



Submission to the National Inquiry into Sexual Harassment in Australian Workplaces

28 February 2019

NOW Australia acknowledges the Traditional Custodians of Australia and pays respect to their Elders past, present and emerging.

CONTENTS

EXECUTIVE SUMMARY	4
SUMMARY OF RECOMMENDATIONS	6
Now is the time for better prevention	6
Now is the time for stronger regulation	6
Now is the time for more effective support	7
PART 1: BACKGROUND	9
1.1 About NOW Australia	9
1.2 Methodology.....	9
1.3 Overview of submission.....	9
1.4 Guiding principles for reform (Guiding Principles).....	10
PART 2: THE PROBLEM	11
2.1 Sexual harassment at work is widespread and prevalent	11
2.2 Sexual harassment is a form of violence against women.....	12
2.3 Sexual harassment is driven by gender inequality.....	13
2.4 Sexual harassment is part of an entrenched culture.....	14
2.5 Sexual harassment disproportionately impacts some people.....	15
2.6 Sexual harassment most commonly impacts mental health	15
2.7 Most people do not report sexual harassment or seek support.....	16
2.8 There are significant barriers to reporting sexual harassment.....	17
2.9 The regulatory response to sexual harassment is inadequate	18
2.10 There is a lack of specialist sexual harassment support	19
PART 3: NOW IS THE TIME FOR BETTER PREVENTION	20
3.1 Sexual harassment can be prevented.....	20
3.2 The existing primary prevention framework	21
3.3 A positive duty to prevent sexual harassment	22
3.4 Public education to support prevention	26



PART 4: NOW IS THE TIME FOR STRONGER REGULATION.....	27
4.1 The existing regulatory model for sexual harassment at work.....	27
4.2 The approach to reforming the regulatory model	31
4.2 External complaint processes and outcomes.....	33
4.3 Workplace accountability	37
PART 5: NOW IS THE TIME FOR MORE EFFECTIVE SUPPORT	38
5.1 Existing support for people who experience sexual harassment.....	38
5.2 The development of a sexual harassment support model	42
5.3 The potential for a legal defence fund	44
PART 6: NOW IS THE TIME TO INVEST IN REFORM.....	44

Executive summary

Now is the time to end sexual harassment at work

NOW Australia welcomes the opportunity to make a submission to the National Inquiry into Sexual Harassment in Australian Workplaces (**National Inquiry**) and commends the Australian Human Rights Commission (**AHRC**) for leading the Inquiry.

Research has well established what too many of us know from lived experience: Australia has a deeply rooted and widespread problem with sexual harassment in the workplace.

NOW Australia's submission is informed by literature review and consultation with over 80 individuals and organisations. We recognise that sexual harassment is a form of gendered violence and must stop NOW. We have participated in a range of vital consultations, roundtables, conferences and forums all aimed at addressing and reducing gendered violence, including sexual harassment, within our country.

This submission does not focus on specific workplace interventions, policies or practices, but rather on the macro-picture of long term, systemic and cultural change.

Here's what is irrefutable:

- **Federal legislation** has been around for over 30 years and yet the problem continues. Therefore current legislation alone isn't enough.
- **Gender inequality is a key driver** and is embedded across our social and cultural landscape. Therefore we need to address long term social and cultural issues by achieving gender equity and equality.
- Sexual harassment is **intersectional** in nature. Therefore, we must ensure that services and policies address the needs of the more vulnerable members of our society.
- The **current onus is complaint driven** which means workplaces are often reactive in their dealings with sexual harassment. Therefore we need a positive duty to demand proactive changes to create healthy cultures and workplaces.
- We have **significant barriers to reporting** which means people underreport. Therefore we need to remove these barriers.
- When people do report, the **regulatory response is often inadequate** and lacking in teeth. Therefore we need stronger regulators with effective powers.
- **Mental health** is commonly impacted by sexual harassment yet it is not seen as a public health issue. Therefore we need to embrace the opportunity to broaden our definition of public health issues.
- Sexual harassment affects **workplace health and safety**, but is not commonly considered within the workplace health and safety remit. Therefore sexual harassment must be addressed as a workplace health and safety issue.
- There is a lack of **sexual harassment specialist support** resulting in people not knowing where to go with their stories or approaching organisations who are not specifically resourced and trained to deal with this issue. Therefore we must create easily accessible avenues of specialist support.

We state 9 guiding principles within this submission. We firmly believe that all reform must be anchored in these overarching principles.



Our submission offers 17 key recommendations. Each is embedded within a body of knowledge that informs that recommendation. They are focused upon three important areas:

- **Better prevention**
- **Stronger regulation**
- **More effective support**

Our recommendations reflect our belief that current structures need to be amended to explicitly and proactively prevent and respond to sexual harassment in the workplace.

NOW Australia's recommendations and guiding principles build upon the long legacy of expertise and practice in the sphere of gendered violence in Australia.

Today we are in a unique position to consolidate that legacy. We can convert the global awareness of sexual harassment and its devastating, common place consequences into something potent, practical, partnered and impactful.

We thank the AHRC and Kate Jenkins, the Sex Discrimination Commissioner, for their leadership in this space. We look forward to the outcomes of the National Inquiry and hope this submission enables a powerful mandate for immediate and future transformation.

The time for change is NOW.

LJ Loch

NOW Australia Chair

Summary of recommendations

Now is the time for better prevention

Recommendation 1: Australian governments should proactively use the existing national framework 'Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia' (**Change the Story**) to assist in the prevention of sexual harassment in Australian workplaces.

Recommendation 2: The Australian Government should work in partnership with state and territory governments and the primary prevention sector to develop a second National Plan to Reduce Violence against Women and their Children (**National Plan**). Work to develop the second National Plan, including sector engagement, should commence immediately.

Recommendation 3: In supporting the implementation of Change the Story, the Australian Government should develop and resource a holistic national prevention strategy to promote gender equality and address the underlying drivers of violence against women (including sexual harassment). The strategy should address the factors that intersect with the primary drivers to increase the probability, frequency and severity of violence, including socio-economic inequality and discrimination.

Recommendation 4: The *Sex Discrimination Act 1984* (Cth) should include a positive duty for all duty holders to eliminate sexual harassment, discrimination and victimisation. The positive duty should apply to sexual harassment, discrimination and victimisation to ensure that sexual harassment is addressed holistically in the broader context of gender inequality and other forms of intersectional discrimination.

Recommendation 5: The AHRC should be equipped with a range of regulatory functions and powers to support compliance with the positive duty outlined in Recommendation 4 and enforce non-compliance (taking into account the UK Equality and Human Rights Commission's powers to enforce the public sector equality duty as a useful comparator). This includes the ability to impose financial penalties for not complying with the positive duty.

Recommendation 6: These AHRC regulatory functions and powers should be adequately resourced to support compliance with the positive duty and enforce non-compliance.

Recommendation 7: Human rights commissions and work safe regulators should be resourced to provide public education and guidance on sexual harassment.

Now is the time for stronger regulation

Recommendation 8: Reform to the regulatory model for sexual harassment should:

- be underpinned by the Guiding Principles outlined in this submission;
- be informed by existing evidence, expertise and practice;
- be subject to further consultation with sector experts including legal experts, complaint handling bodies, advocacy groups, unions and employer groups;
- consider the important holistic role of human rights commissions as the existing regulators of sexual harassment, gender inequality and other forms of intersectional discrimination at work and in other areas of public life; and

- consider the potential for complementary regulation by human rights commissions, work health and safety regulators and employment regulators.

Recommendation 9: Prior to reform to the regulatory model for sexual harassment:

- work health and safety regulators should immediately prioritise and proactively address sexual harassment as a risk to workplace health and safety under existing work health and safety laws; and
- human rights commissions should be resourced to provide education and support to work health and safety regulators to support their understanding and application of sexual harassment as a work health and safety issue.

Recommendation 10: The *Australian Human Rights Commission Act 1986* (Cth) should be amended to ensure that applicants have six years to bring a complaint of sexual harassment to the AHRC.

Recommendation 11: The *Australian Human Rights Commission Act 1986* (Cth) should be amended to provide that parties bear their own costs in sexual harassment matters except in limited circumstances.

Recommendation 12: The AHRC should be empowered and adequately resourced to monitor compliance with settlement terms for sexual harassment complaints.

Recommendation 13: Sexual harassment regulators (including human rights commissions and work health and safety regulators) should be adequately resourced to systematically collect, evaluate and publish de-identified data about sexual harassment complaints and outcomes in a regular, consistent and timely way.

Recommendation 14: Employers should be required to formally and regularly report sexual harassment incidents, complaints and outcomes to an external agency.

Now is the time for more effective support

Recommendation 15: A national sexual harassment support model should be developed, including consideration of the establishment of a specialist national sexual harassment phone service and online reporting tool to provide information, counselling and referrals to people who experience sexual harassment. This could include:

- expanding the remit of 1800RESPECT to explicitly include sexual harassment related support and advice; and
- adequately resourcing 1800RESPECT and SARA to meet national demand and more effectively support people who have experienced sexual harassment.

Recommendation 16: The development of a national sexual harassment support model must be informed by further consultation with the sector, including the establishment of an expert advisory body to consider and advise on the most appropriate sexual harassment support model. The development of the model should be informed by guiding principles agreed by the expert advisory body.

Recommendation 17: Existing state and territory services, including Working Women's Centres, Legal Aid, community legal centres and specialist legal services, should be immediately resourced to develop and provide specialist legal, advocacy and other support services to people who are experiencing or have experienced sexual harassment.



Part 1: Background

1.1 About NOW Australia

NOW Australia was established in March 2018 as a response to the global #MeToo movement. NOW Australia is a non-profit, non-partisan organisation for people across all industries who have been sexually harassed, assaulted or intimidated at work. NOW Australia has an inclusive and diverse Board and is supported by ambassadors and volunteers.

NOW Australia is a fearless advocate and campaigner for sexual harassment reform across all sectors and industries in Australia. NOW Australia is committed to working collaboratively with government, business, as well as community and legal sectors to make work as safe as possible for everyone.

1.2 Methodology

NOW Australia consulted with over 80 individuals and organisations to inform this submission and participated in forums such as the:

- Consultation on the Fourth Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022 (12 September 2018);
- Consultation on the National Inquiry into Sexual Harassment in Australian Workplaces (Melbourne, 21 November 2018);
- Victoria Legal Aid's community and legal sector roundtables on creating sexual harassment free workplaces (13 November 2018 and 15 January 2019); and
- National Council of Women of Australia's Triennial Conference (October 2018).

NOW Australia acknowledges the extraordinary goodwill of the individuals and organisations it consulted with to work collaboratively to reform the system. NOW Australia also acknowledges all the contributors who work against gendered violence and for equality and safety in our workplaces.

NOW Australia also drew on key literature and public policy related to violence against women (including sexual harassment) as an evidence-base for NOW Australia's submission and recommendations.

NOW Australia acknowledges the women who have made disclosures about their lived experiences of sexual harassment to Now Australia and as part of the broader #MeToo movement. Although we have not shared any personal experiences in our submission, the experiences of the women who came forward to share their stories is at the heart of Now Australia's drive and commitment to reform the system.

1.3 Overview of submission

NOW Australia's submission considers measures to address sexual harassment in Australian workplaces and drive systemic change. The submission puts forward recommendations that focus on strategic prevention, response and recovery.

The submission does not consider specific workplace interventions including workplace policies and practices.

The submission includes the following parts:

- Part one: Background

- Part two: The problem
- Part three: Now is the time for better prevention
- Part four: Now is the time for stronger regulation
- Part five: Now is the time for more effective support
- Part six: Now is the time to invest in reform.

