would be called in to mop up the fallout from failed internal investigations, we found many examples of managers and employers refusing to believe or respond adequately to a complaint of sexual harassment, often treating the person complaining as 'the problem'.

The resounding feedback from those who had been sexually harassed, from advocates, and from those undertaking internal investigations, was that employers and managers should take any complaint of, or concern raised about, sexual harassment seriously, listen to the person making it and ask them what they would like to be done. Where someone decides not to proceed with a formal complaint, employers and human resource practitioners need to undertake an assessment of the extent to which the broader workplace culture tolerates sexual harassment.

In the 2012 AHRC prevalence study, in only 9% of cases did employers make changes to employment practices or procedures or develop or amend policies on sexual harassment following a complaint. Similarly, data from our 2012 study of Human Rights Commission complaints found that in the settlement of complaints, systemic responses by employers was rare, with only one quarter stating they would implement education/EEO programs and only 12% promising to change policies and practices.¹³⁴ These findings suggest a resistance by employers to systemically address the problem of sexual harassment even where a complaint is made.

In terms of good practice in the area of prevention, the main primary prevention strategies discussed in the literature on sexual harassment and other workplace injustices focus on policy and training. With respect to policies addressing organisational injustice, six features of effective policies are consistently emphasized which we summarise here together with four principles that appear to be important in designing training content.

First, drawing on the notion of moral agency and studies of whistle blowing,¹³⁵ policies should be underpinned by a clear understanding of what constitutes wrongdoing in the organisation. The second feature of effective policy is visibility. Clear behavioral norms should be set and policies on sexual harassment should be widely known, with open and visible statements that harassment will not be tolerated widely disseminated in public work spaces.¹³⁶ The third element considers the way grievance procedures and protections are framed. This is a complex issue. While 'no tolerance' policies may help prevent sexual harassment, they may also focus more on organisational reputation than on the interests and preferences of those who experience sexual harassment.

Fourth, preventative organisational actions rely on effective high-level management and modeling, including the formulation and communication of policies relevant to sexual harassment as well as to gender equality more broadly. Policy-related management strategies that prevent other forms

¹³⁴ McDonald, P. & Charlesworth, S. (2013) Settlement outcomes in sexual harassment complaints. *Australasian Dispute Resolution Journal*, 24(4), 259-269.

¹³⁵ Miceli, M., Near, J. and Morehead, D.T. (2008) A word to the wise: How managers and policy-makers can encourage employees to report wrongdoing. *Journal of Business Ethics* 86(3), 379-396.

¹³⁶ Bell, M., Cycyota, P. and Quick, J. (2002) Assessment and prevention of sexual harassment of employees: An applied guide to creating healthy organizations. *International Journal of Selection and Assessment* 10(1/2), 160-167.

of organisational injustice have also been raised in the whistleblowing literature. These include building incentives for accurate internal reporting into the reward structure and providing feedback and giving credit to line managers for taking action.¹³⁷ The fifth element of effective policy identified in the sexual harassment literature is the inclusion of a statement of intent to enforce seriously and promptly, and a clear specification of the penalties for violation.¹³⁸ The sixth and final element of effective policy is a commitment to broader gender equality goals, including a focus on gender relations, providing definitions in gender-specific terms and taking differences in power into account.¹³⁹

The second arm of primary prevention is training. Studies on sexual harassment and other workplace injustices have provided recommendations for appropriate content and process. In delivery, for example, education sessions should be conducted regularly and universally, that is, at all work sites and across all hierarchical levels and not only to targeted groups or those who attend voluntarily.¹⁴⁰ Four principles appear to be important in training content. First, training should be developed from information gathered from organisational assessments.¹⁴¹ Assessing early risk factors includes identifying situations in which sexual harassment is more likely to occur, gauging women's roles, status and positions in the organisation, and conducting regular and anonymous attitude surveys which include measures of sexual harassment.¹⁴² Second, training should raise awareness and clarify misconceptions about what constitutes sexual harassment¹⁴³ while highlighting and reinforcing acceptable behavioral norms. Studies have also highlighted the importance of modeling and rehearsal in clarifying misconceptions around sexual harassment.

