

**Submission by the
Australian Discrimination Law
Experts Group
(ADLEG)**

**to the
Australian Human Rights Commission**

**National Inquiry into Sexual Harassment in
Australian Workplaces**

4 March 2019

Introduction

We make this submission on behalf of the Australian Discrimination Law Experts Group (ADLEG), a group of legal academics and practitioners with significant experience and expertise in discrimination and equality law and policy.

This submission focuses on two elements of the Terms of Reference:

- the current legal framework with respect to sexual harassment
- recommendations to address sexual harassment in Australian workplaces.

We are happy to answer any questions about the submission or related issues, or to provide more information on any of the areas covered. Please let us know if we can be of any further assistance in this inquiry.

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Summary

As set out in further detail below, our recommendations are as follows:

Recommendation 1: The SDA should be amended to include the object of achieving substantive equality.

Recommendation 2: The definition of sexual harassment be amended to include harassment on the grounds of sex.

Recommendation 3: Further consideration be given to include harassment on other SDA grounds (pregnancy, family responsibilities, breastfeeding, relationship status, sexual orientation, gender identity and intersex status).

Recommendation 4: The test for sexual harassment be amended so that reference is made to the impact on the harassed person other than “offended, humiliated or intimidated”.

Recommendation 5: The test for sexual harassment be amended to include creating an intimidating, hostile, humiliating or offensive environment for the person harassed.

Recommendation 6: The circumstances to be taken into account in determining unlawful sexual harassment in s 28A(1A) be amended to *require* decision makers to take intersectional factors into account where relevant.

Recommendation 7: That the Commission, drawing on its National Survey, produce educative materials on the differential impact of sexual harassment on specific groups of women

Recommendation 8: Statutory evidence-based guidelines should be developed by the AHRC to assist employers in taking “all reasonable steps” to prevent sexual harassment.

Recommendation 9: The victimisation provision in s 94 should be amended to include protection against victimisation for a claimant who raises a claim or makes an inquiry about a claim internally in the workplace. Where a victimisation claim is brought, it should be processed and heard with the primary claim in order to allow the issues to be resolved in one process which is more efficient and effective for the enforcement system and the claimant.

Recommendation 10: That a provision, equivalent to s 106, be inserted making employers and principals vicariously liable for harassment of their workers by customers and clients unless they took all reasonable steps to prevent it. That s 105 be amended to apply to sexual harassment.

Recommendation 11: That consideration be given to expanding sexual (and sex-based) harassment to all areas, without restriction.

Recommendation 12: That the AHRC be given the power to enforce the SDA by taking claims on behalf of individuals and groups. That the AHRC be given the power to seek the imposition of preventative and corrective orders, and civil penalties on non-compliant organisations (in addition to seeking remedies for the individual/s). The AHRC should be empowered to work with respondents to resolve matters using enforceable undertakings. That the AHRC receive additional resources so that it can perform this new, important function effectively.

Recommendation 13: That the AHRC should be given additional resources for collecting and disseminating data about the prevalence of sexual harassment and how claims are being resolved, and that it should regularly make de-identified settlement data available to practitioners, academics and the public (via its website and in its annual report). To the extent necessary, the Act should be amended to authorise such use of data regardless of the application of confidentiality clauses.

Recommendation 14: That conciliation should no longer be compulsory and complainants should be able to lodge their claim in the federal courts if they so desire.

Recommendation 15: A positive duty to prevent, rather than merely respond to discrimination and sexual harassment.

A positive equality duty be developed carefully with close stakeholder engagement and reflection, is directed at real institutional change, and include:

- a requirement on duty-bearers to scrutinize organizational practices and institutional patterns which allow harassment to occur;
- consultation and involvement of all workplace participants;
- training for members of the organisations involved;
- continued monitoring of the effectiveness of the policies and practices of the organisation; and
- a range of powers for the regulator (such as the AHRC) including compliance measures and sanctions to support such a duty.

Recommendation 16: The AHRC should do what it can to ensure:

- WHS agencies and employers understand that sexual harassment is a workplace hazard that poses a serious risk to the health and safety of Australian workers; and
- WHS agencies acknowledge this and act upon it to:
 - educate employers (and other ‘persons conducting a business or undertaking’, their ‘officers’ and workers) about this workplace hazard;
 - develop guidance materials (including a Code of Practice) to enable prevention; and
 - enforce the WHS duties in respect of sexual harassment.

Recommendation 17: The WHS agencies should be compelled to:

- engage with the AHRC in developing expertise in identifying sexual harassment and sexual harassment risks in work;
- nominate specific personnel within the inspectorates to develop such expertise in identifying sexual harassment and sexual harassment risks in work;
- engage with the AHRC to develop guidance materials and, ultimately a code of practice, specifically in respect of sexual harassment:
 - to help workplace participants prevent sexual harassment; and
 - to enable WHS agencies to hold workplace participants to account in prevention steps;
- Report on these steps.

Recommendation 18: Amend the FW Act to:

- explicitly protect workers from sexual harassment. This could be prohibited as a form of adverse action itself, without the need to identify it as a form of discrimination or as coming within the exercise of a workplace right;
- make clear that sexual harassment comes within the scope of the anti-bullying provisions.

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1 INTRODUCTION: CLAIMS SYSTEMS AND PREVENTION SYSTEMS

Our current federal anti-harassment laws, namely the *Sex Discrimination Act 1984* (Cth) (SDA) and the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), prohibit sexual harassment and allow for those who experience sexual harassment to bring complaints for redress. They are designed primarily as an individual rights-based system of complaints, to allow for redress when sexual harassment occurs, and there are well-founded concerns about their effectiveness. An effective system of individual redress is an important but incomplete component of addressing sexual harassment. *These laws do little to prevent harassment within organisations because they are not designed for this purpose.*

To address harassment, we need more than laws of individual redress. We also need laws designed for prevention, to complement and engage with the system of redress. Workplaces have internal organisational cultures and drivers. To achieve cultural and behavioural change within organisations, such as workplaces, modern regulatory theory says that laws need to prompt the organisations themselves to engage in enforceable self-regulation. This involves a process of self-auditing (including consultation) to identify how the problem manifests and how it can be addressed in the particular context. Importantly, it also requires an enforcement agency to perform two critical roles: to enable compliance, and to enforce it.

Our anti-discrimination laws currently impose no such positive duties to identify sexual harassment risks, to consult with workers or other stakeholders, or develop preventative systems. Without them, sexual harassment will remain an ongoing problem in Australian workplaces, however much the system of redress in the SDA is improved and adjusted.

Some countries have developed their anti-discrimination claims systems to include complementary proactive duties designed to prevent discrimination and harassment. A number of researchers (including ADLEG members) have recommended this for Australia.¹ As experts in this field, we support the introduction of duties that require reasonable steps to prevent discrimination and harassment. However, for such a system of positive duties to be coherent with current laws, and supported and effective, there would need to be significant research, consultation and public debates about its nature and form. Discrimination law is complex in its concepts and effects, and rushed law reform efforts can lead to unintended negative outcomes for the stigmatised groups it sets out to protect. We are strongly in favour of a careful and consultative approach to developing and drafting any new laws.

¹ See, e.g. Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict', (2006a) 28/4 *Sydney Law Review* 689-733; Belinda Smith, 'It's About Time - for a New Regulatory Approach to Equality', (2008) 36/2 *Federal Law Review* 117-44; Dominique Allen, 'Removing Barriers to Substantive Equality: A Case Study of Remedying Disability Discrimination Complaints' (2011) 17(2) *Australian Journal of Human Rights* 159.

In the meantime, in respect of workplaces, we already have a framework of preventative laws in place that could -- and should -- be applied to sexual harassment. Work health and safety laws, in every state and territory, impose positive duties to ensure the safety and health, including psychological health, of workplace participants. These laws apply to all persons who conduct a business or undertaking and effectively require self-regulation to ensure, as far as reasonably practicable, health and safety. And, importantly, these laws establish agencies to assist and enable compliance, and enforce it. There is a growing international understanding that sexual harassment is part of a wider problem of gender violence,² and needs to be addressed as a workplace hazard that exposes workers to risks of physical and psychological harm.³

To address sexual harassment in work in Australia, we need to:

- improve the existing system of redress under anti-discrimination laws;
- develop a preventative response to sexual harassment, by
 - introducing into anti-discrimination laws a complementary positive duty to take reasonable steps to prevent harassment; and/or
 - requiring our work health and safety agencies to acknowledge and act on sexual harassment as a workplace hazard; and
- ensure that these systems of redress and prevention work together to avoid inconsistency and to enable transformation of the cultures that have allowed sexual harassment to persist for so long.

In this submission, we expand upon these points in four steps: briefly setting out the context for our law reform proposals and the importance of ensuring that the regulatory goal is one of ‘substantive equality’; identifying how anti-discrimination laws are designed to work only and inadequately as a system of redress rather than prevention; articulating recommendations for reforming this redress system to make it more effective; and then outlining the theory that supports positive duties of prevention and ways in which anti-discrimination laws and work health and safety could and should be used to prevent harassment in work. We then also outline arguments and recommendations for changes to the *Fair Work Act 2009* (Cth) (FW Act).

² International Labour Office, *Ending Violence and Harassment in the World of Work* (Report V(1), 108th Session, 2019), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_637108.pdf.

³ Deirdre McCann, ‘Sexual harassment at work: National and international responses’ (Conditions of Work and Employment Series No 2, International Labour Organization, 2005).

2 THE CONTEXT OF SEXUAL HARASSMENT LAWS

Sexual harassment laws are embedded in a social, legal and cultural context that may enhance or undermine the way those laws function. They are also underpinned by an international human rights system that establishes fundamental commitments to gender equality, and continues to evolve in developing best practice measures for State parties. Here, we briefly set out some of the key issues we see impacting the operation of sexual harassment laws and argue for a human rights based, substantive equality approach to addressing sexual harassment at work.

2.1 The social context of the SDA

While sexual harassment has been proscribed in Australia for 35 years, it continues to be beset with ambiguities as to how it is understood and applied.

Context is all important in establishing sexual harassment under the SDA.

a Sexualisation of women's bodies and behaviour

The basic proposition that the law has no interest in sexual activity between consenting adults would seem to be relatively uncontentious on its face. However, the definitional problem is compounded by the fact that popular culture is suffused with sexualised images of women, often with pejorative overtones. The prevalence of such imagery in popular and social media underscores the difficulties that inhere within an individual complaint-based system, the operation of which includes the workplace but does not address areas that produce and circulate representations that pervasively sexualise women.