1.4 Guiding principles for reform (Guiding Principles)

Based on NOW Australia’s consultation and literature review, NOW Australia considers that sexual harassment reform should be underpinned by the following Guiding Principles:

Principle 1	Sexual harassment reform must be evidence-based and be informed by and build on existing sector expertise and practice .
Principle 2	Sexual harassment reform must be driven by collaboration and partnerships , including within the existing sector, to ensure an integrated approach to sexual harassment.
Principle 3	Sexual harassment reform must include mutually reinforcing strategies including law reform, policy and program development, organisational strategies, and long-term sustainable funding.
Principle 4	Primary prevention should underpin all measures to eliminate sexual harassment at work by addressing the drivers of violence against women including gender inequality.
Principle 5	The immediate and ongoing safety and support of people who experience sexual harassment should be prioritised.
Principle 6	Sexual harassment reform should acknowledge that people who experience sexual harassment are the experts in their own lives and empower people to make their own informed decisions.
Principle 7	Sexual harassment must be addressed holistically by considering intersectional forms of discrimination that can increase the probability, frequency and severity of sexual harassment.
Principle 8	Clear and accessible information and advice must be provided on the options available to address sexual harassment, including information about different regulators, processes and outcomes.
Principle 9	Sexual harassment regulation and support should be pro-active, user-friendly, universally accessible, timely and sensitive .

Part 2: The problem

Summary

Part two of NOW Australia's submission sets out the facts about sexual harassment at work in Australia. Collectively, these facts characterise a systemic and entrenched problem in Australian workplaces and more broadly. Here are the facts:

1. Sexual harassment at work is widespread and prevalent.
2. Sexual harassment is a form of violence against women.
3. Sexual harassment is driven by gender inequality.
4. Sexual harassment is part of an entrenched culture.
5. Sexual harassment disproportionately impacts some people.
6. Sexual harassment most commonly impacts mental health.
7. Most people do not report sexual harassment or seek support.
8. There are significant barriers to reporting sexual harassment.
9. The regulatory response to sexual harassment is inadequate.
10. There is a lack of specialist sexual harassment support.

2.1 Sexual harassment at work is widespread and prevalent

The AHRC's fourth national survey on sexual harassment in Australian Workplaces (**2018 National Survey**) revealed confronting data about the ongoing prevalence, nature, impact and reporting of sexual harassment including that:

- one in three people have experienced sexual harassment at work in the last five years, including almost two in five women and just over one in four men;
- in the last 12 months, 23% of women have experienced workplace sexual harassment compared to 16% of men;
- in many cases, the sexual harassment was ongoing over an extended period; and
- the reported prevalence of sexual harassment at work has increased significantly from 11% in 2003, to 4% in 2008, to 21% in 2012, to 33% in 2018.¹

Sexual harassment occurs in all industries in Australia. However, the 2018 National Survey revealed that the majority of sexual harassment in the past five years occurred within four industry groups: health care and social assistance, retail trade, education and training, and accommodation and food services.²

In 2018, the Australian Council of Trade Unions also ran a survey into sexual harassment in the workplace. More than 9600 people from a range of industries responded to the survey, with the majority of respondents being women (68%). The survey found that more than half of all respondents (54.8%) had experienced sexual harassment at their most recent workplace or at a previous workplace, and a majority (64%) had witnessed sexual harassment at their most recent or previous workplace.³

¹ Australian Human Rights Commission, 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces' (2018) 8. The AHRC acknowledges that changes in the survey methodology over this time may have influenced the significant change in results.

² Ibid 60.

³ Australian Council of Trade Unions, 'Sexual harassment in Australian workplaces survey results' (2018) executive summary.

It is important to recognise that sexual harassment doesn't start and stop at the workplace. It happens in all areas of public and private life. Alarming, the 2018 National Survey revealed that 71% of Australians have been sexually harassed in their lifetimes, including more than 85% women and 56% of men.⁴ A 2016 Australia Institute survey also found that 87% of women had experienced at least one form of verbal or physical street harassment, overwhelmingly perpetrated by men.⁵

2.2 Sexual harassment is a form of violence against women

Sexual harassment is recognised by international law as a form of violence against women.⁶ The UN General Assembly recently explained that:

Violence against women and girls, including sexual harassment, is rooted in historical and structural inequality in power relations between men and women, seriously violates and impairs or nullifies the enjoyment of all human rights and fundamental freedoms by women and girls and constitutes a major impediment to their full, equal and effective participation in society, as well as economic and political life.⁷

Recognising sexual harassment in the broader context of gendered violence is critical for understanding the drivers of sexual harassment and effectively preventing and responding to sexual harassment. Although not all sexual harassment is gendered, the majority of workplace sexual harassment is perpetrated by men. The 2018 National Survey found that:

- 79% of people who experienced sexual harassment were harassed by one or more male perpetrators (with 93% of females and 58% of men who experienced sexual harassment being harassed by one or more male perpetrators)
- in incidents of sexual harassment involving a single perpetrator, four in five perpetrators (80%) were male.⁸

Atypical forms of sexual harassment (including sexual harassment by men of other men and by women of men and women) occur less often but form part of the broader context for understanding and addressing sexual harassment.⁹ A 2009 study of formal sexual harassment complaints in Australia found that men who experience sexual harassment are far more likely to be targeted by other men than women.¹⁰

The National Plan to Reduce Violence against Women and their Children (National Plan) and the existing three action plans to implement the National Plan do not recognise or prioritise sexual harassment as a form of violence against women.¹¹ NOW Australia is advocating for the fourth action plan to prioritise sexual harassment.

⁴ Australian Human Rights Commission (n 1) 8.

⁵ The Australia Institute, 'Everyday sexism: Australian women's experiences of street harassment' (2015).

⁶ United Nations Declaration on the Elimination of Violence Against Women (2013) article 2(b).

⁷ United Nations General Assembly, 'Intensification of efforts to prevent and eliminate all forms of violence against women and girls: sexual harassment' (17 December 2018).

⁸ Australian Human Rights Commission (n 1) 8.

⁹ Paula McDonald and Sara Charlesworth, 'Workplace sexual harassment at the margins' (2016).

¹⁰ Ibid.

¹¹ Australian Government, 'National Plan to Reduce Violence against Women and their Children (2010-2022).

Part 3 of this submission considers the role of primary prevention in addressing the drivers of violence against women (including sexual harassment).

2.3 Sexual harassment is driven by gender inequality

Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia (Change the Story) contributes to the implementation of the National Plan. Change the Story recognises that ‘gender inequality is the core of the problem and it is the heart of the solution’.¹²

Gender inequality sets the social context in which gendered violence, including sexual harassment, occurs.¹³ Change the Story explains that gender inequality is:

a social condition characterised by unequal value afforded to men and women and an unequal distribution of power, resources and opportunity between them. It results from, or has historical roots in, laws or policies formally constraining the rights and opportunities of women. Gender inequality is maintained and perpetuated today through structures that continue to organise and reinforce an unequal distribution of economic, social and political power and resources between women and men; limiting social norms that prescribe the type of conduct, roles, interests and contributions expected from women and men; and the practices, behaviours and choices made on a daily basis that reinforce these gendered structures and norms.¹⁴

Some factors work to reinforce the gendered drivers of violence against women including socio-economic inequality and discrimination.¹⁵ Although these factors do not in themselves predict violence against women, they can interact with the gendered drivers to increase the probability, frequency and severity of violence.¹⁶

The broader context in which sexual harassment occurs

The prevention of sexual harassment in Australian workplaces must consider the broader context in which sexual harassment happens. For example:

- Australia ranks 39 out of 149 countries on a global index measuring progress towards gender equality, falling from a high point of 15th place in 2006.¹⁷
- The national gender pay gap is currently 14.6 per cent (and has remained between 14.6 per cent and 19 per cent for the last two decades).¹⁸
- The Australian workforce is highly segregated by gender (with 60% of Australians working in industries dominated by one gender) and female-dominated industries are historically undervalued (such as health and community services).¹⁹

¹² Our Watch, VicHealth and ANROWS (n 5) foreword.

¹³ Ibid.

¹⁴ Ibid 8.

¹⁵ Ibid 26.

¹⁶ Ibid 26.

¹⁷ World Economic Forum, ‘Global Gender Gap Report’ (2017) 68.

¹⁸ Workplace Gender Equality Agency, ‘Gender pay gap statistics’ (2017-18). The national gender pay gap is the difference between women’s and men’s average weekly full-time base salary earnings, expressed as a percentage of men’s earnings.

¹⁹ Australian Human Rights Commission, ‘Women in male-dominated industries toolkit’ (2013); Workplace Gender Equality Agency, ‘Five Years of Workplace Gender Equality Agency Data’ (2018).

- Australian women continue to be underrepresented in leadership roles in the private and public sectors. For example, in 2018 women made up only 7 percent of CEOs and 23 per cent of executive management in ASX 200 companies.²⁰
- For organisations that report to the Workplace Gender Equality Agency, women made up only 30% of key management personnel, 17.1% of CEOs, 28.1% of board members and 13.7% of chairs in 2018.²¹
- In 2015-16, the average Australian women retired with an average of \$113,660 less superannuation than the average male.²²

Sexual harassment is also recognised as a form of sex discrimination under the Convention on the Elimination of All Forms of Discrimination Against Women.²³

2.4 Sexual harassment is part of an entrenched culture

The 2018 National Survey clearly indicates that sexual harassment is part of a common, ongoing and habitual culture of harassment. According to the survey:

- one in five people who were sexually harassed at work said the behaviour was common in the workplace;
- two in five people said they were aware of someone else in their workplace who had also been sexually harassed in the same way; and
- more than half of the people who experienced repeated sexual harassment said the harassment was ongoing and continued for more than 6 months.²⁴

Factors associated with higher levels of violence against women include ideas, values or beliefs that are common or dominant in a society (i.e. 'social norms').²⁵ Social norms are reflected in institutional or community practices or behaviours and are supported by formal and informal social structures (such as law and hierarchies).

The 2017 National Community Attitudes Towards Violence Against Women Survey found that while Australians' attitudes to violence against women and gender equality are improving, there are some disturbing trends. Many people's knowledge and attitudes to violence against women are out of step with evidence and women's experiences, and a substantial minority mistrust women's reports of violence and feel gender inequality is exaggerated.²⁶ The survey explains:

Attitudes are shaped by the world around us, including through our families and friends, communities and institutions such as schools and the media. As a reflection of this world, attitudes may serve as a barometer. They are one way of telling us whether progress is being made and where we may need to focus future effort. Many factors

²⁰ Chief Executive Women, 'Senior Executive Census' (2018).

²¹ Workplace Gender Equality Agency, 'Five Years of Workplace Gender Equality Agency Data' (2018).

²² Association of Superannuation Funds of Australia, 'Superannuation account balances by age and gender' (2017).

²³ UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation 19: Violence Against Women' (1992).

²⁴ Australian Human Rights Commission (n 1) 9 and 46.

²⁵ Our Watch, VicHealth and ANROWS (n 5) 21.