Third, research suggests that training for managers should include conflict management, including the managing of emotions and facilitation techniques.¹⁴⁴ A study on employee voice¹⁴⁵ recommended including communication and emotional skills training to ensure managers demonstrate empathy, actively listen and probe effectively, helping them to deal with tendencies to become defensive or to deny the legitimacy of complaints. Fourth, training should challenge gendered organisational cultures. Importantly, it is not the organisational sex-ratio of the workplace that makes sexual harassment problematic, but rather organisational environments that

¹³⁷ Miceli, M., Near, J. and Morehead, D.T. (2008) A word to the wise: How managers and policy-makers can encourage employees to report wrongdoing. *Journal of Business Ethics*, 86(3), 379–396.

¹³⁸ Masters, M. and Albright, R. (2002) *The complete guide to conflict resolution in the workplace*. American Management Association, New York.

¹³⁹ Zippel, K. (2003) Practices of implementation of sexual harassment policies: Individual versus collective strategies. *Review of Policy Research* 20(1), 175–197.

¹⁴⁰ Bell, M., Cychota, P. and Quick, J. (2002) Assessment and prevention of sexual harassment of employees: An applied guide to creating healthy organizations. *International Journal of Selection and Assessment* 10(1/2), 160–167.

¹⁴¹ Buhler, P.M. (1999) The manager's role in preventing sexual harassment. *SuperVision*, 60(4), 16–18.

¹⁴² Bell, M., Cychota, P. and Quick, J. (2002) Assessment and prevention of sexual harassment of employees: An applied guide to creating healthy organizations. *International Journal of Selection and Assessment* 10(1/2), 160–167.

¹⁴³ York, K., Barclay, L. and Zajack, A. (1997) Preventing sexual harassment: The effect of multiple training methods. *Employee Responsibilities and Rights Journal* 10(4), 277–289.

¹⁴⁴ Masters, M. and Albright, R. (2002) *The complete guide to conflict resolution in the workplace*. American Management Association, New York.

¹⁴⁵ Harlos, K. (2001) When organizational voice systems fail: More on the deaf-ear syndrome and frustration effects. *Journal of Applied Behavioral Science* 37(3), 324–342.

are hierarchical, especially those where cultural norms are associated with sexual bravado and posturing and where the denigration of feminine behaviors is sanctioned.^{146 147}

Bystander Interventions

When an individual is sexually harassed at work, others frequently become involved. These individuals include co-workers, line managers, HR personnel, union advocates and contractors. In our published Australian empirical study of bystander involvement in workplace sexual harassment,¹⁴⁸ it was found that the most frequently occurring action was to provide support and advice to those who experienced sexual harassment at some time following the immediate event. Female co-workers were particularly likely to offer support, perhaps because they identified more strongly with those who were harassed who were predominantly women. However, there were numerous examples cited in the study whereby co-workers initially promised to support the target publicly should a complaint escalate, but later withdrew their support. This is likely to be related to perceived negative consequences for the bystander, such as fear of reprisals, or the withdrawal of rewards, for doing so.¹⁴⁹

Bystander actions considered to be more effective, such as interrupting an ongoing harassment incident or challenging a harasser directly, were rare. Frequently, co-workers and managers took no action at all or their responses were tentative, temporary, delayed or ineffective. There were also some examples of co-workers who not only failed to intervene, but also participated in the harassing conduct and this had particularly humiliating and degrading effects on victims. The study concluded that whilst responses were frequent and varied in nature, overall, they were limited in preventing further harassment and/or redressing harm.