The sexualisation of women's bodies and behaviour in popular culture inevitably detracts from the idea of equality for women in the workplace, particularly so far as acceptance in positions of authority is concerned. The pervasiveness of this sexualised cultural backdrop also underscores the difficulty of communicating to the public that sexual harassment in the workplace is unlawful.

b Everyday sexism

Unfortunately, the disproportionate publicity accorded high-flying harassers such as Harvey Weinstein conveys the impression that the facts pertaining to that particular instance are typical of sexual harassment and anything less overt is not sexual harassment. However, it is the normalisation of the microinequities of sex-based harassment to which women are subjected on a daily basis that detracts from the realisation of gender equality at work. Although sexual harassment is treated as discrete within the SDA, it should not be forgotten that it is a subset of sex discrimination.

c Harassment is sex-based as well as sexual

The excessive attention accorded overtly sexualised instances of sexual harassment, particularly on the part of prominent men such as Harvey Weinstein, has served to divert attention away from the panoply of harassing acts that might be described as sexed as well as sexualised. They include verbal put-downs and gender abuse used against women that have become normalised in everyday colloquial speech in a way that is comparable to the normalisation of sexualised imagery. Calling a woman a ‘stupid bitch’, for example, has been held not to constitute the requisite test of sexual harassment, although the abusive epithet is clearly sexualised, as well as sexed.

Abusive, infantilising and demeaning language with sexual overtones may not meet the test for sex discrimination either as there is no comparable male expression to that of ‘stupid bitch’. Its normalisation may also be held to detract from the humiliation, loss of dignity and/or injury to feelings.

Abuse, taunts and insults of a sexually harassing nature that are part of everyday speech fall short of satisfying the somewhat moralising test for sexual harassment in SDA s 28A and may disappear into the gap between sexual harassment and sex discrimination. Focusing only on the most overt forms of sexual harassment causes us to lose sight of the fact that harassment at work is sexed, as well as sexualised. We argue below that the definition of sexual harassment should be extended to include sex-based harassment.

d Changing attitudes to sex and work

Sexual harassment laws may serve to entrench outdated or stereotyped ideas about women’s sexuality and roles at work. The sexual harassment test, which targets actions that would foreseeably humiliate, intimidate or offend can play into the assumption that women find sexual language or behaviours morally offensive or are easily fearful, and need special, more careful treatment than men. Where women have participated in sexual behaviours at work or where they are not humiliated, intimidated or offended but simply want inappropriate behaviour to stop is not easily captured by the definition, with its moral tone and suggestion of female weakness.

e The individual nature of our system of redress

All of these broader social factors end up in a system that focuses on the individual harasser and harassed. At a formal hearing, a complainant has to establish the requisite relationship between the individual complainant and the respondent (individual and/or employer). This problem of the individual versus the systemic nature of complaints is a complication besetting all areas of discrimination, but it is particularly fraught in the case of sexual harassment. The individualisation of sexual harassment complaints obscures its systemic nature and its overall effects on women at work.

All of these factors: the broader sexualisation of women and a background of small but cumulative incidents of sexism; a focus on sexual rather than sexed behaviour; outdated stereotypes of women as more moralistic and weaker than men; and the focus in public discussion and in law on individuals rather than systemic inequalities makes for a challenging context in which to draft and implement effective sexual harassment laws.

2.2 The international context

Australia's social, cultural and legal approach to sexual harassment is situated within a broader international commitment to address not only acts of sex discrimination and harassment but these broader gender stereotypes and systemic inequalities.

Article 5 of CEDAW provides that States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; ...

This important function of governments is foundational to the ability to achieve long lasting changes in gender relations towards greater equality between men and women. While fully implementing this obligation will require action in a wide range of areas, dealing with sexual harassment at work is arguably one of the most important areas in which government support for change is needed. The ability to work without fear of harassment and discrimination is fundamental to women's ability to earn a living and thereby to exercise their other freedoms and capacities. As long as workplaces can rely on sexual harassment laws not being effectively enforced, employers have little incentive to make a difference in this area.

Sexual harassment at work is an important contributor to the demeaning and exclusion of women (along with other kinds of discrimination) and contributes very substantially to their being confined to a narrow range of occupations and lower pay. There are many examples from the reported case law of sexual harassment making work life difficult for women, ranging from cases involving professionals and highly paid women to cases involving more vulnerable, young, and less well-paid women. Examples include *Tan v Xenos* (trainee neurosurgeon harassed by supervising specialist),⁴ *Rich v PriceWaterhouseCoopers* (harassment of female partner at firm),⁵ *GLS v PDP* (harassment of trainee lawyer by supervising lawyer),⁶ many cases about harassment of women entering largely male-dominated workforces (*Hill v Water Resources Commission*,⁷ *Horne v Press Clough Joint venture*,⁸ *Employment Services Australia v*

⁴ *Tan v Xenos (No.3)* [2008] VCAT 584.

⁵ This case was settled; see e.g. <https://www.telegraph.co.uk/finance/markets/2787246/Christina-Rich-in-2-million-settlement.html>.

⁶ [2013] VCAT 1367.

⁷ (1985) EOC 92-127.

⁸ (1994) EOC 92-591.

Poniatowska,⁹ *Lee v Smith*¹⁰). It is vital that these concerns be dealt with to give effect to Article 5.

Article 11 of CEDAW requires state parties to ‘take all appropriate measures to eliminate discrimination’ in work, not merely to establish a claims system of anti-discrimination laws. This article includes the right to the same employment opportunities, equal benefits, and protection of health and safety (quoted below) – sexual harassment in work infringes all of these.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work ...;

(b) The right to the same employment opportunities, ...;

...

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, ...;

(f) The right to protection of health and to safety in working conditions, ...

The draft International Labour Organisation Convention on *Ending Violence and Harassment in the World of Work* that Australia has participated in developing is also an important part of this context (see below, part 5.4, *infra* footnotes 86-93.)

2.3 Substantive equality and sexual harassment

How these broader contextual factors can be addressed in practice is through a deep commitment to achieving *substantive* equality. The definition and meaning of equality in international law, a key source of Australian anti-discrimination law, has developed over time to look beyond narrow, formal understandings of the concept. Removing barriers such as laws preventing married women from working has proved extremely important in reducing gender discrimination. However, despite the removal of these formal barriers in the workplace and elsewhere, women continue to face disadvantage, stigma, stereotyping and others harms based on their gender that prevent their full inclusion in society. Sexual harassment is one of these harms – a distinct form of sex-based discrimination that operates to exclude, demean, damage and disadvantage those who experience it. Other groups, such as those who identify as LGBTI+, may also face gender-based sexual harassment that is equally harmful. The Committee on the

⁹ [2010] FCAFC 92.

¹⁰ [2007] FMCA 59.

Elimination of All Forms of Discrimination in its 2004 General Recommendation No. 25 used the term ‘substantive equality’ to move away from formal approaches to equality that were not adequately ensuring the types of changes needed to overcome discrimination. It said substantive equality requires (at para 10):

... women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

This definition has since been followed by a number of other treaty committees and has been used by constitutional courts in many countries. This approach to equality requires an analysis of the context in which the discrimination occurred and pays attention to systemic inequality and the impact of the harmful act or measures to address it (at paras 10 – 11).

Sandra Fredman, a leading scholar of discrimination law, has suggested that substantive equality captures the multi-dimensional nature of equality when it contains the following four features:¹¹

First, it aims to break the cycle of disadvantage associated with status or out-groups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension. Finally, substantive equality should facilitate full participation in society, both socially and politically. This is the participative dimension.

Substantive equality has been a key lens for the recognition of gender-based violence as a form of discrimination. It acknowledges that this violence has impacts on women’s physical and mental state and that exposes them to harms of ‘recognition’. At the same time, violence may have material impacts in adding to women’s disadvantage in the workplace and contributing to ‘redistributive’ harms. This violence also impacts on their ‘participation’ in limiting their capacity to function fully and freely in society. Lastly, it undermines transformative efforts to create workplaces, schools and other parts of society where women can expect to be safe. Sexual harassment is both a form of gender-based violence and a form of gender-based discrimination. It causes multi-dimensional inequality and requires substantive responses that address all the dimensions of the problem. Discrimination law cannot understand or respond to an

¹¹ Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 25.

individual incident of sexual harassment without locating it within the context of the specific workplace/school etc, and the broader context of gender relations in the community and society. Legal responses are not enough if they allow this broader context to remain unchallenged and unaltered.

This understanding of equality should underpin the legislation and this should be explicitly stated in the SDA.

Recommendation 1

The SDA should be amended to include the object of achieving substantive equality.

3 ANTI-DISCRIMINATION LAWS: ONLY A SYSTEM OF REDRESS

Anti-discrimination law (ADL) has expressly prohibited sexual harassment in Australia for over three decades but has done little to prevent it. These laws are not designed as a regulatory scheme for effecting behavioural and cultural change and thus, unsurprisingly, are limited in this regard. In summary, the law can be characterised as merely a claims-based system of redress because the rule it imposes is only a negative prohibition rather than a positive duty to prevent, it is only enforceable by individual claimants, primarily through a private, confidential conciliation process, and for individual compensatory remedies.¹² Using this framework of regulatory elements – rule, enforcer, process and remedy – we briefly explain below how these limit the transformative capacity of the law.

3.1 The Rule

Anti-discrimination law merely prohibits discrimination, but does not explicitly require any proactive, preventative action of duty-bearers like employers.¹³ It does not require an audit or assessment of risks in the particular workplace, consultation to identify possible risks, development of a policy operationalising the prohibition, training or monitoring of any policies, or even a grievance procedure to respond to issues as they do arise. The law does expose employers to vicarious liability for breaches¹⁴ and has

¹² Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can It Effect Equality or Only Redress Harm?', in Christopher Arup et al. (eds.), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney Federation Press, 2006b); Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict', above n 1; Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Discrimination Law', (2010) 23(3) *Australian Journal of Labour Law* 199-219; Belinda Smith and Dominique Allen, 'Whose Fault Is It? Asking the Right Question to Address Discrimination', (2012) 37(1) *Alternative Law Journal* 31-36.

¹³ Smith, 'Regulatory Analysis', above n 12, 110. C.f., e.g., the positive duty provision in United Kingdom anti-discrimination law: *Equality Act 2010* (UK) c 15, s 149.