²⁶ ANROWS, <https://ncas.anrows.org.au/findings/> (Accessed February 2019).

contribute to violence. Attitudes that endorse violence and disrespect towards women and gender inequality are among these factors.²⁷

2.5 Sexual harassment disproportionately impacts some people

Sexual harassment often intersects with other forms of discrimination. For example, the 2018 National Survey confirmed that diverse groups of people continue to experience workplace sexual harassment at disproportionately high rates including women, young people, people who identify as 'gay, lesbian, bisexual, pansexual, queer, asexual, aromantic, undecided, not sure, questioning or other', Aboriginal and Torres Strait Islander people and people with disability.²⁸

Although the 2018 National Survey found that there was no significant difference in the prevalence of sexual harassment based on the main language spoken at home, the survey was delivered in English which is likely to have influenced the results. Research has previously demonstrated that migrant workers are particularly vulnerable to sexual harassment and face practical barriers to making a complaint.²⁹ The draft International Labour Office Convention on Violence and Harassment in the World of Work also identifies migrant workers as a vulnerable group at work.³⁰

Change the Story explains that gender inequality cannot be considered in isolation and is not experienced in the same way by every woman:

Other forms of systemic social, political and economic discrimination and disadvantage influence and intersect with gender inequality, and in some cases, increase the frequency, severity and prevalence of violence against women. This means that while gender inequality may be a necessary condition for violence against women, it is not the only, or necessarily the most prominent, factor in every context.

For example, Aboriginal and Torres Strait Islander women who, with the men and children of their communities, are suffering the legacy and contemporary manifestations of colonialism, intergenerational trauma and entrenched social and economic disadvantage, may not always place gender inequality as central to their understanding of violence against women. Gender inequality therefore needs to be considered and addressed alongside a range of other significant factors.³¹

2.6 Sexual harassment most commonly impacts mental health

Research consistently demonstrates that, like other forms of sexual violence, individuals who experience sexual harassment at work suffer significant psychological, health and job-related consequences amongst other things.³²

²⁷ ANROWS, 'National Community Attitudes Towards Violence Against Women Survey – Summary Findings' (2017).

²⁸ Australian Human Rights Commission (n 1) 28.

²⁹ Joanna Howe, 'Examining a temporary migrant worker's ability to make a complaint of sexual harassment' (2016); Paula McDonald, 'Workplace sexual harassment 30 years on: A review of the literature' (2012).

³⁰ International Labour Office, 'Ending violence and harassment against women and men in the world of work', Report V1 (2018).

³¹ Our Watch, VicHealth and ANROWS (n 5) 22.

³² Paula McDonald, 'Workplace sexual harassment 30 years on: A review of the literature' (2012).

The 2018 National Survey identified that the most common consequences of workplace sexual harassment were the impacts on a person's mental health, self-esteem and confidence, and employment, career or work.³³ Significantly, more women than men reported that sexual harassment impacted negatively on their mental health or caused them stress (40% compared to 29%).³⁴

Although women are more likely to have adverse health effects that stem from sexual harassment, a range of people can suffer from adverse health effects including victims, witnesses and bystanders. This includes depression, anxiety, and post-traumatic stress disorder, which are all risk factors for chronic diseases.³⁵

Research has also established that more intense yet less frequent harmful experiences (such as sexual coercion and unwanted sexual attention) can have similar negative effects on the wellbeing of women at work as less intense but more frequent harmful experiences (such as a sexist organisational culture).³⁶ Over time, the impact of less intense experiences can have similar effects on individuals as experiences of less frequent but more serious forms of sexual harassment.³⁷

Although it is clear that sexual harassment has significant impacts on health and wellbeing, sexual harassment is not currently characterised as a public health issue. As explained in a recent academic article, 'the #MeToo movement presents an opportunity for the public health community to consider sexual harassment a health issue with implications for disease prevention and health promotion'.³⁸

2.7 Most people do not report sexual harassment or seek support

The 2018 National Survey found that the majority of people (fewer than one in five people) who were sexually harassed at work in the past five years did not make a formal report or complaint.³⁹ The behaviours that were most often experienced tended to be the least likely reported (including sexually suggestive comments or jokes, intrusive questions, and inappropriate staring or leering).⁴⁰ Conversely, incidents with a low incidence had a very high level of reporting.

The 2018 National Survey also found that overall, only 18% of people who experienced sexual harassment at work sought support or advice.⁴¹ People who experienced sexual harassment were most likely to seek support or advice from friends and family members, followed by co-workers at the same level.⁴²

Research demonstrates that people who experience sexual harassment often respond by avoiding the harasser or minimising or denying the behaviours.⁴³ Women can also be reluctant to report sexual harassment to distance themselves from

³³ Australian Human Rights Commission (n 1) 28.

³⁴ Australian Human Rights Commission (n 1) 54.

³⁵ Adrienne O'Neill, Victor Sojo, Bianca Fileborn, Anna J Scovelle, Allison Milner, 'The #MeToo Movement: an opportunity in public health' (2018) 2587.

³⁶ Victor Sojo, Robert Wood and Anna Genat, 'Harmful Workplace Experiences and Women's Occupational Wellbeing: A meta-analysis' (2016).

³⁷ Ibid.

³⁸ O'Neill, Sojo, Fileborn, Scovelle and Milner (n 35) 2587.

³⁹ Australian Human Rights Commission (n 1) 68.

⁴⁰ Australian Human Rights Commission (n 1) 68.

⁴¹ Australian Human Rights Commission (n 1) 85.

⁴² Australian Human Rights Commission (n 1) 85.

⁴³ McDonald (n 32) 5; Bowes-Sperry and O'Leary-Kelly, 'To act or not to act: The dilemma faced by sexual harassment observers' (2005) 288-306.

negative characterisations of feminists.⁴⁴ Responses to sexual harassment can be more assertive as harassment escalates or becomes more frequent or threatening.⁴⁵

2.8 There are significant barriers to reporting sexual harassment

There are significant barriers to reporting sexual harassment such as:

Victimisation: The National Survey found that two in five people experienced negative consequences as a result of making a formal report or complaint. Almost one in five people were labelled as a trouble-maker, were ostracised, victimised or ignored by colleagues or resigned. Significantly, victimisation increased from 16% in 2003 to 43% in 2018.⁴⁶

Impact on employment: A 2012 Australian study of workplace sexual harassment complaints lodged with Australian human rights commissions found that between one-third and one-half of the people who experienced sexual harassment over a six-month period were dismissed or constructively dismissed after making a complaint.⁴⁷ The study also revealed that for around two-thirds of complainants, the employment relationship broke down prior to a complaint being lodged.⁴⁸

Lack of workplace response: The 2018 National Survey found that in almost half of the cases where a formal report or complaint was made, there were no changes at the workplace as a result. This was more common for complaints lodged by women (55%) than by men (31%).⁴⁹ In one in five cases, there were no consequences for the perpetrator. Where action was taken, the most common outcomes were that the perpetrators were formally warned, informally spoken to, apologised, or were disciplined in some other way. Perpetrators paid compensation in only 5% of cases.⁵⁰

Individual perceptions: The 2018 National Survey found that the most common reasons for not reporting were that the person believed people would think they were overreacting, it was easier to keep quiet, they thought it would not change things or that nothing would be done or they deemed the incident not serious enough.⁵¹ Research shows that women often do not label or name their experiences as sexual harassment and are often less able to recognise the broad spectrum of behaviour that constitutes unlawful sexual harassment.⁵²

Time limits: People who report sexual harassment often do not report it immediately and the majority of complainants are no longer in the same workplace when they complain.⁵³ However, a complaint of sexual harassment to the AHRC may be

⁴⁴ For example, Hunter, 'Talking up equality: women barristers and the denial of discrimination' (2002).

⁴⁵ McDonald, Graham and Martin, 'Outrage management in cases of sexual harassment as revealed in judicial decisions' (2010).

⁴⁶ Australian Human Rights Commission (n 1) 102.

⁴⁷ Charlesworth, McDonald, Worley, Graham, Lykhina, 'Formal complaints of workplace sexual harassment lodged with Australian human rights and equal opportunity commissions' (2012).

⁴⁸ Ibid.

⁴⁹ Australian Human Rights Commission (n 1) 77.

⁵⁰ Australian Human Rights Commission (n 1) 76.

⁵¹ Australian Human Rights Commission (n 1) 81.

⁵² Holland and Cortina, 'When sexism and feminism collide: The sexual harassment of feminist working women' (2013); Victorian Equal Opportunity and Human Rights Commission, 'Independent Review into Sex Discrimination and Sexual Harassment in Victoria Police' (2015).

⁵³ Paula McDonald and Sara Charlesworth, 'Settlement outcomes in sexual harassment complaints' (2013) 267.

terminated if lodged more than six months after the alleged conduct.⁵⁴ When a matter is terminated by the AHRC, an application can only be made to a federal court if the court grants leave to do so (except in limited circumstances).

Costs: In the federal jurisdiction, applicants can face significant legal costs if their sexual harassment matter is unsuccessful in court. This is different to state and territory ‘no costs’ jurisdictions where claimants usually bear their own legal costs. This can present a significant barrier to seeking redress for sexual harassment in court, particularly where the respondent is a large and well-resourced organisation.⁵⁵

Defamation law: Australian defamation law has been criticised as being amongst the toughest defamation laws in the world, having a chilling effect on media coverage, women speaking out publicly and the ability to encourage public discourse about sexual harassment. Those who experience sexual harassment can find themselves as defendants in defamation law cases with the onus of proving what they said was true.⁵⁶ In this way, claimants are required to consider their sexual harassment matter in a defamation law context, which can act as a significant disincentive to speaking out.

Whistleblower laws: Stakeholders have argued that laws for corporate whistleblowers need to be strengthened to bring them in line with the public sector and that people who speak out about sexual harassment should be financially compensated to reduce the personal and professional burden of speaking out.⁵⁷

Part 4.2 of this submission considers the barriers to making an external complaint.

2.9 The regulatory response to sexual harassment is inadequate

In Australia, people who experience sexual harassment bear the burden of enforcing the law by making a formal complaint. This is instead of requiring employers to proactively comply with the law or empowering regulators to effectively enforce the law. The conceptual framing of sexual harassment as an individual problem, rather than one with causes and consequences at a systemic level, has been said to limit the development of effective organisational responses.⁵⁸

As explained in Part 2.7, the majority of people who experience sexual harassment do not make a formal report or complaint. There are multiple and complex reasons why people choose not to report or complain about sexual harassment. A system that relies on individual complaints has limited ability to address systemic sexual harassment or to encourage and require employers to take proactive steps to prevent sexual harassment from happening in the first place.

Unlike work health and safety laws that require duty holders to proactively eliminate or minimise risks to health and safety, the federal *Sex Discrimination Act 1984* (Cth) (**SDA**) does not include a ‘positive duty’ for employers to prevent sexual harassment (see Part 3.3). The lack of a positive duty means that the SDA currently prohibits

⁵⁴ Due to amendments to the *Australian Human Rights Commission Act 1986* (Cth) on 13 April 2017.

⁵⁵ Gaze, ‘The Sex Discrimination Act after twenty years: Achievement, disappointment, disillusionment and alternatives’ (2004) 914–921.

⁵⁶ University of Technology, ‘#MeToo exposes problems with Australia’s defamation laws’ (2018).

⁵⁷ For example, Maurice Blackburn, <https://www.mauriceblackburn.com.au/time4reform/> (Accessed February 2019).

⁵⁸ McDonald, Charlesworth and Graham, ‘Developing a framework of effective prevention and response strategies in workplace sexual harassment’ (2015).

unlawful sexual harassment but does not require employers to prevent it. The AHRC also has limited powers to enforce compliance with the law (see Part 4.1.1).

Part 4 of this submission considers the existing regulatory model for sexual harassment and a recommended approach for reform.

2.10 There is a lack of specialist sexual harassment support

Despite the prevalence of sexual harassment in Australia and the detrimental impacts of sexual harassment on individuals and the broader community:

- There are a lack of services that provide specialist support to people who experience sexual harassment and inadequate funding for existing services to develop and provide specialist sexual harassment services.
- There is no national sexual harassment phone line and/or online service that provides tailored information on sexual harassment, counselling, and referrals to specialist legal and counselling services for people who experience sexual harassment.