Other research which has addressed the perceptions of those who are sexually harassed has shown that women who do not laugh at sexist jokes are often accused of not having a sense of humour. This aligns with the notion of devaluation of those who complain, where they are subject to derogatory labelling or accusations of poor performance, dishonesty, sloppiness or incompetence. It is also analogous to the experiences of many sexual assault survivors who are subject to messages that they are to blame for the assault, that they caused it, and that they deserved it.¹⁵⁰

The systems and dynamics of organisational settings powerfully structures and constrains the ability of those who experience sexual harassment in employment and bystanders to respond effectively to sexual harassment and prevent further harm, and in different ways to bystander interventions in other settings such as college campuses or public spaces.

Promoting bystander interventions is likely to be an important component of any multi-faceted strategy to eradicate workplace sexual harassment and abuse. However, it is important that it is not the only solution, as seems to be implied in recent attempts to implement 'instrumental sexual

¹⁴⁶ Chamberlain, L. (2008) *A prevention primer for domestic violence: Terminology, tools, and the public health approach*. The National Online Resource Center on Violence Against Women, Harrisburg, PA.

¹⁴⁷ De Haas, S. and Timmerman, G. (2010) Sexual harassment in the context of double male dominance. *European Journal of Work and Organizational Psychology* 19(6), 717–734.

¹⁴⁸ McDonald, P., Charlesworth, S. & Graham, T. (2015) Action or inaction: bystander intervention in workplace sexual harassment. *The International Journal of Human Resource Management*, 27(5-6), 548-566.

¹⁴⁹ McDonald, P., Graham, T. & Martin, B. (2010) Outrage management in cases of sexual harassment as revealed in judicial decisions. *Psychology of Women Quarterly*, 34(2), 165-180.

¹⁵⁰ Campbell, R., Dworkin, E. & Cabral, G. (2009) An ecological model of the impact of sexual assault on women's mental health. *Trauma, Violence & Abuse*, 10(3), 225-246.

harassment training' in some settings. Bystanders face similar risks to their employment security and reputations as victims do, and organisations should be mindful not to transfer the responsibility of addressing the conduct onto individuals but rather work towards effective systemic measures to promote gender equality.

Responding to Backlash

Backlash is a negative, hostile or aggressive reaction to a political idea. The term has been applied to civil and race rights. Recently however, it has been prominent in politics, business and the media, as an opposing stance to initiatives designed to advance women's rights and social status.

History makes it clear that when gains for women are made, conservative forces, which strongly adhere to the idea that the roles of men and women are traditional or natural, will rise up to slap them down. This has the effect of limiting, and at times reversing the progress that has been made.

Backlash includes attempts to discredit arguments about gender equality or the gendered nature of violence. It also supports efforts to preserve existing gender norms and hierarchies. In organisations, backlash undermines attempts to eradicate sexual harassment and other forms of gender-based violence.

In organizations too, backlash has been a conspicuous feature of attempts to reverse entrenched gender inequality. Research and national consultation undertaken by Our Watch, in partnership with Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth, found evidence of hostility towards gender equality initiatives and reforms where existing or expected power differentials and hierarchies are challenged.¹⁵¹

Backlash has also been evident in Victoria Police in response to recommendations arising from the comprehensive VEOHRC Review and subsequent Audit of the organisation.¹⁵² Examples from survey and interview responses included denials of the extent of the problem, claims that resources would be better diverted elsewhere, and that measures to improve gender equality disadvantage men or undermine organisational goals.

A particularly potent example of backlash recently played out through a succession of legal challenges in Victoria. The United Firefighters Union successfully prevented the release of a report into systemic bullying and sexual harassment in the State's firefighting services. The decision was based on the view that the investigation was illegitimate because the Victorian Government rather than the Metropolitan Fire Brigade or the Country Fire Authority had requested it. However, the Union's additional claim that the Review was flawed on methodological grounds was not upheld.

