

Submission to the National Inquiry into Sexual Harassment in Australian Workplaces

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Introduction

Australian research into occupational health and safety (OHS) is a lot less than research into other areas of business and management, especially in relation to the psychological wellbeing of workers at all levels of the corporate structure. As such, it has become common for experts, advocates and researchers from the social, non-work, public health areas to overlay general and broad research findings on to workplaces – they are, in effect, filling a vacuum. But just because the OHS research into psychological harm is thin or immature does not mean that work does not have its own characteristics.

Over many years OHS has produced research and guidelines that include the psychological effect of sexual harassment, but it has been ineffectual or ignored for many reasons. This submission is an attempt to illustrate the potential **already in existence** in Australia that could be used to prevent sexual harassment-related psychological harm.

This submission has drawn almost exclusively on Australian-based documentation and research to better satisfy the title and aim of this Inquiry. This is not saying that actions and data from overseas are not relevant: there is some excellent information on the matter from the European Union¹, for instance. But quite often people seem to look overseas for evidence and solutions when Australia already has good research and advice, if one looks.

Summary of key points

- Sexual harassment often results in psychological harm to workers, and employers and PCBU's already have a legislative obligation under OHS/WHS law to eliminate (prevent) risks to health and safety, including psychological risks.
- By accepting that sexual harassment is a form of workplace violence, new prevention options may be available.
- Australia has a range of general and specific guidance on the systematic prevention of the psychological harm generated by sexual harassment, produced by Federal and State or Territorial health and safety regulators.
- Prevention of sexual harassment may be extremely disruptive to workplaces even though it remains the most effective control measure.
- Any strategy to prevent sexual harassment must have a multidisciplinary and cross-agency approach.
- Independent assessment of sexual harassment risks can be determined to internationally-recognised Standards

Prevention

A core element of OHS is the prevention of harm, a focus that this Inquiry is also committed to investigating. Other than the legislative requirement to eliminate risk at work, as far as is reasonably practicable, prevention is acknowledged as the most effective and efficient way to eliminate and reduce physical and psychological harm.

There is a moral obligation in the Australian culture not to harm others, but as this Inquiry is to focus on “**Sexual Harassment in Australian Workplaces**”, it is useful to look at the OHS or WHS legislation. Division 2, Section 19 addresses the Primary Duty of Care

- (1) *A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:*

¹ Mainstreaming gender into occupational safety and health practice - <https://osha.europa.eu/en/tools-and-publications/publications/reports/mainstreaming-gender-into-occupational-safety-and-health-practice>

- (a) workers engaged, or caused to be engaged by the person; and
 - (b) workers whose activities in carrying out work are influenced or directed by the person,
- while the workers are at work in the business or undertaking.
- (2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.
 - (3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:
 - (a) the provision and maintenance of a work environment without risks to health and safety; and
 - (b) the provision and maintenance of safe plant and structures; and
 - (c) the provision and maintenance of safe systems of work; and
 - (d) the safe use, handling and storage of plant, structures and substances; and
 - (e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
 - (f) the provision of any information, training, instruction or supervision that is 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; and
 - (g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

The WHS Act defines “health” as meaning both physical and psychological health.

As a curious aside, [Victoria’s 1985 OHS Act](#) failed to make this inclusion, perhaps, because the Government did not think it was necessary, however the acknowledgement of psychological hazards at that time can be assumed by the inclusion in the Act’s Schedule of the prescription of

*“... standards in relation to the use of, including standards of exposure to, any physical biological chemical or **psychological hazard.**” (emphasis added)*

Leaving “reasonably practicable” aside for the moment, business owners must provide safe and healthy work. This is done by providing and maintaining “a work environment without risks to health and safety” and this is achieved through safe systems of work and the monitoring of workers’ health.

Sexual harassment is clearly a breach of many of these duties and yet rarely, if ever, is enforcement action taken against a business owner by the OHS Regulators. There are many reasons why this does not occur, but they are beyond the context of this submission.