Part 5.1 of this submission considers the existing support options for people who experience sexual harassment and a recommended approach to reform.

Part 3: Now is the time for better prevention

Summary

Part three of NOW Australia's submission emphasises the critical importance of the primary prevention of violence against women as part of a holistic approach to addressing sexual harassment in Australian workplaces. This includes:

- that sexual harassment can be prevented by addressing the underlying drivers of violence against women including gender inequality;
- the need to proactively implement the existing world leading primary prevention framework in Australia;
- the need for an enforceable positive legal duty on employers to prevent sexual harassment at work and more broadly; and
- the need to invest in public education about sexual harassment.

3.1 Sexual harassment can be prevented

The primary prevention of violence against women is critical to address the underlying drivers that enable violence to happen. As explained in *Change the Story*:

Although there is no single cause of violence against women and their children, the latest international evidence shows there are certain factors that consistently predict - or drive - higher levels of violence against women. These include beliefs and behaviours reflecting disrespect for women, low support for gender equality and adherence to rigid or stereotypical gender roles, relations and identities.⁵⁹

It is also important that primary prevention is effectively linked to early intervention and response. Although sexual harassment is currently addressed primarily through a response system, *Change the Story* states that:

Primary prevention complements work undertaken in the response system. It is designed to stop violence before it starts by addressing its deep-seated drivers. Because primary prevention targets the whole population, it inevitably reaches those who are already experiencing or perpetrating violence (or who are at increased risk of doing so). As such, primary prevention also enhances early intervention and response activity by helping reduce recurrent perpetration of violence (which is driven in part by similar factors to initial perpetration) and shifting attitudes and practices in service and justice systems that may inadvertently tolerate, justify or excuse violence against women.⁶⁰

For this reason, primary prevention must be complemented by effective laws, public policy and regulation. Importantly, *Change the Story* identifies workplaces as one of the key settings for primary prevention. Although sexual harassment doesn't start and stop at the workplace, the workplace is an important place to influence change.

⁵⁹ Our Watch, VicHealth and ANROWS (n 5) foreword.

⁶⁰ Our Watch, VicHealth and ANROWS (n 5) 15.

3.2 The existing primary prevention framework

3.2.1 Australia already has a world leading national prevention framework

Change the Story is a world leading national framework to prevent violence against women (including sexual harassment).⁶¹ Change the story was developed as part of a cross-party national political agenda to prevent violence against women. The framework contributes to the second action plan of the National Plan (itself a joint bipartisan commitment of Australian governments) and was developed in consultation with over 400 researchers, practitioners and policy makers.⁶²

Change the Story brings together international research and nationwide experience on what works to prevent violence against women and children. Rather than prescribe specific actions, it presents a shared understanding of the evidence and principles of effective prevention and provides a guide to assist governments and other stakeholders to develop their own appropriate policies, strategies and programs to prevent all forms of violence against women.⁶³

Although violence against women can occur in different forms, primary prevention seeks to address the drivers that apply to all forms of violence including sexual harassment. For this reason, Change the Story provides the national roadmap for addressing gender inequality as the foundation for preventing all forms of violence against women in a holistic way.

The Australian Government is currently leading the development of a fourth action plan to the National Plan which is due for release in 2019. NOW Australia is advocating for the fourth action plan to identify sexual harassment as a priority. The opportunity also exists for the Australian Government to build on the achievements of the National Plan, leverage the significant expertise of the growing prevention sector in Australia, and maintain the current momentum to address sexual harassment, by creating a second National Plan with a strong focus on primary prevention.

Recommendation 1: Australian governments should proactively use the existing national framework ‘Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia’ to assist in the prevention of sexual harassment in Australian workplaces.

Recommendation 2: The Australian Government should work in partnership with state and territory governments and the primary prevention sector to develop a second National Plan to Reduce Violence against Women and their Children (National Plan). Work to develop the second National Plan, including sector engagement, should commence immediately.

3.2.2 The need to proactively implement Change the Story

To support the effective implementation of Change the Story, Australian governments must develop practical strategies, policies and initiatives to address the underlying drivers of violence against women, promote gender equality, and ultimately prevent sexual harassment. In particular, the Australian Government has the opportunity to demonstrate best practice primary prevention to influence and promote positive

⁶¹ Our Watch, VicHealth and ANROWS (n 5).

⁶² Our Watch, VicHealth and ANROWS (n 5) 2.

⁶³ www.ourwatch.org.au (Accessed February 2019)

social change in Australia more broadly. This includes by developing a holistic strategy to prevent violence against women and promote gender equality.

The strategy should focus on primary prevention broadly by addressing the drivers of all forms of violence against women, as well as the reinforcing factors that can interact with gendered drivers of violence to increase the probability, frequency and severity of violence against women (including socio-economic inequality and discrimination). While the response to sexual harassment may be tailored for different groups of people, the prevention strategy should be broad and holistic.

Case study: Practical strategies to prevent violence and promote equality

The Victorian Government recently released two practical strategies to prevent violence against women and drive gender equality in the public sector:

- Free from violence: Victoria’s strategy to prevent family violence and all forms of violence against women (Victorian prevention strategy) (2017)
- Safe and strong: A Victorian gender equality strategy (2016).

The Victorian prevention strategy acknowledges that the individual behaviours we seek to prevent need to be understood at an individual and societal level. The strategy explains that ‘this means that any activities to address violence cannot only focus on the individuals who are perpetrating such violence; we must also address the social structures, norms and practices that influence individual attitudes and behaviours which lead to violence’.⁶⁴

The Victorian gender equality strategy aims to prevent violence against women through gender equality, noting that ‘if we are serious about ending violence against women, then we must begin by addressing gender inequality’.⁶⁵ The strategy acknowledges the gendered drivers of violence against women set out in Change the Story, and recognises that gender equality is a precondition for prevention.

Recommendation 3: In supporting the implementation of Change the Story, the Australian Government should develop and resource a holistic national prevention strategy to promote gender equality and address the underlying drivers of violence against women (including sexual harassment). The strategy should address the factors that intersect with the primary drivers to increase the probability, frequency and severity of violence, including socio-economic inequality and discrimination.

3.3 A positive duty to prevent sexual harassment

3.3.1 The existing legislative framework for prevention

(A) The Sex Discrimination Act

The *Sex Discrimination Act 1984* (Cth) (**SDA**) is the federal law that prohibits sexual harassment in public areas of life including at work.⁶⁶ The SDA prohibits sexual harassment but does not include a positive duty to prevent sexual harassment.

Although the SDA requires an employer to establish that they took ‘all reasonable steps to prevent’ sexual harassment as a defence to vicarious liability for the conduct

⁶⁴ Victorian Government, ‘Free from violence: Victoria’s strategy to prevent family violence and all forms of violence against women’ (2017) 8.

⁶⁵ Victorian Government, ‘Safe and strong: A gender equality strategy’ (2016), The Hon Daniel Andrews MP, Premier.

⁶⁶ *Sex Discrimination Act 1984* (Cth), division 3 (sexual harassment).

of their employees, no action can be taken about a failure to take preventative steps in the absence of a complaint.⁶⁷ The defence to vicarious liability only becomes relevant when employers are defending sexual harassment matters, rather than requiring employers to proactively prevent sexual harassment altogether.⁶⁸ A positive duty, on the other hand, would apply without the need for a complaint.

Case study 1: The limited positive duty in Victoria

The *Equal Opportunity Act 2010* (Vic) (EOA) includes a positive duty for duty holders (including employers) to ‘take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible’.⁶⁹ In determining whether a measure is ‘reasonable and proportionate’, the EOA sets out the following factors which must be considered:

- the size of the business or operations;
- the nature and circumstances of the business or operations;
- the resources;
- the business and operational priorities; and
- the practicability and the cost of the measures.

The duty was introduced following a review of the 1995 Act which recommended a shift from the traditional approach of discrimination laws prohibiting unlawful conduct and requiring individual complaints to enforce the law, to a more proactive approach to addressing entrenched systemic issues. The review recommended maintaining a complaints-based process, complemented by a positive prevention duty.

At the time the positive duty was introduced in 2010, it was intended to be enforceable through the Victorian Equal Opportunity and Human Rights Commission’s new public inquiry and investigation powers, supported by powers to compel attendance, information and documents for the purposes of an investigation, and tools to enforce non-compliance including to seek enforceable undertakings and issue compliance notices (as part of a range of possible investigation outcomes).⁷⁰

The EOA was amended before it commenced to significantly limit these powers meaning that the positive duty has limited impact because it is not enforceable.⁷¹

(B) Work health and safety laws

Work health and safety laws include a duty of care to ensure, so far as is reasonably practicable, the health and safety of workers - by identifying, assessing and eliminating or minimising risks. Sexual harassment at work is undoubtedly a risk to health and safety at work. However, in practice, work health and safety regulators have historically not considered sexual harassment as part of their core function. Work health and safety laws are considered in more detail in part 4.1.1.

3.3.2 The need for an enforceable positive duty to require proactive compliance

The complaints based system under the SDA puts the onus on individuals to complain rather than the onus on employers to comply with the law or on the AHRC to enforce the law. Including a positive duty in the SDA, with the ability for the AHRC

⁶⁷ *Sex Discrimination Act 1984* (Cth), s 106.

⁶⁸ Unions NSW, ‘Discussion paper: Reforms to sexual harassment laws’ (2018), 1.

⁶⁹ *Equal Opportunity Act 2010* (Vic) s 15.

⁷⁰ *Equal Opportunity Bill 2010* (Vic).

⁷¹ *Equal Opportunity Amendment Bill 2011* (Vic).

to enforce non-compliance, would encourage proactive compliance with sexual harassment laws in the absence of a complaint.

The 2008 review of the Victorian *Equal Opportunity Act 1995*, which recommended the introduction of a positive duty in Victoria (see Case Study 1), explained that:

The complaints-based system cannot adequately address systemic discrimination. It puts the onus on the individual victim to complain and not on the organisation to comply. Recasting the duty as a positive requirement would encourage compliance with the law even in the absence of a complaint ...

The requirement that a complaint must be lodged before the Commission can act is a significant restriction. Many instances of discrimination never result in complaints to the Commission for a wide range of reasons. These include the perceived difficulties in making a complaint, which may be financial, emotional, legal or practical. Making a complaint can be particularly difficult where the person experiencing discrimination is vulnerable or disadvantaged.

It may be even more difficult for an individual to make a complaint about systemic discrimination because systemic issues can be difficult to identify. The complaints system is focussed on specific acts of discrimination rather than 'systems' which are discriminatory. It imposes a considerable burden on an individual, even if a representative is prepared to lodge a complaint on their behalf.⁷²

In 2008, a Senate Committee reported on its inquiry into the effectiveness of the SDA in eliminating discrimination and promoting gender equality.⁷³ Its overall finding was that although the SDA has had an impact on the most overt forms of sex discrimination, it has been less successful in addressing systemic discrimination.⁷⁴ The committee recommended further consideration be given to including a positive duty in the SDA to eliminate sex discrimination and sexual harassment,⁷⁵ noting that the UK public sector's equality duty provides a useful model to adopt and apply to the public and potentially private sectors.⁷⁶

Case study 2: The enforceable public sector equality duty in the UK

The *Equality Act 2010* (UK) includes a general equality duty which requires public authorities to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act; and
- advance equality of opportunity and foster good relations between persons who share a protected characteristic (such as sex or race) and persons who don't.⁷⁷

⁷² Julian Gardner, 'An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report' (2008) 39 and 124.