While most examples of backlash are ideologically driven, attacking the principles of feminism and gender equality more broadly, recently we've seen a new twist on the theme. Reminiscent of climate change deniers who for decades have challenged the science that sits behind predictions of global warming, the methods utilised in Australian research to estimate the prevalence and nature of sexual harassment and sexual assault has recently come under fire. This was especially notable

¹⁵¹ Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth (2015). *Change the story: A shared framework for the primary prevention of violence against women and their children in Australia*, Melbourne: Our Watch.

¹⁵² VEOHRC (2017). *Independent review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police: Phase 2 audit*. Melbourne: VEOHRC.

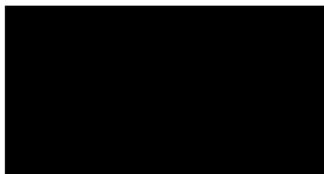
in response to the Australian Human Rights Commission's study of sexual harassment on University campuses,¹⁵³ which drew a scathing attack from several conservative journalists.

These examples of backlash offer some important lessons. In organisations and other institutions, some will feel that there is no value in a more diverse workforce and that measures to address entrenched gender inequality are unfair and a form of 'reverse discrimination'. A comprehensive employee engagement process is needed to ensure women are not targeted or ostracised during the transition. Reviews and surveys should be well designed and administered so their findings can withstand scrutiny from conservative commentators. The benefits of achieving gender equality for both men and women need to be reinforced. Inevitably however, measures which challenge the status quo bring with them opposition and resistance. Anticipating and planning to address backlash is an important part of the change process.

Recommendation 16: That governments and regulators encourage the adoption by employers of clear evidence-based principles to underpin organisational sexual harassment policy and training to ensure a safe workplace for all workers.

Recommendation 17: Employers should support bystanders to be proactive in preventing and calling out sexual harassment as one component of broader systemic organisational change and recognising limitations in this onus of responsibility.

Recommendation 18: Employers should prepare for backlash where negative, hostile or aggressive reactions are likely to occur in response to initiatives designed to advance gender equality.



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¹⁵³ Australian Human Rights Commission (2017). *Change the course: National report on sexual assault and sexual harassment at Australian Universities*. Sydney: AHRC.

Appendix: Published Research relevant to workplace sexual harassment by the Submission's authors

Term of Reference 2: Online workplace-related sexual and sex-based harassment

1. McDonald P. & Thompson P (2016). Social media(tion) and the reshaping of public/private boundaries in employment relations. *International Journal of Management Reviews*, 18(1), 69-84.

Term of Reference 3: The use of technology and social media

2. McDonald P, P Thompson & P O'Connor (2016). Profiling employees online: Shifting public-private boundaries in organisational life. *Human Resource Management Journal*, 26(4), 541-556.
3. O'Connor, P. & McDonald, P. (2016). Is your employer watching you? Online profiling blurs the boundary of our public and private lives. *The Conversation*, 25 August. <https://theconversation.com/is-your-employer-watching-you-online-profiling-blurs-the-boundary-of-our-public-and-private-lives-64300>