¹⁴ See section 106 SDA.

prompted some normative change, so some employers have been prompted to take action to prevent harassment, but the law itself does not *require* such action, inform or enforce it.

Further, there is little authoritative guidance on what does and does not constitute sexual harassment in practice, and even less guidance on what needs to be done to prevent it.¹⁵ The Australian Human Rights Commission's (AHRC) Code of Practice in respect of sexual harassment¹⁶ goes some way in performing this role, but it has no legal authority, is not in an easily accessible format, and is not regularly updated based on best practice in respect of prevention. The law provides a prohibition but, without further explanation, individuals (as perpetrators or claimants) might struggle to identify whether conduct constitutes sexual harassment. And, for those employers prompted to be proactive, there is a dearth of reliable guidance on what works; there is virtually no support or guidance to *enable* prevention.¹⁷

3.2 Enforcement

Enforcement rights are given only to those who experience harassment under ADL; there is no public agency empowered to identify and publicly prosecute breaches. This individual claims-based enforcement suggests that incidents of sexual harassment are isolated and private matters, with no wider public implications. Expecting those who experience harassment 'to identify breaches, press claims, and enforce outcomes without any public assistance represents a fundamental regulatory weakness.'¹⁸ It denies the wider public purpose of these laws,¹⁹ and ignores the personal risk of victimisation faced by claimants.

3.3 Process

The process for resolving harassment claims under the SDA involves compulsory, confidential conciliation before access to a federal court hearing for enforceable orders. While conciliation is relatively accessible, it is overshadowed by the significant risks of proceeding further to hearing (such as legal costs), pressuring claimants to settle. The confidential process of negotiation and settlement also suggests that the wrong is merely a private, interpersonal dispute rather than potentially part of a wider cultural and behavioural problem in the workplace warranting public scrutiny and systemic attention; if the parties reach a settlement, the problem is considered solved.

¹⁵ Smith, 'Regulatory Analysis', above n 12, 110-111. Belinda Smith, 'How Might Information Bolster Anti-Discrimination Laws to Promote More Family-Friendly Workplaces?' (2014) 56(4) *Journal of Industrial Relations* 547; Belinda Smith and Simon Rice, 'Mechanisms for Meaning: Exploring ways to make anti-discrimination laws more effective by focusing on prevention rather than breach', conference paper, Berkeley Comparative Equality and Anti-Discrimination Law Study Group Annual Conference, Melbourne, June 2018 (on file).

¹⁶ Australian Human Rights Commission, *Effectively preventing and responding to sexual harassment: A Code of Practice for Employers* (2008).

¹⁷ Smith, 'Bolstering Anti-Discrimination Laws through Information' above n 15.

¹⁸ Smith, 'Regulatory Analysis', above n 12, 112.

¹⁹ Smith, 'Fair and Equal in the World of Work', above n 12, 204.

3.4 Remedy

Remedies for those who experience sexual harassment, when ordered by a court after a hearing, have been limited primarily to individual financial compensation under the AHRC Act.²⁰ In many cases, the level of damages awarded has been very low and this creates difficulties both in adequately compensating claimants, and in providing an incentive for individuals to enforce the law and for duty-holders to comply (discussed further below at 4.3c). While the level of damages needs to be addressed, damages alone are not a sufficient response. Without possible sanctions of penalties, punitive damages, or corrective orders (such as quotas, policies or training), the law focuses only on individual harm and does so retrospectively, which further limits its transformative potential.

Although the Full Federal Court decision in *Richardson v Oracle*²¹ was understood at the time as setting a new benchmark in the level of damages for sexual harassment, there is little indication that it has been followed in subsequent decisions. Earlier Federal Court decisions had awarded larger amounts but only in cases of very serious and apparently permanent harm.²² The Victorian Civil and Administrative Tribunal has on several occasions awarded damages for pain and suffering in sexual harassment matters of \$100,000 or more,²³ and the Queensland Civil and Administrative Tribunal has awarded \$70,000 general damages in two sexual harassment matters,²⁴ but other decision-makers have not followed, and awards of general damages in reported cases continue to be low. This is of concern as it undermines the incentive for enforcement of the law and the incentive for employers to take action to prevent it. Instead, it can be treated as a business risk that can be discharged through either insurance or paying relatively small sums of compensation. While it is clear that in some cases that are settled outside court, much larger remedies are awarded,²⁵ the confidentiality surrounding these settled cases makes it impossible to use them to clarify the ‘benchmarks’ for damages.

For these reasons, the current regulatory framework of anti-discrimination laws has very limited capacity to allow incidents of sexual harassment to be challenged, and even less capacity to transform workplace cultures to prevent it in the future.

²⁰ See Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia* (Cambridge University Press, 2017).

²¹ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.

²² *Lee v Smith* [2007] FMCA 59, *Employment Services Australia v Poniatowska* [2010] FCAFC 92.

²³ *Tan v Xenos (No 3)* [2008] VCAT 584, *GLS v PDP* [2013] VCAT 221, *Collins v Smith* [2015] VCAT 1992; see also *McKenna v Victoria* [1999] VSC 310.

²⁴ *STU v JKL (Qld) Pty Ltd* [2016] QCAT 505; *Green v State of Queensland, Brooker and Keating* [2017] QCAT 008.

²⁵ E.g. *Rich v PriceWaterhouseCoopers*, above n 5.

4 HOW TO IMPROVE THE CLAIMS SYSTEM

In this section we set out the legal and other changes that need to be made to the Sex Discrimination Act and the *Australian Human Rights Commission Act* to make the system more effective at enabling claimants to get justice.

4.1 Rule

a Definition

The statutory definition of sexual harassment needs amending in the following key respects in order to make it more effective:

- Include sex-based harassment in the definition, as well as harassment on other SDA grounds.
- Amend the requirement that the harassing behaviour “offend, humiliate or intimidate”.

Sex-based harassment and sexual harassment

The statutory definition of sexual harassment should be broadened to include sex-based harassment. The definition of sexual harassment has been important in focusing attention on the behaviour and its impact on the person experiencing the conduct, and removing the need for repetition and for workforce hierarchy as elements of the claim, but the definition of conduct that is caught is too narrow to adequately protect women at work. This is recognized internationally.²⁶

Harassment of women at work is broader than directly sexual conduct. The definition should include conduct that is hostile based on sex. This would extend the law to include sex-based harassment of the kind that was demonstrated in *Hill v Water Resources Commission*,²⁷ in the same year as the first sexual harassment as sex discrimination case *O’Callaghan v Loder*.²⁸

Limiting harassment to “sexual” behaviour suggests that women are disadvantaged by individual acts of sexual aggression, rather than more systemic inequalities. The remedy for sexual harassment then becomes dealing with individual perpetrators. This approach diminishes the many non-sexual acts that might form the basis of harassing behaviour and make workplaces hostile to women. For example, recent Australian research demonstrated that women had to modify their behaviour to avoid harassment over their appearance, their potential for pregnancy or negative assumptions about their intelligence. Women reported that they felt they had to dress differently, or take off a

²⁶ McCann, above n 3.

²⁷ (1985) EOC 92-127.

²⁸ [1984] EOC ¶92-023.

wedding ring to avoid assumptions about child-bearing and complained of being “treated like a moron”, and not taken seriously compared to men.²⁹

When women are harassed at work because of their sex, this may still be prohibited as a form of sex discrimination, but this requires meeting the separate (and generally more onerous) test of unlawful direct or indirect sex discrimination. Further, non-sexual, sex-based harassment has not received the same level of public or legal attention that sexual harassment has, meaning that there is not the same level of policy infrastructure, including training, nor are there legal precedents, to encourage workers or their employers, to recognize these behaviours as potentially unlawful sex discrimination.

There is no rational underpinning for limiting harassment to *sexual* behaviour. Doing so has had the effect of artificially created two seemingly distinct categories of harassment and channelling attention to the sexual. A better statutory definition would include both sex-based and sexual harassment in the same section.

We note that the *Workplace Gender Equality Act* already uses this broader formulation as an element of Gender Equality Indicator 6, which requires employers subject to its reporting obligations to report on their policies on ‘sex-based harassment and discrimination,’ thus using the broader classification for reporting purposes and to assess employer policies. It is time for this broader approach to be adopted in the SDA.

While the specific elements of the current definition of sexual harassment should be retained (subject to the recommendations below), the prohibition should be extended by adding provisions that cover other types of harassment. Since the SDA also covers other grounds, including pregnancy, breastfeeding, family responsibilities, sexual orientation, relationship status, gender identity and intersex status, these should also be included for consistency.

A good analogy is disability harassment, which is explicitly prohibited by the DDA (ss 35, 37 and 39), which provides that ‘[i]t is unlawful for a person to harass another person who: (a) is an employee of that person; and (b) has a disability; in relation to the disability.’ By analogy, the SDA should prohibit harassment ‘in relation to’ all of the grounds contained in the Act. However it is important that harassment under the SDA not be confined only to harassment by an employer, but continue to include other potential harassers, such as co-workers, contractors in the workplace and even customers.

Other jurisdictions

This approach is similar to that used in Canada, the European Union, and the United Kingdom.

²⁹ Marian Baird, Rae Cooper, Elizabeth Hill, Elspeth Probyn and Ariadne Vromen, *Women and the Future of Work: Report 1 of The Australian Women’s Working Futures Project* (University of Sydney, 2018), 93.

The European Union Equality Directive prohibits both harassment on the grounds of sex and sexual harassment.³⁰ Harassment is defined as “unwanted conduct related to the sex of a person with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”³¹

Sexual harassment is defined as “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”³²

In the United Kingdom, the Equality Directive is given effect through s 26(1) and (2) of the *Equality Act 2010*. There is an important difference between the wording of the Equality Directive and the *Equality Act* in that sex-based and sexual harassment are prohibited where the conduct will either violate a person’s dignity *or* create an intimidating, hostile, degrading, humiliating or offensive environment.

Recommendation 2

The definition of sexual harassment be amended to include harassment on the grounds of sex.

Recommendation 3

Further consideration be given to include harassment on other SDA grounds (pregnancy, family responsibilities, breastfeeding, relationship status, sexual orientation, gender identity and intersex status).

b Extend “offended, humiliated or intimidated”

In order for sexual harassment to be unlawful, a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. This is an objective test, and one that was amended in the 2011 amendments to make the test less onerous. This was a welcome change to the law and the test itself does not need amending.