⁷³ Standing Committee on Legal and Constitutional Affairs, 'Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality' (2008).

⁷⁴ *Ibid* 47.

⁷⁵ *Ibid* xviii (recommendation 40).

⁷⁶ *Ibid* 164 (recommendation 42).

⁷⁷ *Equality Act 2010* (UK), s 149.

The UK Equality and Human Rights Commission (**EHRC**) has a range of regulatory tools to enforce compliance with the public sector equality duty. The EHRC may:

- conduct an assessment of compliance with the duty;
- issue a compliance notice (which may be enforceable by a court order);
- institute judicial review proceedings in matters relevant to its functions;
- intervene in proceedings to assist the court in clarifying the law;
- enter into an agreement with a public authority to ensure the authority takes steps to comply with the equality duty (in lieu of a compliance notice);
- undertake investigations and inquiries; and
- require information for assessing compliance with the duty.⁷⁸

The EHRC recently recommended that the UK Government introduce a positive duty on *all* employers to eliminate harassment and victimisation in the workplace (not just public authorities). The EHRC found that although employers are liable for sexual harassment by their employees unless they took ‘all reasonable steps’ to prevent it, only a small minority of employers used effective approaches to prevent and address sexual harassment.⁷⁹ The report recommended that the UK Government should:

- introduce a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace;
- ensure that a breach of the mandatory duty constitutes an unlawful act which is enforceable by the EHRC; and
- introduce a statutory code of practice on sexual harassment and other forms of harassment at work, specifying the steps that employers should take to prevent and respond to sexual harassment, and which can be considered in evidence when determining whether the mandatory duty has been breached.⁸⁰

The EHRC noted that ‘we believe that a mandatory statutory duty would create a clear and enforceable legal requirement on all employers to safeguard their workers and help bring about cultural change’.⁸¹

NOW Australia considers that the AHRC must be equipped with adequate regulatory powers to support duty holders to comply with the positive duty and to effectively enforce non-compliance (see part 4.1.2 for further information on enforcement).

Recommendation 4: The *Sex Discrimination Act 1984* (Cth) should include a positive duty for all duty holders to eliminate sexual harassment, discrimination and victimisation. The positive duty should apply to sexual harassment, discrimination and victimisation to ensure that sexual harassment is addressed holistically in the broader context of gender inequality and other forms of intersectional discrimination.

Recommendation 5: The AHRC should be equipped with a range of regulatory functions and powers to support compliance with the positive duty outlined in Recommendation 4 and enforce non-compliance (taking into account the UK Equality and Human Rights Commission’s powers to enforce the public sector equality duty

⁷⁸ *Equality Act 2006* (UK), part 1 (enforcement powers).

⁷⁹ Equality and Human Rights Commission, ‘Turning the tables – Ending sexual harassment at work’ (2018), 9.

⁸⁰ *Ibid* 13 and 14.

⁸¹ *Ibid* 13.

as a useful comparator). This includes the ability to impose financial penalties for not complying with the positive duty.

Recommendation 6: These AHRC regulatory functions and powers should be adequately resourced to support compliance with the positive duty and enforce non-compliance.

3.4 Public education to support prevention

Human rights commissions and work safe regulators have statutory functions which enable them to provide education to the public. NOW Australia considers that both regulators should be adequately resourced to provide public education on sexual harassment and best practice guidance to employers. Public education will increase community awareness and understanding of sexual harassment, including its drivers and impacts. It will also support best practice compliance with sexual harassment laws.

Recommendation 7: Human rights commissions and work safe regulators should be resourced to provide public education and guidance on sexual harassment.

Part 4: Now is the time for stronger regulation

Summary

Part four of NOW Australia's submission considers the existing regulatory model for workplace sexual harassment and recognises that reform is a complex issue. Part four makes overarching observations about the existing regulatory environment, ultimately recommending that any reform should be underpinned by the Guiding Principles and informed by further consultation. Part four considers:

- the current regulation of sexual harassment in Australian workplaces;
- the tools regulators have to enforce the law;
- NOW Australia's recommended approach to reforming the regulatory model;
- issues with external complaint processes and outcomes;
- the need for systematic data collection, evaluation and de-identified reporting of sexual harassment complaints and outcomes; and
- the need for better workplace accountability by introducing mandatory reporting on sexual harassment to an external agency.

4.1 The existing regulatory model for sexual harassment at work

4.1.1 Who regulates sexual harassment at work?

(A) Human rights commissions

At the federal level, sexual harassment is explicitly regulated by the AHRC under the SDA. Sexual harassment is also regulated by equivalent state and territory human rights commissions under state and territory equal opportunity laws.

The role of the AHRC

The AHRC has functions under the SDA including to:

- promote an understanding and acceptance of the SDA;
- undertake research and educational programs;
- report to the Minister on new laws or action that should be taken relating to discrimination and sexual harassment;
- prepare guidelines on discrimination and sexual harassment; and
- intervene in court proceedings involving discrimination and sexual harassment.⁸²

The AHRC also has the power to:

- inquire into and attempt to conciliate complaints; and
- inquire into any act or practice that may be inconsistent with or contrary to any human right and if appropriate, endeavour to settle the matter by conciliation.⁸³

As the federal regulator of sexual harassment law in Australia for over 30 years, the AHRC has significant expertise in sexual harassment. This includes conciliating sexual harassment complaints, providing information, education and guidance on sexual harassment including a code of practice for employers, conducting national surveys on sexual harassment, and most recently launching the National Inquiry.

⁸² *Sex Discrimination Act 1984* (Cth) s 48.

⁸³ *Australian Human Rights Commission Act 1986* (Cth) s 11(f).

Human rights commissions in Australia regulate sexual harassment in broad areas of public life including employment, education, the provision of goods, services and facilities, the provision of accommodation, and clubs.⁸⁴ This holistic approach to sexual harassment recognises that sexual harassment doesn't start and stop in the workplace and requires action that extends beyond the workplace.

The AHRC also has significant expertise in gender inequality and other forms of intersectional discrimination, such as racism, ableism and homophobia, underpinning inequality broadly. This means that the AHRC can take a holistic approach to sexual harassment that addresses gender inequality as a primary driver of sexual harassment and other forms of intersectional discrimination, that can increase the probability, frequency and severity of sexual harassment.

(B) Work health and safety regulators

Model work health and safety laws and regulations have been implemented in all Australian jurisdictions except for Victoria and Western Australia. The model Work Health and Safety Act (**WHS Act**) provides a framework to protect the health, safety and welfare of all workers at work and of other people who might be affected by the work.⁸⁵ 'Health' is defined to mean psychological health as well as physical health.⁸⁶

The WHS Act aims, amongst other things, to protect the health and safety of workers and other people by eliminating or minimising risks arising from work or workplaces (risk management). In this way, WHS laws require duty holders to take proactive action to identify and manage risks (rather than simply prohibiting unlawful conduct).

The WHS Act sets out a range of duties including that:

- A 'person conducting a business or undertaking' (**PCBU**) must ensure, so far as is reasonably practicable, the health and safety of workers by eliminating or minimising risks to health and safety.⁸⁷
- An officer of a PCBU must exercise due diligence to ensure the PCBU complies with its health and safety duties.⁸⁸ For example, taking reasonable steps to acquire and keep up to date knowledge on work health and safety matters, and to ensure the PCBU has and uses appropriate resources and processes to eliminate or minimise risks to work health and safety.⁸⁹

The role of WHS regulators

WHS regulators have a broad range of functions including to:

- monitor and enforce compliance with the WHS Act and WHS Regulations;
- provide advice and information on work health and safety;
- foster a cooperative, consultative relationship between duty holders and the people they owe work health and safety duties, and their representatives;
- promote and support education and training on work health and safety;
- engage in, promote and coordinate the sharing of information;
- conduct and defend legal proceedings under the WHS Act;

⁸⁴ *Australian Human Rights Commission Act 1986* (Cth), division 3 (sexual harassment).

⁸⁵ Safe Work Australia, 'Guide to the Model Health and Safety Act' (March 2016) 2.

⁸⁶ *Ibid* 2.

⁸⁷ Safe Work Australia (n 85) 7.

⁸⁸ Safe Work Australia (n 85) 8.

⁸⁹ Safe Work Australia (n 85) 9.

- collect, analyse and publish statistics relating to work health and safety; and
- promote public awareness and discussion of work health and safety matters.⁹⁰

Sexual harassment is a clear risk to workplace health and safety (including psychological health) that can and should be regulated under existing WHS laws. Although the model WHS Act and WHS Regulations do not explicitly reference sexual harassment, WHS regulators and inspectors have a broad range of powers, functions and enforcement tools to effectively protect the health and safety of workers.

Historically, WHS regulators have not proactively considered sexual harassment as being part of their jurisdiction. Some stakeholders have noted the existing 'hands off approach' of WHS regulators, including referring sexual harassment matters to human rights commissions rather than addressing sexual harassment as a risk to work health and safety.⁹¹ Safe Work Australia also refers people to human rights commissions and the Fair Work Commission for advice on sexual harassment.⁹²

A recent UK report on sexual harassment in the workplace similarly found that:

Sexual harassment in the workplace is a serious health and safety concern, but we were astonished to find that the Health and Safety Executive (HSE) does not see tackling or investigating it as part of its remit. The HSE told us that there is no specific duty under health and safety legislation regarding sexual harassment, and that law on sexual harassment was for the Equality and Human Rights Commission (EHRC) and the police to enforce.⁹³

A recent report by the Victorian Trades Hall Council reporting the outcomes of consultations with women on gendered violence at work found that:

Too often the violence perpetrated against women because they are women is overlooked and under investigated. Women report they have no confidence that their employers or the workplace health and safety regulator (WorkSafe) take this matter seriously or are prepared to take action to prevent or stop the violence we are experiencing.⁹⁴

Given the hands-off approach of WHS regulators, NOW Australia is concerned that WHS regulators do not currently have the capacity, expertise or desire to regulate sexual harassment effectively and sensitively, including identifying and responding to sexual harassment as a workplace health and safety issue.

(C) Workplace relations regulators

The *Fair Work Act 2009* (Cth) (**FW Act**) governs workplace relations in Australia but does not explicitly make sexual harassment unlawful. Instead, sexual harassment is usually considered where a complainant alleges that a sexual harassment complaint

⁹⁰ Safe Work Australia (n 85) 27.

⁹¹ Unions NSW (n 68); http://www.comcare.gov.au/virtual_workplaces/office/rooms/office/harassment and <https://www.worksafe.vic.gov.au/workplace-bullying-safety-basics> (Accessed February 2019).

⁹² Safe Work Australia (n 85).

⁹³ House of Commons, Women and Equalities Committee, 'Sexual Harassment in the Workplace, Fifth Report of Session 2017-19' (18 July 2018) 19.

⁹⁴ Victorian Trades Hall Council, 'Stop gendered violence at work: women's rights at work report'.

was a reason for their dismissal or where the alleged harasser lodges a complaint of unfair dismissal after being dismissed for sexual harassment.⁹⁵

Victoria Legal Aid has previously noted that the lack of clear legislative protection from sexual harassment in the FW Act discourages people from lodging claims.⁹⁶ Stakeholders have called for reform to the FW Act including introducing a new right of action for sexual harassment under the FW Act and requiring a sexual harassment term to be included in modern awards and enterprise agreements.⁹⁷

4.1.2 What tools do regulators have to enforce the law?

Human rights commissions, work health and safety regulators, and workplace relations regulators all have different regulatory tools to enforce laws that explicitly or implicitly regulate sexual harassment. Although work health and safety regulators and workplace relations regulators do not currently explicitly regulate sexual harassment at work, both regulators have a significantly broader range of regulatory tools than human rights commissions to effectively enforce compliance with the law.