Contrary to much of the discussion of sexual harassment in Australian workplaces, WHS/OHS legislation **already** includes a positive duty to provide work and workplaces free from the risk of sexual harassment and its psychological harm. It is requested that the Commission note this fact when reviewing other Submissions and considering its Recommendations.

(In)Actions to Prevention

The prevention of psychological harm resulting from a range of work-related activities was ignored or, perhaps to be fairer, given a low priority for many years. One example of this could be the quiet response in the Industry Commission's 1995 inquiry into OHS², which does not specifically mention sexual harassment or psychological harm but does discuss the value and importance of prevention and wrote:

"...successful control of the risks of occupational injury and disease relies on an approach involves the following steps:

- *the identification of the hazards at the workplace;*
- *assessment of the factors which are essential or contribute to the greatest risks to health and safety;*
- *assessment of the risk associated with each hazard; and*
- *selection and implementation of the most appropriate control measures.*

This approach is the most fruitful one to prevention. It considers all the factors associated with injury and disease and selects those that can be controlled such that the risks are reduced. This contrasts with an approach that only focuses on those factors which were in play at the time or were immediately linked to the injury or disease. As this latter approach tends to ignore the nature of the work environment and its activities, it tends to focus on worker behaviour as the cause of injury and disease." (page 26)

A hazard identification process that leads to the prevention of harm has long been supported by the OHS profession and OHS Regulators who agree with the benefits of prevention, but the latter approach in the quote above, which the Industry Commission says ignores "*the nature of the work environment and its activities*", has been the dominant approach taken on sexual harassment and the need for this particular Inquiry can be seen as evidence of that approach's failure.

Shortly after the Industry Commission's 1995 report, OHS Regulators began to "switch on" to the harm created by bullying, harassment and violence in the workplace.

Sexual Harassment and Workplace Violence

In the 1990s OHS regulators realised that the bullying of apprentices needed regulatory and enforcement attention after several serious injuries. The regulators and some academics began to analyse bullying in the workplace and determined that it was a manifestation of harassment and was an act of violence. Those early incidents and prosecutions did not include a sexual or gender context.

As the study of workplace violence increased, attention was given to the occupational environment of those types of incidents – hospitality, mining, customer service, health services and hospitals.... Some of the violence occurred in female-dominated industries like nursing, sometimes the nature of the violence included a gender context. This seemed to split the research strategies resulting in a sparse and confusing spread of research into workplace violence and allowed silos to develop.

Looking at some of the research prior to the split is of great benefit in trying to understand sexual harassment as a subset of workplace violence.

The Australian Institute of Criminology published a series of reports on workplace violence in the late 1990s with one written by Santina Perrone³ being particularly relevant to OHS and sexual

² [Work, Health and Safety – An Inquiry into Occupational Health and Safety](#), Industry Commission 1995

³ [Violence in the Workplace](#), Santina Perrone published by the Australian Institute of Criminology, Research and Public Policy Series No 22, 1999

harassment. Perrone included a chapter on “Countering Workplace Violence: Proactive and Reactive Strategies” which included discussion on occupational health and safety approaches:

*“Occupational health and safety legislation has historically served as the principal bulwark against employee harms. Nevertheless, as previously stated, occupational health and safety inspectorates around Australia have customarily chosen to avert their gaze from incidents of workplace violence, preferring to regard them as Crimes Act matters. It should be underscored that occupational health and safety regulators have jurisdiction to investigate all circumstances that constitute an unsafe working environment. Hence, **neglect of workplace violence is the consequence of internal policy rather than legislative constraint.**” (page 72)*

The last sentence in this paragraph is particularly pertinent to the National Inquiry which is likely to receive many submissions about legal interpretations and “solutions”. If, as Perrone says, that the neglect of workplace violence and, its subset, sexual harassment is a matter of internal policy, legal interventions are likely to be predominantly of indirect influence on prevention strategies.