However, the words “offended, humiliated or intimidated” unnecessarily constrain the test by delimiting the kind of reaction the claimant is expected to have. Further, if the definition of harassment is expanded to include sex-based harassment, these words become even less adequate. We need to move on from a view of sexual harassment that implies that women find sexual behaviour offensive or humiliating. There will be times when women may find either sexual or sex-based negative behaviours inappropriate and unacceptable at work, for example, where the behaviours prevent them carrying

30 Directive 2006/54/EC Arts. 1(c) and 1(d)

31 Directive 2006/54/EC Arts. 1(c)

32 Directive 2006/54/EC Arts. 1(d).

out their work tasks or demean them at work. In such a case, the person may not be offended, humiliated or intimidated, but have still experienced significant negative effects.

An example of how the existing definition fails to protect claimants of sexual harassment arose in the case of *TN v BF & Anor* [2015] FCCA 1497. In this case a young woman, TN, reported multiple acts of workplace sexual harassment, including masturbation, by AB, the elderly founder of the company where she was employed. During one incident, TN videoed AB on her phone, while he masturbated for four and a half minutes. In her affidavit TN said: “I was disgusted though did not want to leave as I did not want to lose my job. I was waiting for him to ejaculate so that I could leave the room.” However, the fact that TN videoed the act of masturbation was used as evidence that she was not offended, humiliated or intimidated by her employer masturbating.

A better definition would allow for workplace behaviours that are sexual, or sex-based, and create a hostile environment for another person to work in, or interfere with their capacity or authority to carry out their work. This could be added to the existing definition and sit alongside it.

Recommendation 4

The test for sexual harassment be amended so that reference is made to the impact on the harassed person other than “offended, humiliated or intimidated”.

Hostile environments

Early sexual harassment case law protected against gender-hostile working environments. *O’Callaghan v Loder* [1984] EOC ¶92–023, 75, 497, involved a sexually permeated workplace, but other early decisions found that the cumulative effects of an endless succession of petty acts, not necessarily “sexual” in nature, such as nuisance calls and upsetting jokes could contribute to a hostile workplace: *Hill v Water Resources Commission* [1985] EOC ¶92–127, 76, 290.³³ However, following these early cases, Mason and Chapman write that “[hostile environment] has not been unequivocally embraced as being within legislative definitions of sexual harassment.”³⁴ It has been referred to in some cases, but in obiter,³⁵ and in others, rejected.³⁶

³³ See also *Bennett v Everitt* [1988] EOC ¶92–244; *Bebington v Dove* [1993] EOC ¶92–543; *Freestone v Kozma* [1989] EOC ¶92–249; *Hall v Sheiban* [1989] EOC ¶92–250).

³⁴ Gail Mason and Anna Chapman “Defining sexual harassment: a history of the Commonwealth legislation and its critiques.” (2003) 31 (1) *Federal Law Review* 195-224.

³⁵ *Freestone v Kozma* [1989] EOC ¶92–249, 77, 377; *G v R and Department of Health Housing and Community Services* (Unreported, HREOC, 17 September 1993).

³⁶ *A v B* [1991] EOC ¶92–367.

An explicit recognition that the creation of a hostile environment can be a form of sexual harassment would help to protect against some of the patterns of harassment that otherwise might go unprotected. These would include: non-sexual behaviours; behaviours that do not offend, intimidate or offend, as noted above; and behaviours that on their own may not meet a threshold for sexual harassment, but cumulatively create a particular ‘environment’ of hostility.

An example of such a law is the Equality Act 2019 (UK), which includes the following definition of harassment in s 26:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

...

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Recommendation 5

The test for sexual harassment be amended to include creating an intimidating, hostile, humiliating or offensive environment for the person harassed.

c Intersectionality

Sex discrimination cannot be understood with reference to the experience of one group of women alone. It occurs alongside many other forms of discrimination such as race, age and disability. Forms of sex discrimination may affect women of one economic class differently from another and may take very different forms in different cultural contexts. The CEDAW Committee in General Recommendation No 28 on the Core Obligations of States Parties under Art 2 of CEDAW has explained this as follows (para 18):

Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibits them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25.

Sexual harassment, as a form of sex discrimination, must be understood intersectionally. This involves close attention to context, cultural meanings and the experiences of a range of groups that have suffered different forms of unequal treatment. It may not always be possible to neatly separate racist, sexist, ableist or ageist underpinnings of harassment. Our federal anti-discrimination laws, separated as they are into categories of discrimination, do not always make it possible to address the experiences of complainants who struggle to fit their experiences of harassment into the frames provided by the legislation.

Even were multiple forms of discrimination able to be accommodated in the federal legislation, for example, by creating an omnibus act, this would not capture the uniquely different experiences that research has shown are the experiences of, for example, non-white women or women with disability.³⁷ The Commission's own data demonstrates a differential, and amplified impact on particular groups of women.³⁸

These groups of women, and sometimes men, are not adequately protected under discrimination law, and while the problem of their exclusion has been recognised in the literature for 30 years, little has been done about it. This Inquiry provides a crucial opportunity to address this.

This is not the first time that there have been law reform efforts to amend the SDA to take better account of intersectionality. Subsection (1A) of Section 28A was added to the SDA through the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) (*SADLAA*) Sch 1, s 54. These amendments were in response to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) and their Report on 'Effectiveness of the *Sex Discrimination Act 1984* in Eliminating Discrimination and Promoting Gender Equality' (Report).

The Senate had directed the committee to inquire into and report on the effectiveness of the Act, with particular reference to (among various other issues) its 'effectiveness in addressing intersecting forms of discrimination' and 'sexual harassment' (Report, p 2). The Report relating to the subsection (1A) amendment, among other amendments, notes that the proposed amendment would allow courts to have particular regard to how the protected attributes of a person harassed impacts upon how the person experiences unwelcome sexual conduct, and explicitly draws on an equivalent Queensland provision for inspiration.

³⁷ See eg, Angela Onwuachi-Willig, 'What About #UsToo? The Invisibility of Race in the #MeToo Movement' (2018) 128 *Yale Law Journal Forum* 105; Jessica Penwell Barnett, 'Intersectional harassment and deviant embodiment among Autistic adults: (dis)ability, gender and sexuality' (2017) 19(11) *Culture, Health & Sexuality* 1210.

³⁸ Australian Human Rights Commission, *Everyone's Business Fourth National Survey on Sexual Harassment in Australian Workplaces* (Australian Human Rights Commission, 2018) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/everyone-s-business-fourth-national-survey-sexual>>.

Recommendation 16 of the Report states:

The committee recommends that the section 28A of the Act be amended to provide that the circumstances relevant to determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include:

- the sex, age and race of the other person;
- any impairment that the other person has;
- the relationship between the other person and the person engaging in the conduct; and
- any other circumstance of the other person.

This section seems, on the face of it, to be directed at addressing intersectional aspects of sexual harassment. It certainly could be applied in that way. However, research has shown that the section has never been explicitly applied to intersectional sexual harassment, and that, in fact, relevant differences in the circumstances of a sexual harassment claim are generally overlooked.³⁹

It could be argued that there is no need for law reform where there is an existing legislative sub-section that could be applied to address the problem. However, it is also untenable that the serious problem of intersectional sexual harassment continues without effective redress.

We suggest amending existing s 28A(1A) so that the listed circumstances *must* be taken into account where relevant in determining whether unlawful sexual harassment has occurred and in assessing the impact on the claimant.

We also note that while this would require a decision-maker to take intersectional factors into account, this would not require that it be done in any particular or particularly beneficial manner. In the case of *TN v AB*, cited above, the decision-maker did not explicitly apply s 28A(1A) to a fact situation where the complainant allegedly had a disability (a personality disorder), however, in his consideration of that disability, he imputed inappropriate sexual behaviour to the complainant, because of that disability, rather than to her employer, who masturbated in front of female staff at work. Greater awareness of some of the ways that intersectional factors make certain women more subject to particular stereotypes and assumptions that can then feed into harassing behaviour is required, for decision-makers as well as other legal actors.

³⁹ Karen O’Connell, Unpublished Paper, on file with author.

Recommendation 6

The circumstances to be taken into account in determining unlawful sexual harassment in s 28A(1A) be amended to *require* decision makers to take intersectional factors into account where relevant.

Recommendation 7

That the Commission, drawing on its National Survey, produce educative materials on the differential impact of sexual harassment on specific groups of women.

d Employer duties and vicarious liability

This submission argues that in general sexual harassment at work is best dealt with by prevention rather than after the fact compensation, and that prevention is best undertaken as a responsibility of employers for the benefit of their workforce and their undertaking. However anti-discrimination law does not provide enough incentive for all employers to take this obligation seriously.⁴⁰ While a positive duty to take better steps towards prevention would be a very worthwhile advance, and is addressed further below, there is an existing negative duty that can also be improved on. We argue that what matters more than the positive or negative nature of the duty is its being publicised to employers, its enforceability, and its actual enforcement. As noted above in the comment on *Richardson v Oracle*, there are substantial concerns about the major barriers to enforceability of Australia's harassment and discrimination laws. When the law can only be enforced by those subject to the conduct, and yet they are deterred from enforcing it by the legal process, then in effect it becomes unenforceable. That undermines the rule of law and the promise of enforceable rights that Australia has undertaken to provide. Once it is widely understood that enforcement of the law is very difficult, it is likely to be seen by duty-holders as weak and only symbolic and therefore as not requiring compliance. There is little doubt that an improvement to enforceability is needed, whether through allowing agencies to assist with enforcement or through making it easier and less risky for affected individuals to enforce the law. However, more effective would be to review and improve the duty on employers.

We argue that the duty on employers is currently set too low. After more than 30 years the SDA, and its sexual harassment prohibitions, have not succeeded in ensuring that all organisations take seriously their obligation to prevent sexual harassment and to ensure fair and effective internal processes for dealing with complaints.⁴¹ It is time to

⁴⁰ Instead there is a temptation for even rational and well-intentioned businesses to dismiss it as a business cost and if the amounts involved remain small and relatively manageable, to avoid the effort of changing.

⁴¹ This was illustrated in 2018 in the cases of sexual harassment complaints mishandled by the Sydney Theatre Company and the National Party, in the absence of effective complaints procedures.

further develop this duty to ensure that the most effective methods of prevention are used. This would ideally be done through legislative change, but could also be done in a more flexible way through a code of practice issued by the AHRC, provided the code was given legal status as a required relevant consideration in assessing compliance and compensation/ remedies in sexual harassment claims.