(A) Human rights commissions

Although the AHRC has powers to support compliance (such as by providing information and education about sexual harassment) and conciliate complaints, the AHRC has limited regulatory tools to effectively enforce non-compliance and address systemic issues. For example, the AHRC currently does not have the power to issue compliance notices, accept enforceable undertakings or issue fines.

The 2008 Senate inquiry into the effectiveness of the SDA in eliminating discrimination and promoting gender equality identified that many witnesses and submissions advocated to increase the powers of the AHRC and the Sex Discrimination Commissioner to enhance the ability to tackle systemic discrimination.⁹⁸ This included that human rights regulators should have similar regulatory tools to work health and safety regulators to effectively enforce the law.⁹⁹

(B) Work health and safety regulators

Compared to human rights regulators, work health and safety regulators and inspectors have a broad range of enforcement tools under WHS law. For example:

- An improvement notice may be issued by an inspector requiring a contravention to be remedied or prevented.¹⁰⁰
- A prohibition notice may be issued by an inspector prohibiting an activity at a workplace from continuing or being carried out in a specific way.¹⁰¹
- The regulator may apply to a court for an injunction to require or compel a person to comply with a notice, or to restrain them from contravening a notice.¹⁰²

⁹⁵ For example, *Crawford v Steadmark Pty Ltd* (No 2)[2015] FCCA 2698 and *Luke Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174.

⁹⁶ Victoria Legal Aid, 'Submission to the Productivity Inquiry into the Workplace Relations Framework' (2015) 12.

⁹⁷ For example, Unions NSW (n 68) 9 and Victoria Legal Aid Sexual Harassment Roundtable (13 November 2018, Melbourne).

⁹⁸ Senate Standing Committee on Legal and Constitutional Affairs (n 73) 127.

⁹⁹ For example, Senate Standing Committee on Legal and Constitutional Affairs (n 73) 127.

¹⁰⁰ *Work Health and Safety Act*, ss 191 to 194.

¹⁰¹ *Work Health and Safety Act*, ss 195 to 197.

¹⁰² *Work Health and Safety Act*, s 215.

- An inspector may issue an infringement notice ('on the spot' fine) as an alternative to prosecution for prescribed offences.¹⁰³
- The regulator may take reasonable remedial action to make a workplace or situation safe if a person fails to take reasonable steps to comply with a prohibition notice.¹⁰⁴
- A person may give the regulator an enforceable undertaking about a contravention or alleged contravention.¹⁰⁵

The WHS Act also includes criminal offences for breach of health and safety duties, with different maximum penalties depending on the category of offence and whether the offender is an individual, officer or body corporate.¹⁰⁶ Proceedings for an offence may be brought by the regulator and the Director of Public Prosecutions.¹⁰⁷

(C) Workplace relations regulators

The Fair Work Ombudsman has a broad range of powers to enforce compliance with the FW Act including undertaking workplace investigations, issuing compliance notices and infringement notices, entering into compliance partnerships, accepting enforceable undertakings and litigating contraventions of the FW Act.¹⁰⁸ Issues that are potentially criminal in nature are referred to the Australian Federal Police.

4.2 The approach to reforming the regulatory model

NOW Australia considers that the existing regulatory model for sexual harassment at work requires significant reform to effectively prevent and respond to sexual harassment at work. However, the most effective regulatory model for sexual harassment at work is a complex issue that requires considerable thought leadership and expertise.

NOW Australia makes the following observations about the existing regulatory model to inform future reform of sexual harassment regulation:

- The burden of enforcing the law should be shifted from requiring individuals to make a complaint to requiring employers to proactively comply with the law and empowering regulators to effectively enforce the law.
- Sexual harassment must be addressed holistically in the broader context of gender inequality and other forms of intersectional discrimination. For this reason, it is important to recognise the broad role of human rights commissions in addressing sexual harassment alongside other forms of discrimination.
- It is important to recognise that sexual harassment doesn't start and stop at work and to ensure that the regulatory response to workplace sexual harassment doesn't diminish the importance of a broader response to sexual harassment.
- The AHRC has limited functions and powers under the SDA to effectively enforce compliance with sexual harassment laws. The AHRC needs a range of regulatory tools from education to enforcement to effectively address sexual harassment.

¹⁰³ *Work Health and Safety Act*, s 243.

¹⁰⁴ *Work Health and Safety Act*, ss 211 to 213.

¹⁰⁵ *Work Health and Safety Act*, ss 216 to 222.

¹⁰⁶ Safe Work Australia (n 85) 35.

¹⁰⁷ Safe Work Australia (n 85) 35.

¹⁰⁸ Fair Work Ombudsman, <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation> (Accessed February 2019).

- Sexual harassment is a clear risk to workplace health and safety that can and should be regulated under existing WHS laws (noting that WHS regulators and inspectors have a broad range of functions, powers and enforcement tools to effectively address risks to health and safety). Alternatively, WHS laws and regulations could explicitly regulate sexual harassment as a WHS risk.
- WHS regulators require a cultural and policy shift to prioritise and proactively address sexual harassment as a risk to workplace health and safety. This should include promoting sexual harassment as part of the WHS jurisdiction.
- WHS regulators require capacity building, education and support to identify and respond to sexual harassment, and to ensure that people who experience sexual harassment are safe and supported. Human rights regulators have the existing expertise to support capacity building and education for WHS regulators.
- If sexual harassment is explicitly regulated under the FW Act, the Fair Work Commission and the Fair Work Ombudsman will require capacity building and education to understand the drivers and impacts of sexual harassment.

4.2.3 Potential for co-regulation

NOW Australia supports the potential for stronger co-regulation of sexual harassment. However, it is important that a future co-regulatory model is underpinned by guiding principles to ensure that any reform achieves its desired outcomes (see NOW Australia's Guiding Principles for reform in Part 1.4).

A co-regulatory model should also be informed by existing expertise and practice and be based on a strong and collaborative partnership between different regulators. Multiple regulators must have complementary processes and outcomes, supported by clear and accessible information about different regulatory options. Importantly, clear referral pathways must be established between different regulators and to relevant legal and support options in different Australian jurisdictions.

Recommendation 8: Reform to the regulatory model for sexual harassment should:

- be underpinned by the Guiding Principles set out in this submission;
- be informed by existing evidence, expertise and practice;
- be subject to further consultation with sector experts including legal experts, complaint handling bodies, advocacy groups, unions and employer groups;
- consider the important holistic role of human rights commissions as the existing regulators of sexual harassment, gender inequality and other forms of intersectional discrimination at work and in other areas of public life; and
- consider the potential for complementary regulation by human rights commissions, work health and safety regulators and employment regulators.

Recommendation 9: Prior to reform to the regulatory model for sexual harassment:

- work health and safety regulators should immediately prioritise and proactively address sexual harassment as a risk to workplace health and safety under existing work health and safety laws; and
- human rights commissions should be immediately resourced to provide education and support to work health and safety regulators to support their understanding and application of sexual harassment as a work health and safety issue.

4.2 External complaint processes and outcomes

4.2.1 Procedural barriers to making a complaint

(A) Time limits

As discussed in Part 2.8, complaints of sexual harassment to the AHRC must be made within six months of the harassment or the complaint may be terminated by the President of the AHRC. NOW Australia considers that the six month time limit is an arbitrary and unnecessary barrier to reporting sexual harassment which is not aligned with the time limits for other breaches of employment law such as a breach of contract.

Law firm Maurice Blackburn explains that:

On paper, a six-month time limit for sexual harassment complaints to be lodged with the AHRC might seem adequate. In reality, by the time a victim is ready to open up about their experiences, often months, and even years, have passed. Longer and more reasonable time frames already exist for other employment law breaches (for example, six years for breach of contract cases) and there's a good case to be made for extending or abolishing the AHRC's six-month limit to make a sexual harassment complaint.

The AHRC allows victims to take part in a confidential mediation with the parties involved. If a complaint is made after six months, then the AHRC might refuse to deal with it. Then complainants have to head to court to get redress (and this can only happen if the court grants leave to deal with the application even though it was made out of time). They may have to face their harasser for the first time in open court - exacerbating their already traumatic situation.

By removing or increasing the time period for making a claim, victims can seek justice, including confidential mediation, quickly and when they are ready and strong enough to do so.¹⁰⁹

NOW Australia considers that it is critical for complainants to have sufficient time to make a complaint to the AHRC without being faced with the prospect of attending court as the only way to seek redress for sexual harassment if they are time barred.

(B) Costs

As discussed in Part 2.8, in the federal jurisdiction, complainants can face significant legal costs if their sexual harassment matter is unsuccessful in court. If a complainant loses their case, they must pay their own legal costs and there is also a trend for complainants to be ordered to pay the respondent's costs.¹¹⁰

In its submission to the Senate inquiry into the effectiveness of the SDA in eliminating discrimination and promoting gender equality, Job Watch noted that:

In the federal jurisdiction, costs follow the event once the matter goes to the Federal Court ...If it was what we would call a test case, which might relate to systemic discrimination or whether someone is covered by the Act, our advice to our client might be, 'We'll go through the state

¹⁰⁹ Maurice Blackburn, <https://www.mauriceblackburn.com.au/time4reform/> (Accessed February 2019).

¹¹⁰ Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008).

jurisdiction because your case is risky and, generally speaking, if you lose in the Victorian system, each party bears its own costs.¹¹¹

In ‘no costs’ jurisdictions, each party bears its own costs except in exceptional circumstances. For example, the Victorian Civil and Administrative Tribunal considers factors such as whether a complaint was frivolous or vexatious when it decides whether to make a cost order for a complainant to pay the respondent’s costs.¹¹²

A 2008 review of the Victorian *Equal Opportunity Act 1995* found that:

Concerns were raised by lawyers who act frequently in this jurisdiction about the trend towards costs orders. Anecdotally, this is becoming a significant factor in lawyers advising clients not to proceed with claims. VCAT should remain a no costs jurisdiction so that worthy actions and actions in the public interest are not discouraged by the prospect of an adverse costs order. It remains appropriate, however, that costs can continue to be awarded against vexatious litigants or where the claim has no tenable basis in fact or law.¹¹³

NOW Australia considers that the prospect of a costs order in the federal jurisdiction is a significant and unnecessary barrier to seeking redress in the judicial system.

Recommendation 10: The *Australian Human Rights Commission Act 1986* (Cth) should be amended to ensure that applicants have six years to bring a complaint of sexual harassment to the AHRC.

Recommendation 11: The *Australian Human Rights Commission Act 1986* (Cth) should be amended to provide that parties bear their own costs in sexual harassment matters except in limited circumstances.

4.2.2 Settlement agreements

(A) Confidentiality clauses

A significant critique of conciliation of sexual harassment complaints is that the private nature of conciliation limits public scrutiny of conciliation processes and outcomes.¹¹⁴ Most sexual harassment cases that are conciliated by human rights commissions in Australia settle on a confidential basis. The lack of public accountability and the fact that de-identified conciliated outcomes are not routinely published can make complainants vulnerable to accepting lesser remedies.¹¹⁵

Settlement agreements typically include confidentiality clauses that restrict disclosure of the terms of the agreement, the circumstances of the alleged sexual harassment, and the negotiations leading to the settlement agreement. This generally means that settlement terms and the identity of a perpetrator cannot be revealed.¹¹⁶ Unions NSW has argued that although these clauses can have benefits:

their use in the sexual harassment context leads to situations where serial offenders are able to pay money, silence their victims, and engage in unlawful conduct repeatedly. Their victims are unable to

¹¹¹ Senate Standing Committee on Legal and Constitutional Affairs (n 73) 73.