A more sustainable prevention strategy may be possible through organisational change and policy re-evaluation, however it is acknowledged that Perrone’s research is twenty years old, and a legitimate question is, why was the OHS approach not applied?

Perrone provides a suggestion that history would support:

“Though many forms of workplace violence remain within the regulators' peripheral vision, many applaud the early indicators of a broadening of the occupational health and safety reach. However, this regulatory expansion also has associated problems. As suggested by Russell (1999), harassment, including sexual harassment, presents special difficulties for occupational health and safety regulators. Though tacitly acknowledged as an occupational health and safety issue, if explicitly accepted as such, it has the potential to impose huge demands on both human and financial capital. When the call for increased regulation is juxtaposed against the ever-dwindling resource base, the problems become patently clear.”

Sexual harassment did provide “special difficulties” for OHS Regulators, especially if those Regulators are not sufficiently funded and resourced. Hopefully WorkSafe Victoria makes a submission to the National Inquiry which illustrates the operational and resource difficulties it faced when trying to address workplace bullying through the establishment of a specialised inspectorate taskforce.

The issue of inadequate funding and enforcement was a major finding recently of the Senate Inquiry into Industrial Deaths⁴:

“The committee recommends that Commonwealth, State and Territory governments ensure that adequate funding and resourcing is allocated to their WHS regulators to allow for increased, more effective preventative activities in workplaces”. (Recommendation 12)

Sadly, as with many of the Recommendations in this report, the Federal Government⁵ only encourages the State and Territory regulators to reconsider funding and resourcing. OHS is a State/Territory obligation but a more coordinated, national leadership could have been given on this Recommendation.

Regardless of the politics, Perrone acknowledged the power of OHS legislation to address the potential and real harm from sexual harassment and other forms of workplace violence:

“The various State and Territory health and safety acts do not expressly address workplace violence. However, the respective general duties provisions are broadly based. Under these provisions, employers are generally required to bear the primary responsibility for providing their employees (and non-employees) a working environment that is free from recognised

⁴ [They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia](#) October 2018

⁵ [Australian Government response to the Senate Education and Employment References Committee report](#) – December 2018

risks, hazards, and potentially dangerous situations and processes (for a detailed review of the Australian health and safety legislation, see Johnstone 1997).

*Through vicarious liability provisions, employers can be held liable for the aggressive acts of one employee directed towards another employee. Moreover, the legislation is framed in such a manner that prosecutions may be launched irrespective of whether or not actual harms eventuate. It is the failure to provide a safe working environment, not the consequences of that failure (that is, actual harm), which constitutes the breach. Therefore, it is clear that, unlike the situation with respect to Crimes Acts, under the Occupational Health and Safety Acts, the employer's obligation to control risk is extended to addressing the potential for violence if it is an inherent feature of the working environment (Russell 1999). **This obligation technically extends to all forms of violence, whether it results in harm or simply constitutes an imminent danger.**" (page 72, emphasis added)*

Perrone went on to discuss Violence Prevention Programs, the majority of which focused on pre-incident actions and which are tabulated below:

- A Risk Management Approach
 - Pre-incident Strategies
 - A documented commitment to violence prevention
 - Pre-employment screening and termination procedures
 - Worksite risk analysis
 - Hazard prevention and control
 - Training and education
 - Crisis Management Team
 - Post-Incident Strategies
 - Trauma Counselling
 - Investigation of event.

The legitimacy of sexual harassment as an example of workplace violence was supported by WorkSafe Victoria in its 2005 publication "Workplace Violence and Bullying"⁶. In that publication the OHS Regulator says:

"The guide looks separately at areas of workplace violence such as assault and other crimes, threats, sexual harassment, racial abuse, and bullying." (page 2)

It lists examples of workplace violence which include actions that are considered as sexual harassment and notes that some may also be crimes:

- *"Someone threatening to hurt you*
- *Objects being thrown at you*
- *Pushing, shoving, punching, kicking*
- *Being touched up and any other type of indecent physical contact*
- *Racial abuse*
- *Unwelcome sexual comments" (page 3)*

There are more sexual harassment-specific actions listed later in the document.