Term of Reference 4: The drivers of workplace sexual harassment

4. McDonald P (2012). Workplace sexual harassment 30 years on: A review of the literature. *International Journal of Management Reviews*, 14(1), 1-17.
5. McDonald, P. (2016). Why is sexual harassment in the AFP systemic? And can the culture be changed? *The Conversation*, 25 August. <https://theconversation.com/why-is-sexual-harassment-in-the-afp-systemic-and-can-the-culture-be-changed-64306>
6. McDonald, P. (2015). *Report reveals entrenched nature of sexual harassment in Victoria Police*. *The Conversation*, November. <https://theconversation.com/report-reveals-entrenched-nature-of-sexual-harassment-in-victoria-police-51810>
7. McDonald P & A Cathcart (2013). Speaking truth to power: sexism, outrage and the public consciousness. In J Caro (Ed.) *Destroying the Joint: Why Women Have to Change the World*. University of Queensland Press, St Lucia, 182-188.
8. Mayes R (2014). Gender dimensions of resource extraction: The place of women. In M Brueckner, A Durey, Angela, R Mayes & C Pforr (Eds.) *Resource Curse or Cure? On the Sustainability of Development in Western Australia*. Springer, Heidelberg. 121-133.
9. McDonald P, R Mayes & M Laundon (2016). *Everyday Sexism Survey: Report to Victoria's Male Champions of Change Group*. Queensland University of Technology, Brisbane.
10. McDonald P & S Charlesworth (2016). Workplace sexual harassment at the margins. *Work, Employment and Society*, 31(1), 118-134.
11. McDonald P, R Price & J Bailey (2013). Knowledge is not power, but it's a start: What young people know about their rights and obligations in employment. *Youth Studies Australia*, 32(2), 49-58.
12. Kellner A, P McDonald & JM Waterhouse (2011). Sacked! Workplace dismissals amongst youth employees. *Journal of Management and Organisation*, 17(2), 226-244.
13. Dear K & P McDonald (2005). Who is upholding the rights of young workers? *Youth Studies Australia*, 24(3), 10-16.

14. Townsend K, P McDonald & A. Cathcart (2017). Managing flexible work arrangements in small not-for-profit firms: The influence of organisational size, financial constraints and workforce characteristics. *The International Journal of Human Resource Management*, 28(14), 2085-2107.
15. Williams P, P McDonald & A Cathcart (2017). Executive-level support for flexible work arrangements in a large insurance organisation. *Asia Pacific Journal of Human Resources*, 55(3), 337-355.
16. Smith N & P McDonald (2016). Facilitating sustainable professional part-time work: A question of design? *Journal of Management & Organisation*, 22(2), 205-223.
17. Cathcart A, P McDonald & D Grant-Smith (2014). Challenging the myths about flexible work in the ADF. *Australian Defence Forces Journal* 95, 55-68.
18. McDonald P, K Townsend & A Wharton (2013). The legitimisation and reproduction of discourse-practice gaps in work-life balance. *Personnel Review*, 42(2), 205-222.
19. McDonald P & E Jeanes (Eds) (2012). *Men, Wage Work and Family*. Routledge, London.
20. Chang A, P McDonald & P Burton (2010). Methodological choices in work-life balance research 1987 to 2006: A critical review. *International Journal of Human Resource Management*, 21(13), 2381-2413.
21. McDonald P, L Bradley & K Brown (2009). Full-time is a given here: Part-time versus full-time job quality. *British Journal of Management*, 20(2), 143-157.
22. Townsend K & P McDonald (2009). Work life balance. In T Redman & A Wilkinson (Eds.) *Contemporary Human Resource Management (3rd Edition)*. Financial Times/Prentice Hall, Harlow. 364-380.
23. McDonald P (2008). Family responsibilities discrimination in Queensland workplaces: Where business and caring collide. *Journal of Industrial Relations*, 50(1), 45-67.
24. Pini B & P McDonald (2008). Men, masculinities and flexible work in a local government authority. *Gender in Management: An International Journal*, 23(8), 598-612.
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26. McDonald P, K Brown & L Bradley (2005). Explanations for the provision-utilisation gap in work-life policy. *Women in Management Review*, 20(1), 37-55.
27. McDonald P, D Guthrie, L Bradley & J Shakespeare-Finch (2005). Investigating work-family policy aims and employee experiences. *Employee Relations*, 27(5), 478-494.
28. McDonald P & B Pini (2004). A good job for a woman? The myth of local government as family friendly. *Local Governance*, 30(3), 144-151.
29. McDonald P & K Dear (2008). The incidence and patterns of discrimination and harassment affecting working women in Australia. *Women's Studies Journal*, 22(1), 37-48.
30. Charlesworth, S. (2002). 'Risky Business: Managing Sexual Harassment at Work', *Griffith Law Review*, 11(2), 353- 376.
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