¹¹² Senate Standing Committee on Legal and Constitutional Affairs (n 73) 85.

¹¹³ Gardner (n 72).

¹¹⁴ McDonald and Charlesworth (n 53) 259.

¹¹⁵ McDonald and Charlesworth (n 53) 260.

¹¹⁶ Unions NSW (n 68) 15.

speak out publicly to identify them, meaning the perpetrators remain protected and the unlawful conduct is able to continue. Confidentiality/non-disparagement clauses allow perpetrators to conceal and continue longstanding patterns of sexual misconduct, and prevent discussion of the accusations among complainants, co-workers and the public. This is especially true of cases involving the most serious abusers. As employers have a big incentive to settle the most egregious claims to avoid high damages and negative publicity. This means the worse cases will never see the light of day.¹¹⁷

Unions NSW also cautions that discouraging confidentiality clauses ‘may mean far less cases are settled and therefore far fewer complainants receive any type of justice’.¹¹⁸ It could also have unintended consequences such as disincentivising employers and individuals to settle matters, a reduction in settlement amounts, and a public airing of a matter resulting in a public attack on the complainant.¹¹⁹

A recent UK report on sexual harassment in the workplace found that non-disclosure agreements are used unethically by some employers and members of the legal profession to silence people who experience sexual harassment, and that there is insufficient oversight and regulation of their use in the UK.¹²⁰

NOW Australia commends the employers who issued a limited waiver of confidentiality obligations in non-disclosure agreements for the purpose of allowing people to make a confidential submission to the National Inquiry. However, only 25 employers across the private and public sectors in Australia were willing to step up to the mark. The reluctance of the vast majority of Australian workplaces to support people to share their stories with the National Inquiry is indicative of an entrenched culture of concealing sexual harassment experiences.

(B) Systemic outcomes

Conciliation of sexual harassment complaints can also fail to address systemic sexual harassment in Australian workplaces or advance broader social change.¹²¹ A 2012 Australian study of 136 formal complaints of workplace sexual harassment lodged with Australian human rights commissions found that only 36 of complaints resulted in the inclusion of systemic terms in settlement agreements such as sexual harassment training and/or a change in policy or practice.¹²² However, the lack of public accountability to comply with settlement agreements means that it is not clear whether employers actually implement systemic changes in the workplace.

(C) Monitoring compliance with settlement agreements

Human rights commissions in Australia do not currently have a statutory role to monitor employer compliance with settlement agreements and there is little systemic data collection on the outcomes of settlement agreements. This means that even where settlement agreements include changes to employer policy and practice (such

¹¹⁷ Unions NSW (n 68) 16.

¹¹⁸ Unions NSW (n 68) 16.

¹¹⁹ Unions NSW (n 68) 16.

¹²⁰ House of Commons (n 93) 37.

¹²¹ McDonald and Charlesworth (n 53) 259.

¹²² Charlesworth, McDonald, Worley, Graham, Lykhina (n 47) 30.

as the development of a sexual harassment policy or sexual harassment training), the agreement cannot be enforced and is not subject to external oversight.¹²³

In an article considering settlement outcomes in sexual harassment complaints in Australia, academics Paula McDonald and Sara Charlesworth explained that:

Severely curtailing the goal of systemic change at the workplace level, however, is that anti-discrimination commissions in Australia do not have a statutory role to monitor compliance with settlement terms. This limitation was at the heart of concerns expressed confidentially about the extent to which settlement terms detailing policy changes at the organisational level were 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 SH 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 the United States, where settlement agreements secured during conciliation and mediation are actively monitored and followed up.¹²⁴

Recommendation 12: The AHRC should be empowered and adequately resourced to monitor compliance with settlement terms for sexual harassment complaints.

4.2.3 Sexual harassment complaint data

Complaint data about sexual harassment including the terms of settlement agreements (such as financial and other settlement terms) is critical as a baseline to better understand sexual harassment, identify systemic issues across particular industries, occupations or workplaces, demystify settlement outcomes, and develop tailored strategies to more effectively prevent and respond to sexual harassment.

However, Australian human rights commissions do not collect, evaluate and publish de-identified data about sexual harassment complaints and outcomes in a systematic way.¹²⁵ For example, the AHRC most recently published de-identified settlement outcomes related to sexual harassment on its website in 2016.¹²⁶ As a result, there is limited research about the outcomes of conciliation processes, with existing studies generally about a single jurisdiction and/or limited by small sample sizes.¹²⁷ This creates a culture of concealed or incomplete data.

¹²³ McDonald and Charlesworth (n 53) 259.

¹²⁴ McDonald and Charlesworth (n 53).

¹²⁵ McDonald and Charlesworth (n 53).

¹²⁶ Australian Human Rights Commission,

https://www.humanrights.gov.au/complaints/conciliation_register_list?field_date_value%5Bvalue%5D%5Byear%5D=&field_discrimination_type_value=discrimination_type_sex&field_grounds_value=All&field_areas_value=All&keyword= (Accessed February 2019).

¹²⁷ McDonald and Charlesworth (n 53) 261.

Leading sexual harassment academics in Australia have explained that:

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 anti-discrimination commissions publish 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.¹²⁸

Recommendation 13: Sexual harassment regulators (including human rights commissions and work health and safety regulators) should be adequately resourced to systematically collect, evaluate and publish de-identified data about sexual harassment complaints and outcomes in a regular, consistent and timely way.

4.3 Workplace accountability

There is currently no requirement for employers in Australia to report sexual harassment incidents and complaints internally (to boards) or externally (to an agency such as the Workplace Gender Equality Agency).¹²⁹

NOW Australia considers that the introduction of mandatory reporting would:

- hold individual workplaces publicly accountable;
- support the development of tailored workplace strategies;
- act as an incentive for employers to better prevent sexual harassment; and
- add weight to complaint data collected by sexual harassment regulators to provide a more holistic and deep understanding of the prevalence of sexual harassment across different industries, occupations and workplaces.

Maurice Blackburn has commented that ‘if we make this reporting compulsory, we will have a growing pool of data that we can draw from to identify industries most affected by sexual harassment, allowing companies to work on their culture, reduce the number of victims and make workplaces safer, particularly for women’.¹³⁰

Recommendation 14: Employers should be required to formally and regularly report sexual harassment incidents, complaints and outcomes to an external agency.

¹²⁸ McDonald and Charlesworth (n 53) 268.

¹²⁹ Maurice Blackburn, <https://www.mauriceblackburn.com.au/time4reform/> (Accessed February 2019).

¹³⁰ Maurice Blackburn, <https://www.mauriceblackburn.com.au/time4reform/> (Accessed February 2019).

Part 5: Now is the time for more effective support

Summary

Part five of NOW Australia's submission considers:

- the existing support for people who experience sexual harassment at work, including information, advocacy, counselling and legal services;
- the need for a national sexual harassment support model (informed by the establishment of an expert advisory body and guiding principles);
- the potential establishment of a national sexual harassment phone and/or online service to provide specialist information, counselling and referrals;
- the need to immediately fund existing state and territory services to develop and provide specialist sexual harassment support; and
- the potential for a future sexual harassment legal defence fund.

5.1 Existing support for people who experience sexual harassment

There are a broad range of federal, state and territory services that provide support to people who experience sexual harassment at work (either as part of their core remit or outside of their remit in acknowledgement of the gap in service provision). This includes information, advocacy, counselling and legal services.

Most services are high-demand and under-resourced. Many of the available services do not currently have the capacity or expertise to provide bespoke support to people who experience sexual harassment (particularly counselling services that tend to focus on sexual assault and domestic violence rather than sexual harassment).

This section of the submission provides an overview of some of the key services that provide support to people who experience sexual harassment. It is not intended to cover the field but is an indication of the significant existing expertise in the sector in providing support to people on a broad range of issues related to sexual harassment.

5.1.1 Information, advocacy and counselling services

(A) National Information Service (AHRC)

The AHRC's National Information Service (**NIS**) provides free and confidential information and referrals for individuals, organisations and employers. The NIS does not provide legal advice but can:

- provide information about rights and responsibilities under federal human rights and anti-discrimination law (including sexual harassment);
- discuss whether a person can make a complaint to the AHRC or how the law may apply in the circumstances (without providing legal advice);
- provide information about how to make a complaint, respond to a complaint or deal with specific discrimination issues (including sexual harassment); and
- provide referrals to relevant services.

State and territory human rights commissions have similar information services under state and territory anti-discrimination laws.

(B) Women's services

Working Women's Centres (**WWCs**) are not-for-profit community organisations that support women by providing a free and confidential service on work-related issues. WWCs work primarily with women who are not represented by a union, a lawyer or another advocate. WWCs provide services such as information, advice and support to women on work issues, including lodging complaints and claims. WWCs also refer women to appropriate legal services, conduct research and develop resources on work-related issues.

A 2008 review of WWCs found that WWCs are:

robust community service providers whose strength lies in their specialist workplace relations expertise and holistic client-centred approach to service delivery. They provide high quality, ethical services to women in vulnerable employment, covering issues across state and federal jurisdictions, by delivering specialist advice, information and casework services to women and valuable policy and advocacy services to government on issues for women in the workplace. The centres are highly valued by unions, government and non-government agencies for supporting women whom no one else can support. They are very well regarded for their application of a holistic approach to assisting women with workplace relations difficulties and for the linking and capacity-building role they play in the sector, that builds social capital in the community.¹³¹

WWCs are not mainstream services, meaning that they apply a gendered analysis to all of their work. However, the Northern Territory WWC explained that WWCs are 'forced to turn away women who require assistance with sexual harassment due to our limited resources'. Significantly there are only three WWCs remaining in South Australia, the Northern Territory and Queensland. WWCs in NSW and WWC closed over a decade ago due to insufficient government funding and in 2016, the federal government withdrew funding from the QLD WWC. NOW Australia considers that the WWC model of service delivery is effective for women and continues to be relevant.

The Women's information and Referral Exchange (**WIRE**) is another example of a Victoria-wide free, confidential information, support and referral service for women.

(C) 1800RESPECT

1800RESPECT is the national sexual assault, domestic and family violence counselling service which is part of the National Plan to Reduce Violence against Women and their Children 2010-2022. 1800RESPECT is a confidential service available 24/7. 1800RESPECT is funded by the Australian Government's Department of Social Services to provide support for people experiencing, or at risk of experiencing, sexual assault, domestic or family violence. 1800RESPECT also provides support to family and friends and supporting professionals and workers.

1800RESPECT provides the following key services:

- information on sexual assault, domestic and family violence and abuse;
- referrals to relevant people and services; and

¹³¹ Booth, 'Report of a review of community-based employment advice services, prepared for the Fair Work Ombudsman' (2009).

- counselling provided by trained trauma informed counsellors.

This includes helping people to define behaviours. 1800RESPECT also assists people by talking about ways to improve safety, explaining the different sorts of services and support available, and connecting clients with services including specialist counselling and support groups.

Sexual harassment is not explicitly part of 1800RESPECT's remit (unless it constitutes sexual assault). However, AHRC is referring people who have experienced sexual harassment to 1800RESPECT for information, referrals and counselling during the National Inquiry. 1800RESPECT has experienced a spike in calls about sexual harassment since the inception of the #MeToo movement.