The current duty in s 106(2) of the Act requires employers to take ‘all reasonable steps’ to prevent sexual harassment in their workforce. What ‘all reasonable steps’ means is not set out in the legislation. It is given its meaning by case law, and although there have been few cases setting out what is required, those cases indicate that it will depend on the context, including the size of the company, and that a statement or policy making it clear that sexual harassment is unacceptable and unlawful, a communication of that statement/policy, and effective grievance procedures are required.⁴²

The legislation and the scant case law fails to give adequate guidance to employers, many of whom are not in a position to undertake research on their own account. Of further concern is emerging sociological research that measures to prevent sexual harassment may in fact worsen gender inequality.⁴³ Given this, it is no longer sufficient to assume that a generic sexual harassment policy and training meet “all reasonable steps”, or even that they are positive steps at all. While there is no definitive research on how to prevent sexual harassment, it is likely that this is because there is no single way to do so, and employers and institutions need to be more active in working out the needs of their own workplaces.

We believe that statutory guidelines should be developed by the AHRC based on its lengthy experience of conciliating in sexual harassment matters that are given authority by the legislation. These need to be developed in accordance with the best current research in the field. The existing guidelines, *Effectively preventing and responding to sexual harassment: A Code of Practice for Employers* (AHRC, 2008) provide useful guidance but they need to be updated and strengthened, and they have no legislative status requiring compliance with them to be considered in assessing vicarious liability. New or revised guidelines could cover issues such as the steps currently outlined in the existing Code of Practice to develop policy and procedures for dealing with harassment and discrimination. They should also cover the operation of those procedures and policies when a complaint of harassment is made so that an employer cannot defend against liability for harassment where their investigation and response to the complaint has been deficient, even if their policy and procedures met the required standard on paper.

⁴² The relevant case law is set out in AHRC, *Federal Discrimination Law*, 2016, para 4.9.3

⁴³ See, e.g., Grant E Buckner et al, ‘Managing Workplace Sexual Harassment: The Role of Manager Training’ (2014) 26 *Employment Responsibility Rights Journal* 257; Vicky J Magley et al, ‘Changing Sexual Harassment within Organizations via Training Interventions: Suggestions and Empirical Data’ in Ronald J Burke (ed), *The Fulfilling Workplace: The Organization’s Role in Achieving Individual and Organisational Health* (Cooper, Taylor & Francis Group, 2013) 225; Justine E Tinkler, Yan E Li and Stefanie Mollborn, ‘Can Legal Interventions Change Beliefs? The Effect of Exposure to Sexual Harassment Policy on Men’s Gender Beliefs’ (2007) 70(4) *Social Psychology Quarterly* 480.

Recommendation 8

Statutory evidence-based guidelines should be developed by the AHRC to assist employers in taking “all reasonable steps” to prevent sexual harassment.

Recent thorough empirical research in the US has identified that there, 99.8% of people subject to sexual harassment at work never file formal charges with the EEOC or their state agency. Where formal charges were filed, the majority of employers reacted punitively: 68% of sexual harassment charges include an allegation of employer retaliation and 64% of sexual harassment charges are associated with job loss.⁴⁴ Although no similar research has been done in Australia (and may not be able to be done because of difficulties in accessing agency files for research), it is likely that high levels of punitive responses also occur.⁴⁵ In order to rely on the defence of having taken ‘all reasonable steps’ to prevent harassment, an employer should have to demonstrate not only having adopted policy and procedures but also implementing them in a way that provides an effective response to a complaint in each individual case. If law seeks to encourage the use of internal claiming processes in order to resolve harassment cases as early as possible, it must ensure that employers have an incentive to ensure effective processes that take account of the needs and interests of the parties to the complaint as well as the employer’s interests. If there was not an effective process, or if the claimant was penalised for making a complaint (whether internal or external), then it should not be possible to rely on the reasonable steps defence. In addition, if any victimisation occurred as a result of raising a complaint either internally or externally, then the victimisation should be able to be dealt with in the same proceedings as the original claim, in order to minimise the effort required for enforcement by the claimant.

Recommendation 9

The victimisation provision in s 94 should be amended to include protection against victimisation for a claimant who raises a claim or makes an inquiry about a claim internally in the workplace.

Where a victimisation claim is brought, it should be processed and heard with the primary claim in order to allow the issues to be resolved in one process which is more efficient and effective for the enforcement system and the claimant.

⁴⁴ Carly McCann, Donald Tomaskovic-Devey, and M. V. Lee Badgett, *Employer’s Responses to Sexual Harassment*, Centre for Employment Equity, University of Massachusetts, Amherst (Dec 2018).

⁴⁵ Reported case law certainly illustrates punitive responses in many cases. E.g. *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, *Choi v Deloitte Touche Tomatsu* [2016] NSW CATAD 304.

Scope of the prohibition in relation to customers, clients and third parties

Although the SDA prohibits sexual harassment in the supply and receipt of goods and services and supply of accommodation, this protection is too limited. It does not explicitly require employers to take reasonable steps as far as possible to protect their workers from harassment by customers or other third parties. Employers must be held responsible for taking steps to protect their employees when dealing with customers or clients of the employer, as the employer is the one who determines the workplace conditions for their employees and is the only one with power to make changes to better protect employees. While such harassment may be covered by provisions against harassment in the provision of goods, services and accommodation, those provisions do not expressly require employers to take steps to protect their employees. However an employer who permits such conduct, could be liable under s 105 of the SDA if this section was amended to apply to sexual harassment.

By way of example, this is the approach adopted in other jurisdictions including Canada,⁴⁶ New Zealand,⁴⁷ and Ireland.⁴⁸ In each of these jurisdictions, an employer is made liable, albeit in more proscribed circumstances, for harassment by clients, customers or other business contacts.

Recommendation 10

That a provision, equivalent to s 106, be inserted making employers and principals vicariously liable for harassment of their workers by customers and clients unless they took all reasonable steps to prevent it. That s 105 be amended to apply to sexual harassment.

e Areas

Two State jurisdictions prohibit sexual harassment without restricting protection to limited areas of public life, including employment. In Queensland, s 118 of the Anti-Discrimination Act (1991) and in Tasmania, s 17 of the Anti-Discrimination Act 1998, prohibit sexual harassment without any restriction to specified areas.

The most recent comprehensive discrimination law reform reviews in other jurisdictions have recommended similar changes. In 2015, the Law Reform Advisory Council in the ACT recommended that the Discrimination Act should be amended to prohibit sexual harassment generally, in all areas of life (Recommendation 15.1). In 2012, the federal consolidation of anti-discrimination law project made the same recommendation.

46 *British Columbia Human Rights Tribunal v Schrenk* 2017 SCC 62

47 *Employment Relations Act 2000* (NZ) s 117.

48 *Employment Equality Act 1998 – 2015* s 23(1).

While this Inquiry is focused on workplace sexual harassment, there are still good reasons for considering the removal of an ‘areas’ restriction in the SDA:

- Sexual harassment is socially pervasive and takes place in many areas of life. Unless there is a reason to restrict coverage, we consider that beneficial human rights legislation should provide as much protection as possible for discriminatory acts. Sexual harassment provisions should not be limited by placing unnecessary hurdles to bringing complaints. The expanded coverage in other Australian state jurisdictions demonstrates that removal of area restrictions is possible and practical.
- Where areas of sexual harassment are demarcated, the lines of demarcation can themselves become an unnecessary source of legal and regulatory attention. So, for example, what constitutes “work” changes over time. Removing area restrictions provides clarity and prevents resources being wasted on seeking legal determinations on the demarcations of areas of activity over time.
- The removal of areas restrictions in other jurisdictions, along with the equivalent recommendations for change in the other most recent law reform inquiries, demonstrates that this is the direction that sexual harassment law reform is taking. A change to the SDA would be consistent with the overall direction of sexual harassment law reform.

One possible argument against removing the areas restriction is that it may take away from a focus on the key areas of public life where sexual harassment is both common and possible to regulate. For example, while street harassment is extremely common, it is difficult to regulate effectively through a civil action such as sexual harassment.

On balance, we recommend that the areas restriction be removed.

Recommendation 11

That consideration be given to expanding sexual (and sex-based) harassment to all areas, without restriction.

4.2 Enforcer and Remedies

Sexual harassment laws rely on the individual claimant for enforcement. There is no scope for the AHRC or another statutory agency to take action on their behalf or on the community’s behalf. Nor can the AHRC assist the individual financially or otherwise if they take their claim to court. As we have noted above, the individual complaints system is complex and costly, and after four decades, it has not adequately addressed sexual harassment in the workplace.

We recommend that the AHRC be given the power to enforce the SDA by taking claims on behalf of individuals and groups. It is not anticipated that the AHRC would fund all claims that were pursued to the Federal Courts; it would be expected to take a strategic approach to its litigation work and support cases that would clarify and develop the law,

address systemic issues, and have an impact on a group of women. We further recommend that the AHRC be given the power to seek the imposition of preventative or corrective orders and civil penalties on non-compliant organisations (in addition to seeking remedies for the individual/s). The AHRC should be empowered to work with respondents to resolve matters using enforceable undertakings

This model has already been used successfully by the Fair Work Ombudsman to address many forms of unlawful conduct in the workplace and could be replicated to address sexual harassment in the workplace.

Finally, we recommend that the AHRC receive additional resources so that it can perform this new, important function effectively.

As discussed below, we also recommend that the FW Act prohibit sexual harassment and, consequently, that the Fair Work Ombudsman be given the power to enforce the new prohibition.

Recommendation 12

That the AHRC be given the power to enforce the SDA by taking claims on behalf of individuals and groups.

That the AHRC be given the power to seek the imposition of preventative and corrective orders, and civil penalties on non-compliant organisations (in addition to seeking remedies for the individual/s). The AHRC be empowered to work with respondents to resolve matters using enforceable undertakings.

That the AHRC receive additional resources so that it can perform this new, important function effectively.

4.3 Process

a Confidentiality of complaints

As described above, the process of making and resolving a sexual harassment claim is confidential which gives the impression that the wrong is a private matter between individuals, rather than part of a broader social problem. This is compounded by the fact that most claims settle; they are not heard by a court.⁴⁹ Those that settle include a confidentiality clause which can extend as far as preventing the claimant from talking about the circumstances of the claim, the parties involved, its resolution and the terms of settlement. The use of confidentiality clauses masks the extent to which sexual harassment remains a problem in society, its nature and it hides how it is being

⁴⁹ See further Dominique Allen, 'Settling Sexual Harassment Complaints – What Benefits does ADR Offer?' (2013) 24 *Australasian Dispute Resolution Journal* 169-177; Dominique Allen, 'Behind the Conciliation Doors – Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778-799.

addressing. The AHRC does not publish de-identified data about the terms of settlement.

Recommendation 13

That the AHRC should be given additional resources for collecting and disseminating data about the prevalence of sexual harassment and how claims are being resolved, and that it should regularly make de-identified settlement data available to practitioners, academics and the public (via its website and in its annual report). To the extent necessary, the Act should be amended to authorise such use of data regardless of the application of confidentiality clauses.

b Compulsory conciliation

In order to access the federal court system for a legal determination, complaints must first go to the AHRC for conciliation.

While there are significant benefits to conciliation, it is sometimes inappropriate or undesirable for a complainant to go through the conciliation process. For example, where sexual harassment is one aspect of a more complex matter that is otherwise being litigated, compulsory conciliation creates a separate process for one part of a claim, meaning that it may be dropped. Further, where complainant does not want to conciliate, they should be able to waive conciliation and receive a termination notice to access the court system. This would enable them to avoid the delay that is often associated with accessing conciliation.

Recommendation 14

That conciliation should no longer be compulsory and complainants should be able to lodge their claim in the federal courts if they so desire.

c Costs

Among serious barriers to the ability to bring a sexual harassment claim to protect rights are the general civil procedure litigation rules that apply to federal civil litigation, which interact with the assessment of damages in sexual harassment matters as discussed below. These rules apply with particular harshness in sexual harassment claims because of the structure in which an individual must bring a claim against their employer or ex-employer, which is likely to be an organisations with much larger resources and a less personal stake in the matter, and from the low level of damages assessed in most reported sexual harassment claims. The best example is *Richardson v Oracle*,⁵⁰ in which a sexual harassment claimant succeeded in her claim in the Federal Court, but

⁵⁰ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.

was awarded only \$18,000 damages, a remarkably low amount given the harm she suffered, and the costs and risks involved in litigating her claim.

Because of the operation of the Federal Court Rules (which are very similar to the costs rules in other Australian courts) and because she had refused to settle for an offer of \$55,000 before the hearing occurred, instead of having her costs paid as she had succeeded, she was ordered to pay the costs of the respondent from the date of the offer on an indemnity basis (ie the full costs incurred).⁵¹ This was financially disastrous and her legal success became a pyrrhic victory. In effect, a claimant is put in the position of having to gamble on weighing the amount of damages a court would award her if she succeeded against the risk of paying the other side's indemnity costs. This cannot be regarded as a satisfactory process in proceedings to resolve an individual work dispute that concerns protection of a human right: it operates not as a general incentive to negotiate a settlement but as an almost insuperable barrier to enforcing the law, given the usually low damages awarded in sexual harassment cases. Richardson had little alternative but to appeal the decision on damages to the Full Federal Court, which upheld her appeal. The Court decided that the category of damages for pain and suffering (ie not proved economic loss) for sexual harassment had been evaluated well below the level of compensation set in comparable cases, such as common law personal injuries claims for psychological injuries resulting from workplace bullying and harassment. The Court decided that her damages for pain and suffering should be increased to \$100,000, and she should be awarded \$30,000 for economic loss for a period after she left Oracle when her salary in her new job was lower. As a result, she was no longer liable to pay the respondent's costs, and instead they were required to pay hers. Because the amount awarded exceeded the amount of a counter offer to settle made on her behalf, her costs were to be paid on an indemnity basis by the respondent from that date.⁵²

The impact of these costs rules exacerbates the risks of litigating a sexual harassment claim and emphasises the inappropriateness of requiring individuals to bring claims against their employers in the civil courts on the same basis as other civil litigation. Enforcing a claim under the FW Act does not involve such risks, as costs are not generally awarded unless circumstances are exceptional. Australia's anti-discrimination laws limit the vindication of human rights claims to the individual affected with no assistance from a public agency, and then impose punitive civil litigation and costs rules on the litigant. This is not an effective enforcement mechanism of the type Australia agreed to provide when it ratified the UN Human Rights and Discrimination Conventions.

The difficulties in this area are further support for the argument, below, that employers need to be incentivised to act on prevention, as individual resolution of disputes is not

⁵¹ Ibid at [234] – [237].

⁵² *Richardson v Oracle Corporation Australia Pty Ltd (No 2)* [2014] FCAFC 139.

an adequate process, and that sexual harassment should be prohibited in the FW Act (see below), so that process is open for use.

5 DEVELOPING AND UTILISING PREVENTION SYTEMS

5.1 To effect change, we need to require and enable change

To complement the claims system outlined above, we need to include in the regulatory mix laws that prompt proactive, preventative action. This means ensuring that there is a positive duty on organisational leaders to take steps to prevent sexual harassment. But a duty alone is not sufficient to effect change. There are other regulatory elements required to ensure that such a duty is effective. In this section we set out briefly what elements are required for a positive duty to effect change, how anti-discrimination laws could be amended to include such an approach, and our argument that work health and safety laws already reflect this approach but need to be enlivened to address sexual harassment.

5.2 Modern regulatory theories

When examined in light of modern regulatory theories, it is not surprising that anti-discrimination laws have not transformed norms and cultures sufficiently to address sexual harassment. These laws are focused on allowing individuals to claim redress after the fact, with little power to challenge and transform the cultures that allow such behaviour. Additional and complementary regulatory mechanisms are needed to challenge the underlying phenomenon to prevent harassment. One key part of a more effective regulatory mix would be reflexive regulation, which is designed to effect cultural change within institutions, such as workplaces.

The theory of reflexive regulation focuses on ways to prompt institutions to review and revise their own internal practices, to meet public policy goals.⁵³ The aim of this regulation is to alter the behaviour of the regulated actors (e.g. those within workplaces) *prospectively*, rather than merely enforce rules following their breach. This ‘second generation regulation’ seeks to promote ‘a culture of compliance’.⁵⁴ To drive change, it relies less on litigation of individual cases of breaches, and ‘more on responsive proceduralized self-regulation, in which compliance is based on developing the capacity of institutions to address inequality’⁵⁵ and skilfully wielding enforcement powers to ensure this happens.

⁵³ Manfredi et al, ‘The Public Sector Equality duty: enforcing equality rights through second generation regulation’ (2018) 47(3) *Industrial Law Journal* 365, 372. This theory of reflexive regulation, based on autopoiesis or systems theory, posits that law cannot *directly* change norms within organisations, but has potential to *indirectly* change them by prompting internal reflection and action.

⁵⁴ Manfredi et al, above n 53, 370.

⁵⁵ Manfredi et al, above n 53, 371.

A leading UK equality scholar, Bob Hepple, applied this theory of reflexive regulation to equality and identified three necessary criteria in the design of effective laws:⁵⁶

- **Positive duty:** A legal duty that requires the organisation to scrutinise its own practices, to prompt ‘self-regulation’;
- **Stakeholder involvement:** ‘involvement of “interest groups (such as managers, employees and service users) who must be informed, consulted and engaged in the process of change”’; and
- **Enabling and Enforcing:** ‘an enforcement agency ... which should provide the back-up role of assistance, building capabilities and ultimately sanction where voluntary methods fail’.

These three ‘interlocking mechanisms’ are not effective in isolation. They operate together to create a:

triangular relationship among those regulated ... others whose interests are affected ... and the enforcement agency as the guardian of the public interest.⁵⁷

The duty: The duty is a positive one, imposed on those who have some capacity to change the culture and prevent the offending behaviour. It requires the organisational leaders to audit the organisation to identify how the particular problem manifests – what are the risks and problems – in that particular context, and develop a response that is tailored to that particular context.

Stakeholder involvement: A critical and often overlooked part of this system of regulation is the active and informed engagement of stakeholders in these processes of identifying the problem and designing responses. In the case of sexual harassment, stakeholders include all workplace participants; not just management and officers, but those who are at risk of experiencing harassment and even potential perpetrators. ‘Such second-generation regulatory mechanisms aim to be *participative* and *deliberative*, thereby ensuring their effectiveness as they can draw on the experience of those with the best practical knowledge and experience of any obstacles to implementation.’⁵⁸

Agency role: To ensure that the positive duty and consultation are not merely checkbox or bureaucratic exercises, there must be some agency input and oversight. The agency role is two-fold – enabling compliance and enforcing it. Many organisations upon whom the positive duty falls will lack the will, insight or resources to be able to comply. Consultation with stakeholders could provide insight, but even this could be perfunctory and thus not challenge or change behaviours or norms. Agencies, *with sufficient resources and expertise*, need to be empowered to build the capacity of duty-

⁵⁶ Manfredi et al, above n 53, 372, citing to B. Hepple ‘Enforcing Equality Law: Two Steps Forward and Two Steps Backwards of Reflexive Regulation’ (2011) 40 *Industrial Law Journal* 321

⁵⁷ Hepple, (n56).

⁵⁸ Manfredi et al, above n 53, 371

bearers to respond effectively. This might mean providing training or guidance materials, or enabling stakeholders to participate more fully and forcefully in consultations and deliberations about organisational responses. Such enabling powers, however, must be paired with enforcement powers. By providing an enforcement agency with a range or pyramid of enforcement tools, the agency has capacity to regulate responsively.⁵⁹ With a range of ‘soft’ tools of persuasion and education, combined with access to harder tools of punitive sanctions, the agency can more effectively encourage and ensure compliance. In this system, the agency must have power to identify risks and wrong-doing, *enable* compliance (through guidance, capacity building etc.) and, ultimately *enforce* the rules.

To address sexual harassment in work we need a positive duty on those within workplaces to take active steps to prevent harassment. But this duty cannot merely be an unenforceable suggestion. It needs to be within a regulatory framework that compels engagement with stakeholders, and empowers and resources an agency to enable and enforce compliance.

5.3 Positive duties in anti-discrimination laws?

As noted above, currently our anti-discrimination laws prohibit harassment, but do not require or effectively enable organisations to change. They do not impose a positive duty on organisations to audit or self-regulate. They impose no obligations to inform, consult or engage stakeholders in identifying risks of harassment or designing solutions. And, while the AHRC has some important powers of providing education and guidance, these can only be offered, not wielded in any strategic pyramid of enforcement.⁶⁰

Many have suggested that our anti-discrimination laws should be amended to include an enforceable positive duty to prevent discrimination and harassment. The purpose of positive duties is to place obligations onto duty-holders to prevent, rather than merely respond to discrimination and sexual harassment.⁶¹ Such a duty requires duty-bearers to acknowledge and dismantle systemic workplace practices which allow for sexual harassment to occur.