1800RESPECT has indicated that if its remit was expanded to include sexual harassment, its counsellors would need to be trained and upskilled and would need adequate support to manage the traumatic nature of the service. It is also critical that there are appropriate referral pathways to organisations who have the capacity and expertise to adequately support people who experience sexual harassment.

(D) Sexual assault services

There are national, state and territory services that provide support to people who have been sexually assaulted in Australia (including face-to-face, online and telephone support services). These services generally don't provide services to people who have been sexually harassed as part of their direct remit.

Case study: SARA anonymous reporting tool

The Sexual Assault Report Anonymously (**SARA**) mobile friendly website was created and is maintained by the South Eastern Centre Against Sexual Assault (SECASA) in Melbourne. SARA is the only Australia-wide anonymous reporting tool for sexual assault. SECASA noted that approximately 7% of reports to SARA are about sexual harassment.

Anyone in Australia can use SARA to anonymously report sexual assault. If a reporter chooses to leave their contact details, a SECASA worker will call them within 24 hours or on the next business day. The worker will speak to them about counselling options and police follow-up. Anonymous data is passed on to police and contributes to police intelligence about sexual assault.

(E) Employee Assistance Program

The Employee Assistance Program (**EAP**) provides employees with employer-funded confidential 24/7 phone counselling support. The EAP website notes that 'research indicates that the most crucial aspect of effective assistance is for it to be provided as quickly as possible with employees preferring telephone counselling above all other contact mediums'. EAP counsellors are not specifically trained to understand violence against women (including sexual harassment) and its impacts.

(F) Unions

Australian unions support union members at work by providing services such as advice on wages, conditions and rights, assistance for workplace problems, and access to union lawyers. Each union in Australia specialises in provide support and representation for its members according to their occupation, industry, employer and/or location. The Australian Council of Trade Unions is the peak union body that represents the interests of working Australians and their families at a national level.

5.1.2 Legal services

(A) Legal Aid

Legal Aid in each state and territory deliver a range of legal services related to civil law matters (including sexual harassment). Some legal assistance is free, including information, resources and telephone legal advice. To be eligible for legal representation, people must satisfy means and merits tests, and meet the relevant Legal Aid guidelines.

Case study: Services offered by Victoria Legal Aid

Anyone can get free information by:

- going to the Find legal answers section on Victoria Legal Aid's website;
- ordering free publications and resources;
- visiting Victoria Legal Aid's public law library; or
- getting legal help or referrals over the phone.

Depending on the circumstances, Victoria Legal Aid may be able to:

- provide free legal advice, in person, by video conference or over the phone; and
- help people who are at court without a lawyer.

People may also be eligible for legal representation if criteria are met (including the likely benefit to the person and the public and the person's financial situation).

VLA's dedicated Equality Law Program provides advice and representation to people who experience sexual harassment, including representation of clients with sexual harassment in state and federal jurisdictions.

(B) Community legal centres

Community legal centres (**CLCs**) are independent, not-for-profit, community-based organisations that provide free legal and related services to people, including people experiencing discrimination and disadvantage. CLCs provide services including information, referral, legal advice, non-legal support, duty lawyer services, and casework including representation. CLCs also use early intervention and prevention strategies such as community legal education and community development, individual skill building, systemic advocacy and law and policy reform activities.

In consultation, NOW Australia heard that few community legal centres provide specialist employment law advice (including advice about sexual harassment). JobWatch is an example of a specialist employment rights legal centre which provides assistance to Victorian, Queensland and Tasmanian workers about their rights at work (including about sexual harassment). JobWatch provides:

- a free and confidential telephone information and referral service for Victorian, Queensland and Tasmanian workers;
- community legal education, including training, seminars and the production of a variety of publications on employment law and workers' rights;
- representation and assistance for disadvantaged workers in Victoria through a legal casework practice; and
- campaign and law reform activity with a view to promoting workplace justice and equity for all workers.

(C) Justice Connect

Justice Connect provides national specialist and generalist legal services to help people access the most appropriate legal help. This includes over-the-phone legal help, tools and resources, or connecting people to intensive support from Justice Connect's significant network of pro bono lawyers. Self-represented litigants in a federal court in Victoria, NSW, Tasmania or the ACT can access Justice Connect's Self Representation Service (subject to eligibility criteria) for free assistance with legal issues including human rights and discrimination (including sexual harassment).

Individuals may also be referred to Justice Connect's Public Interest Law Service (subject to eligibility criteria) which matches people experiencing disadvantage due to legal problems with lawyers in its pro bono network. The term 'public interest' refers to a legal issue involving an important point of law that is uncertain and requires clarification or a case relating to an important right affecting the community.

5.2 The development of a sexual harassment support model

As set out in Part 2.10, there are a lack of services that provide specialist support to people who experience sexual harassment and inadequate funding for existing services to develop and provide specialist sexual harassment services. There is also no national sexual harassment service that provides specialist counselling, information and referrals for people who experience sexual harassment.

It is critical that there is adequate support for people who experience sexual harassment, including access to information, advocacy, counselling and legal services that are well resourced and coordinated. NOW Australia considers that a national sexual harassment support model should be developed to address the needs of people who experience sexual harassment. The model must be informed by further consultation with the sector and consider the development of a specialist national sexual harassment phone service and online reporting tool.

In consultation with sector experts which informed NOW Australia's submission, the following key themes arose relating to a national sexual harassment service:

- There is significant existing expertise and infrastructure to support women who have experienced gendered violence (particularly sexual assault). The development of a national sexual harassment service must build on existing expertise and best practice related to other forms of gendered violence.
- Few existing support services deal specifically with sexual harassment. It is critical that existing state and territory services are adequately funded and supported to develop and provide specialist sexual harassment services that a national sexual harassment service (and related services) can refer to.
- A national sexual harassment phone and/or online service will need to:
 - have significant investment in infrastructure, technology and other resources (to meet demand for a national service dealing with a high profile issue);
 - estimate demand and be able to scale up its service to meet demand;
 - provide services at 'safe times' for people to call (which may be outside normal business hours);
 - prioritise the health and wellbeing of frontline staff who may experience vicarious trauma by investing in adequate support and supervision;
 - provide specialist trauma informed sexual harassment training to staff; and

- be accessible to all people who experience sexual harassment.
- The success of a national sexual harassment service will rely on strong partnerships and ‘warm’ referral pathways with legal and other support services to minimise the risk of re-traumatising a person, by requiring them to relive the harassment by repeating their story.
- There was general support for expanding the remit of 1800RESPECT to include sexual harassment as 1800RESPECT already has the existing infrastructure and relationships with service providers in the health service sector.
- It is critical that a national sexual harassment service:
 - validates the experience of a person who has been sexually harassed;
 - supports people to name and define sexual harassment;
 - supports people to understand their rights and pathways; and
 - empowers people with information to understand their options, make informed decisions and be ‘an expert in their own situation’.

In its submission to the Senate inquiry into the effectiveness of the SDA in eliminating discrimination and promoting gender equality, the AHRC identified the importance of women being able to access government funded specialist advocacy and legal centres, such as the WWCs noting that ‘these organisations are an important point of contact and support for people wanting to make complaints to [the AHRC].¹³² The Senate committee recommended that increased funding be provided to the WWCs, CLCs, specialist low cost legal services and legal aid to ensure they have the resources to provide advice for sex discrimination and sexual harassment matters.

NOW Australia strongly considers that an expert advisory body should be established to consider and advise on the most appropriate sexual harassment support model including the potential for a national sexual harassment phone and/or online service. The design of the bespoke sexual harassment model must draw on existing sector expertise and be underpinned by guiding principles (see NOW Australia’s Guiding Principles for reform in Part 1.4 of this submission).

NOW Australia also considers that an immediate investment should be made to support existing services, including Working Women’s Centres, Legal Aid, community legal centres, and specialist legal services, to develop and provide specialist legal, advocacy and other support services to people who experience sexual harassment. This will ensure that existing services can effectively deliver services to people who experience sexual harassment as a primary referral point in states and territories.

Recommendation 15: A national sexual harassment support model should be developed, including consideration of the establishment of a specialist national sexual harassment phone service and online reporting tool to provide information, counselling and referrals to people who experience sexual harassment. This could include:

- expanding the remit of 1800RESPECT to explicitly include sexual harassment related support and advice
- adequately resourcing 1800RESPECT and SARA to meet national demand and more effectively support people who have experienced sexual harassment.

¹³² Senate Standing Committee on Legal and Constitutional Affairs (n 73) 458.

Recommendation 16: The development of a national sexual harassment support model must be informed by further consultation with the sector, including the establishment of an expert advisory body to consider and advise on the most appropriate sexual harassment support model. The development of the model should be informed by guiding principles agreed by the expert advisory body.

Recommendation 17: Existing state and territory services, including Working Women’s Centres, Legal Aid, community legal centres and specialist legal services, should be immediately resourced to develop and provide specialist legal, advocacy and other support services to people who are experiencing or have experienced sexual harassment.

5.3 The potential for a legal defence fund

Now Australia is investigating the potential to establish a legal defence fund in partnership with an existing legal triage service to fund strategic litigation to inform the development of sexual harassment law in Australia. The legal defence fund would support a ‘strategic casework approach’ to sexual harassment litigation, including clear and transparent criteria for prioritising support to those who need it the most and to the types of cases that could set a legal precedent to benefit others.

NOW Australia has had preliminary discussions with Justice Connect who support a potential partnership to establish and deliver a national legal defence fund. NOW Australia will continue to explore this option with Justice Connect in 2019.

The AHRC has the statutory power to seek leave to intervene in sexual harassment matters to provide expert assistance that would not otherwise be available to the court.¹³³ However, the AHRC website lists one sexual harassment matter that the AHRC intervened in in 2003. NOW Australia recognises that the AHRC’s power to intervene is likely to be constrained by limited resources and capacity.

Case study: Time’s Up legal defence fund

Time’s Up is the movement against sexual harassment in the United States. The Time’s Up Legal Defence fund helps to cover the legal and public relations costs in select cases for people who have experienced sexual harassment and related retaliation at work. Since the fund was launched in January 2018, it has helped more than 3,400 women and men connect to legal resources with more than 800 attorneys across the country taking on sexual harassment cases.¹³⁴ The Time’s Up Legal Defence Fund sets out clear eligibility requirements and priority criteria for funding. Priority is given to matters involving individuals in low-wage jobs who could not otherwise obtain legal help to challenge sexual harassment and related retaliation.

Part 6: Now is the time to invest in reform

Summary

Part six of NOW Australia’s submission concludes that sexual harassment reform requires a significant investment to address a serious public health issue.

¹³³ *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o) and s. 31(j) and *Sex Discrimination Act 1984* (Cth), s 48(1) (gb).

¹³⁴ Time’s Up, https://www.timesupnow.com/times_up_legal_defense_fund (Accessed February 2019).



Sexual harassment reform will only be effective with adequate resourcing to enable better prevention, stronger regulation and more effective support. NOW Australia's submission makes recommendations about the significant investment required to catalyse change and address one of our serious public health issues. This includes the need to resource regulators to provide education, support compliance, collect and evaluate data on sexual harassment, and monitor compliance with settlement terms. It is also critical for existing state and territory services to be immediately resourced to provide specialist sexual harassment support.

NOW Australia is also investigating the potential to establish a grants outreach program (similar to the program offered by Time's Up in the United States). The program could potentially provide grants to state and territory services to support the provision of specialist sexual harassment services. It could also prioritise programs such as upskilling organisations to respond more effectively to gendered violence and supporting education programs on sexual harassment. NOW Australia will continue to consult with the sector to scope the potential for a grants program.