In many jurisdictions there has been the growing utilisation of responsive and reflexive regulation theory. Comparable jurisdictions have introduced elements of a proactive model aimed at institutional change.⁶² As Fredman has articulated, this approach moves away from the fault-based model of traditional anti-discrimination measures and

⁵⁹ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Socio-Legal Studies.; New York: Oxford University Press, 1992) 205; John Braithwaite, 'The Essence of Responsive Regulation', (2011) 44 *University of British Columbia Law Review* 475-520.

⁶⁰ Belinda Smith, 'A regulatory analysis', above n 12, 105, 109, 111-112. Cf Fair Work Ombudsman.

⁶¹ Belinda Smith, 'Not the Baby and the Bathwater', above n 1, 713.

⁶² Belinda Smith, 'It's About Time', above n 1, 137.

instead focuses on the capacity of institutions to address issues of systemic inequality.⁶³ The UK, among other jurisdictions, has taken this step. The UK's public sector equality duty is an example of this kind of second generation reflexive law, designed to complement and enhance the individual claims-based system of anti-discrimination laws to achieve greater cultural change.⁶⁴ Though the duty appears to be very modest, research shows it has already had some effect in changing practices and norms as this theory predicts.⁶⁵

It is important when designing a positive equality duty that it does not become an 'exercise in procedure and paperwork' but rather does create institutional change.⁶⁶ To do this, each part of Hepple's interlocking regulatory mechanism needs to be engaged.

A positive duty should be action-based and goal-orientated.⁶⁷ Such a duty should require duty-bearers to scrutinize organizational practices and institutional patterns which allow harassment to occur rather than only focus on individual complainants and the individuals responsible for the harassment.

The duty should require the consultation and involvement of all workplace participants in identifying and addressing the institutional patterns and structures which perpetuate harassment in the workplace.⁶⁸ This engages the stakeholder arm of Hepple's interlocking regulatory mechanism and allows for the approach of the duty-bearer to engage with and better understand how sexual harassment manifests in that workplace and the best way to tackle it.⁶⁹ It focuses on the need for training for members of the organisation and the continued monitoring of the effectiveness of the policies and practices of the organisation.⁷⁰

Finally, for any positive duty to have the desired outcome, the regulator (such as AHRC) must have a range of powers available to them to support such a duty.⁷¹ This can involve supporting self-regulation through persuasion, advice, the provision of

⁶³ Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 373 and Belinda Smith and Dominique Allen, 'Whose Fault Is It?', above n 12.

⁶⁴ Sandra Fredman and Sarah Spencer, 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes', *European Human Rights Law Review*, 6 (2006), 598-606; Sandra Fredman, 'Changing the Norm' (n63), Sandra Fredman, 'Equality as Proactive Duty' (2012) 60 *American Journal of Comparative Law* 265; Christopher Mccrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper', *Industrial Law Journal*, 36/3 (2007), 255-66.

⁶⁵ Manfredi et al, above n 53; S Arthur, M Mitchell, J Graham & K Beninger (NatCen), *Views and Experiences of the Public Sector Equality Duty (PSED) Qualitative research to inform the review* (Government Equalities Office, Sept 2013).

⁶⁶ Sandra Fredman and Sarah Spencer, 'Delivering Equality: Towards an Outcome-Focused Positive Duty' (Submission to the Cabinet Office Equality Review to the Discrimination Law Review, June 2006), 1.

⁶⁷ *Ibid*, 10.

⁶⁸ *Ibid*, 12.

⁶⁹ Belinda Smith, 'How might information bolster anti-discrimination laws' (n15).

⁷⁰ Smith, 'It's About Time – For a New Regulatory Approach to Equality' (n1).

⁷¹ Smith, 'Not the Baby and the Bathwater', (n1) 723.

guidance on best practice and evidence of the practices of comparable organisations.⁷² However, to be effective, there needs to be sufficient sanctions in case of non-compliance through powers of enforcement involving a range of systemic corrective orders and even penalties.⁷³ A positive duty needs to be supported through a range of compliance measures and sanctions consistent with Braithwaite’s regulatory pyramid.

Recommendation 15:

A positive duty to prevent, rather than merely respond to discrimination and sexual harassment.

A positive equality duty be developed carefully with close stakeholder engagement and reflection, is directed at real institutional change, and include:

- **a requirement on duty-bearers to scrutinize organizational practices and institutional patterns which allow harassment to occur;**
- **consultation and involvement of all workplace participants;**
- **training for members of the organisations involved;**
- **continued monitoring of the effectiveness of the policies and practices of the organisation; and**
- **a range of powers for the regulator (such as the AHRC) including compliance measures and sanctions to support such a duty.**

5.4 Existing laws – work health and safety

In any event, it is time to recognize that a positive duty already applies to organisational leaders to prevent sexual harassment in workplaces (and beyond). Our Work Health and Safety (WHS) laws impose such a duty to proactively identify and address risks of harm in the workplace, and these include obligations to consult stakeholders. These laws also empower government agencies to enable and enforce compliance. In contrast to anti-discrimination laws, WHS laws more closely reflect the theory of reflexive regulation and allow for responsive regulation.

Recalling Hepple’s three requirements for reflexive regulation, it is clear that WHS laws reflect this framework:

	Reflexive Regulation theory	WHS laws provide
1.	a positive duty to scrutinize organizational practices	a positive duty on employers to ensure, <i>so far as is reasonably practicable, the health and safety of workers and other workplace</i>

⁷² Smith, ‘Not the Baby and the Bathwater’, (n1) 727; Smith, ‘It’s About Time – For a New Regulatory Approach to Equality’, (n1) 142 and 143.

⁷³ Smith, ‘Not the Baby and the Bathwater’, (n1) 705 – 706.

		<i>participants</i> , and this includes psychological health
2.	a consultation requirement	with a raft of associated duties (eg consultation, cooperation, training and monitoring) to give effect to the primary duty
3	an agency that can: <ul style="list-style-type: none"> • Enable: build capacity • Enforce: ultimately sanction 	WHS agencies that: <ul style="list-style-type: none"> • provide assistance (codes of practice, guidance materials, etc); and • enforcement (with access to a range of possible sanctions for non-compliance).

There can be no doubt that WHS statutes are intended to address the types of psychological and physical harms that often result from harassment (and discrimination). The object of the Model WHS Act⁷⁴ is ‘to secure the health and safety of workers and workplaces’,⁷⁵ including by eliminating or minimising risks arising from work to protect ‘workers and other persons against harm to their health, safety and welfare’.⁷⁶ ‘Health’ is defined to include ‘psychological health.’⁷⁷

The primary duty of care imposed by the Model WHS Act is on a person conducting a business or undertaking (PCBU) *to ensure, so far as is reasonably practicable, the health and safety of workers and other workplace participants* (e.g. volunteers, contractors, suppliers) under their effective control.⁷⁸ PCBUs must also ensure that a workplace that they manage or control, or anything arising from that workplace, does not put at risk the health and safety of any person.⁷⁹

The focus is not on individuals and isolated incidents of misbehaviour; the focus is on systems and cultures. The obligation requires the PCBU to provide and maintain safe ‘systems of work’⁸⁰ and a ‘work environment’ that is safe and without risk to health.⁸¹ In addition, PCBUs must so far as is reasonably practicable, *consult* with workers and any health and safety representatives about work health and safety matters that directly affect them;⁸² and provide ‘any information, training, instruction or supervision that is

⁷⁴ There are nine sets of WHS statutes across Australia, but seven of these reflect the Model Act developed through a national harmonization process (2008-2011), with Victoria and Western Australia legislating independently.

⁷⁵ *Work, Health and Safety Act 2011* (Cth) s 3(1).

⁷⁶ *Work, Health and Safety Act 2011* (Cth) s 3(1)(a).

⁷⁷ *Work, Health and Safety Act 2011* (Cth) (s 4 and Schedule 5).

⁷⁸ *Work, Health and Safety Act 2011* (Cth) s 19(1).

⁷⁹ *Work, Health and Safety Act 2011* (Cth), s 20.

⁸⁰ *Work, Health and Safety Act 2011* (Cth) s 19(3)(c).

⁸¹ *Work, Health and Safety Act 2011* (Cth) s 19(3)(a).

⁸² *Work Health and Safety Act 2011* (Cth) s47(1).

necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.’⁸³

However, there is a fundamental problem: despite the growing evidence of the seriousness and pervasiveness of sexual harassment and the harm that it causes, Australian WHS agencies have shown remarkable blindness or reluctance to acknowledge harassment as a workplace hazard that warrants their attention. *Unless and until WHS agencies acknowledge and address this gap, this whole system that is explicitly designed to protect workers from harm will continue to fail to protect workers from sexual harassment.*

There is growing recognition across Australia⁸⁴ that sexual harassment is part of a wider problem of gender inequality and gender violence, and that a focus on gender, and that health and safety laws should be enlivened as part of the regulatory response. Other submissions to this inquiry have similarly recognized the absence or underperformance of WHS agencies⁸⁵ in protecting women from this workplace hazard.

There is also growing *international* support for characterizing sexual harassment as a gendered harm and one that warrants a proactive response that includes attention to health and safety.

In August 2018, the International Labour Organisation (ILO), released a draft Convention (with associated Recommendation) on *Ending Violence and Harassment in the World of Work*.⁸⁶ This was developed after years of consideration and consultation with governments and representative organisations of employers and workers, including those from Australia.⁸⁷ The draft Convention defines ‘violence and harassment’ as ‘a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, having the aim or effect of causing physical, psychological, sexual or economic harm, and includes gender-based violence and harassment’.⁸⁸ ‘Gender-based violence and harassment’ are in turn defined to mean ‘violence and harassment directed at persons because of their sex or gender, or affecting

⁸³ *Work, Health and Safety Act 2011* (Cth) s 19(3)(f).

⁸⁴ See, e.g., Victorian Trades Hall Council, *Stop Gendered Violence at Work* (Report, 2017) https://d3n8a8pro7vhmx.cloudfront.net/victorianunions/pages/4164/attachments/original/1511416569/Stop_GV_At_Work_Report_2017.pdf?1511416569; Unions NSW, *Reforms to Sexual Harassment Laws* (Discussion Paper, 2018), http://www.asmfnsw.org.au/DISCUSSION_PAPER_Reforms_to_sexual_harassment_laws_Final_13_August_2018.pdf; Northern Territory Working Women’s Centre, *Submission to NT Workplace Health and Safety Review* (2018).

⁸⁵ See e.g. Submission 170: Professors McDonald and Charlesworth; Victorian Legal Aid submission; Unions NSW submission.

⁸⁶ International Labour Office, *Ending Violence and Harassment in the World of Work* (Report V(1), 108th Session, 2019), <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_637108.pdf> 97.

⁸⁷ For Australia, this included the federal government, the Australian Council of Trade Unions and the Australian Chamber of Commerce and Industry.

⁸⁸ ILO (n86) Art 1 (a)

persons of a particular sex or gender disproportionately, and includes sexual harassment.⁸⁹

The preamble to the draft Convention recognises ‘an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to ending violence and harassment in the world of work’.⁹⁰

The draft Convention sets out the prevention measures that Member states must take, including national laws and regulations that require employers to take steps to prevent workplace harassment and violence, and which:⁹¹

- (a) adopt and implement, in consultation with workers and their representatives, a workplace policy on violence and harassment;
- (b) take into account violence and harassment and associated psychosocial risks in the management of occupational safety and health;
- (c) identify hazards and assess the risks of violence and harassment, with the participation of workers and their representatives, and take measures to prevent and control them; and
- (d) provide to workers concerned information and training on the identified hazards and risks of violence and harassment and the associated prevention and protection measures.

Member states are required to ensure that ‘guidance, resources, training or other tools are provided to employers, workers and their organizations’,⁹² and that the duties on employers are monitored and enforced, with appropriate sanctions.⁹³

Governments in other countries have already adopted laws that reflect this approach. Two examples from Canada are provided. In Canada, the need for an employer to take steps to prevent sexual harassment in the workplace is embedded in the national workplace health and safety regulation. The Canadian *Labour Code* requires every employer to produce a policy statement (after consultation with their employees) which includes the following:⁹⁴

- A definition of sexual harassment (based on the one provided in the Code)
- A statement that everyone is entitled to be free from sexual harassment

⁸⁹ ILO (n86) Art 1(b).

⁹⁰ ILO (n86) 16.

⁹¹ ILO (n86) Art 9.

⁹² ILO (n86) Art 11.

⁹³ ILO (n86) Art 10.

⁹⁴ Labour Code s 247.4(1) and (2)

- A statement that the employer will make every reasonable effort to ensure that no employee is subject to sexual harassment
- A statement that the employer will take such disciplinary measures as the employer deems appropriate;
- A statement outlining the complaints procedure
- A statement confirming non-disclosure or complaints unless required by law.

Additionally, all persons under the direction of the employer must be made aware of this policy.⁹⁵

Further, the Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017 was passed in October 2018, and create the following obligations for employers:⁹⁶

- Take prescribed measures to prevent and protect against harassment and violence in the workplace and offer support to employees affected by harassment and violence in the workplace
- Ensure that all employees, including those who have supervisory or managerial responsibilities receive training in the prevention of harassment and violence in the workplace
- Ensure that the complaints person is trained or has knowledge or experience to deal with issues relating to harassment.

At a provincial level in Canada, there are also obligations contained in the *Occupational Work and Safety Acts*. For example. The Ontario Act requires employers to have a policy with respect to workplace harassment which is reviewed annually (at a minimum), be and posted in a conspicuous location in the workplace (unless there are under 5 employees).⁹⁷

The program must include the following:⁹⁸

- Measures and procedures for workers to report incidents of workplace harassment to the employer
- Measures and procedures for workers to report incidents of workplace harassment to a person *other* than the employer in cases where the employer is the harasser.
- Set out how incidents and complaints will be dealt with
- Set out the non-disclosure regime associated with the complaint

⁹⁵ Labour Code s 247.4(4).

⁹⁶ Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, s 3(3).

⁹⁷ *Occupational Work and Safety Act* s 32.0.1(1)(b) (Ontario)

⁹⁸ *Occupational Work and Safety Act* s 32.0.1(2) and (3) (Ontario)

- Set out how the worker(s) will be informed of the outcome of any investigation and of how corrective action can be taken as a result of the investigation.

The employer's duties with respect to harassment in the workplace include:⁹⁹

- A duty to conduct an appropriate investigation
- A duty to inform complainants and alleged harassers (if a worker) of the outcome and actions that will be taken

The approach adopted in Canada recognises sexual harassment as a workplace hazard. It does not focus on an individual complaint, but instead focuses on the systems and procedures that need to be in place to combat sexual harassment in the workplace.

Recommendation 16

The AHRC should do what it can to ensure:

WHS agencies and employers understand that sexual harassment is a workplace hazard that poses a serious risk to the health and safety of Australian workers; and

WHS agencies acknowledge this and act upon it to:

- **educate employers (and other 'persons conducting a business or undertaking', their 'officers' and workers) about this workplace hazard;**
- **develop guidance materials (including a Code of Practice) to enable prevention; and**
- **enforce the WHS duties in respect of sexual harassment.**

Recommendation 17

The WHS agencies should be compelled to:

- **engage with the AHRC in developing expertise in identifying sexual harassment and sexual harassment risks in work;**
- **nominate specific personnel within the inspectorates to develop such expertise in identifying sexual harassment and sexual harassment risks in work;**
- **engage with the AHRC to develop guidance materials and, ultimately a code of practice, specifically in respect of sexual harassment:**
 - **to help workplace participants prevent sexual harassment; and**
 - **to enable WHS agencies to hold workplace participants to account in prevention steps;**

⁹⁹ *Occupational Work and Safety Act* s 32.0.6

- **report on these steps.**

6 SEXUAL HARASSMENT AND THE FAIR WORK ACT

As a significant proportion of all sexual harassment occurs at work, it is essential that there is a specific prohibition of sexual harassment in the national workplace relations laws and that there are viable options for preventing and remedying sexual harassment under such laws. It is also important from a deterrence point of view that the national workplace relations regulator, the Fair Work Ombudsman, have a role in prosecuting such conduct.

At present, there are no specific provisions in the FW Act directly prohibiting sexual harassment or providing a direct means for pursuing a remedy for workplace sexual harassment. Instead, a person who experiences sexual harassment at work has to rely on other provisions in the FW Act that do not explicitly refer to sexual harassment, but may in some circumstances be found to cover such conduct (discussed below).

This is unsatisfactory as it does not name the conduct as unacceptable workplace behaviour. Nor does it provide a clear avenue for redress that is readily apparent to those who are subject to such conduct/behaviour. These indirect means of redress are very unlikely to be pursued in the absence of legal advice or representation.

Currently, the primary means for pursuing a claim for sexual harassment under the FW Act are the general protections and the bullying provisions of the Act. Each of these has limitations in terms of their effectiveness in preventing and remedying sexual harassment at work.

The general protections provisions in the FW Act prohibit adverse action in employment with respect to a range of attributes covered by anti-discrimination laws, including sex. As sexual harassment has been found to constitute sex discrimination, it could be a form of adverse action based on sex. However, the applicant would need to prove that the treatment was because of the attribute. This necessitates a comparative approach that relies on less favourable treatment based on an attribute; for example the sexualised way that women were treated would not have occurred to men. This does not fit well with the way in which sexual harassment arising in many workplaces, where there is an unacceptable sexualisation of the workplace and its culture more broadly, which does not hinge on a specific gender differential. Very few claims have proceeded in this manner. The Fair Work Commission's *General Protections Benchbook*¹⁰⁰ refers to only one case example, where the Court held that, apart from her own hypotheses and beliefs, the applicant had not provided any evidence of actions or

¹⁰⁰ Fair Work Commission, *Benchbook General Protections* (<https://www.fwc.gov.au/documents/documents/benchbookresources/generalprotections/general-protections-benchbook.pdf>).

behaviours which were as a result of her sex.¹⁰¹ It when on to state that to succeed the applicant would have to show that the respondent ‘would have acted in a different manner if the applicant was not a woman.’¹⁰²

Another type of general protections action that could arise is where a person who is subject to sexual harassment exercises a workplace right to enquiry or make a complaint about harassing conduct or behaviour, and as a consequence is treated adversely in the workplace. This again is an indirect way of dealing the problem and it does not address the unacceptable nature of the conduct itself, but instead targets the treatment received by a person when seeking some form of assistance or redress.

Part 6-4B of the FW Act provides an avenue for workers who are bullied at work to apply to the Fair Work Commission for an order to stop the bullying they are currently experiencing. It is a regime that does not afford any compensation for what a person has experienced, as it is designed primarily to bring unacceptable workplace conduct to an end. No remedy is available to a person who has left the workplace due to such treatment. The Commission is given wide powers to make preventative orders

The Act defines bullying as repeatedly behaving unreasonably towards a worker where that behaviour creates a risk to health and safety. Sexual harassment claims could satisfy these three criteria. The case law arising from applications made under these provisions tends to use the terms ‘harassment’ in a generic way as a potential subset of bullying, without linking it to any specific type of harassment. For example, in *Amie Mac v Bank of Queensland Limited and Others*¹⁰³ the Fair Work Commission indicated that some of the features which might be expected to be found in a course of repeated unreasonable behaviour constituting bullying at work were: ... ‘intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination.’

While much of the material surrounding the topic of bullying refers to bullying in unison with harassment, this scope is not apparent from a reading of the provisions themselves. The Fair Work Ombudsman’s explanation of the anti-bullying laws, while referring to harassment generally makes no specific mention of sexual harassment or guidance that harassment could be dealt with in this way.¹⁰⁴ In contrast the Fact Sheets on workplace bullying made available by the Australian Human Rights Commission specifically refers to sexual harassment in outlining what bullying at the workplace looks like.¹⁰⁵

¹⁰¹ *Evangeline v Department of Human Services* [2013] FCCA 807.

¹⁰² *Ibid.*, [10].

¹⁰³ [2015] FWC 774 (Hatcher VP, 13 February 2015) [99].

¹⁰⁴ See <https://www.fairwork.gov.au/employee-entitlements/bullying-and-harassment>

¹⁰⁵ <https://www.humanrights.gov.au/workplace-bullying-violence-harassment-and-bullying-fact-sheet> .

Recommendation 18

Amend the FW Act to:

- **explicitly protect workers from sexual harassment. This could be prohibited as a form of adverse action itself, without the need to identify it as a form of discrimination or as coming within the exercise of a workplace right;**
- **make clear that sexual harassment comes within the scope of the bullying provisions.**