Considering sexual harassment as an element of workplace violence provides many more options for change and change from existing social, managerial and legislative mechanisms which should minimise the costs of implementation.

⁶ Workplace Violence and Bullying, http://www.vfbv.com.au/region/13/documents/vwa_violence_bull.pdf

Focus on the Individual

For several decades the OHS and Human Resources (HR) professions were captured by this individual focus which was supported by the Behavioural Approach to OHS, which measured OHS performance on the basis of individual behaviour. It was allowed to permeate the management of personnel as it was easier to blame someone else for problems rather than face the structural and cultural factors that created or contributed to the hazards.

The Trade Union movement flagged the unfairness of this approach with its discussion of “the myth of the careless worker” best illustrated by John Matthews in his [Australian trade union safety representative handbook](#) published from the 1980s through to the 1990s but opposition was also expressed by many others including Andrea Shaw in her [paper published by WorkSafe Australia in 1994](#). Shaw wrote that the behavioural approach:

*“... model is based on theories of accident causation which stress behaviour rather than environment and system causes. Given the modern approach to OHS management which stresses 'safe place and safe system' approaches to risk control, such an approach to performance measurement would not be appropriate for the OHS Benchmarking Guidelines. It takes measurement one step back from system failure (an injury or disease) but **does not actually address the circumstances** which allow unsafe behaviours to be manifested.” (page 18, emphasis added)*

More recently, 2014, Professor Sidney Dekker has been quoted as saying:

“The claim I want to make most strongly is that safety culture is becoming, or has already become, the new human error in that it fits hand in glove with behavioural-based safety programs, which really are code for blaming the worker.” (page 20, Borys⁷)

Focussing on the individual worker was one way of addressing the “special difficulties” mentioned by Perrone above.

The OHS profession has largely rejected the Behaviour Based Safety (BBS) approach as it fails to encourage the continuous improvement of workplace health and safety promoted by the OHS Regulators, and supported by OHS/WHS legislation and guidances, and Australian Standards for OHS Management Systems. BBS seems to continue to be applied by the HR profession, especially in relation to sexual harassment.

Examples of this persistence in HR and many business management strategies is the provision of training in Resilience. Resilience training largely supports the BBS concept of individual toughness and the ability to put up with working conditions and activities that, under OHS law, could be considered unsafe and unhealthy. This type of training is a convenient way for many businesses to avoid the level of change that compliance with OHS laws would require, as seen in the legislative quote above.

Several submissions to this National Inquiry already indicate a preference for more or better individual-level interventions as if organisational and systematic approaches have somehow been shown to be ineffective, even though they have rarely been tried.

Workplaces are different

There is a tone from some of the publicly available Submissions⁸ that workplace health and safety Regulators are not equipped to address sexual harassment claims and incidents. That may be the case, but the potential of these Regulators, OHS/WHS laws and the OHS profession should not be

⁷ Borys D , (2014) Organisational Culture In Safety Institute of Australia, *The Core Body of Knowledge for Generalist OHS Professionals*. Tullamarine, VIC Safety Institute of Australia

⁸ As at 15 February 2019

dismissed, particularly as the existing prevention and management strategies have failed to meet the legislative obligations under the 1984 Sex Discrimination Act or address what some are currently describing as a [sexual harassment crisis](#).

Several submissions seem to see workplaces as just a part of social life that operates under the same morality, laws and scrutiny without acknowledging the specific duties of care prescribed under OHS legislation, regulations and guidances. These submissions also seem to forget, or ignore, that this Inquiry is about sexual harassment in **Australian workplaces**.

It is requested that the Commission to give greater prominence to information it receives that relates, predominantly to

- Australian legislative structures, **and**
- Australian mental health strategies, **and**
- Australian workplaces.

In support of this request, it is requested that the Commission to give close attention to a recent Safe Work Australia document that has been largely ignored by the community and especially by the public health and HR profession:

- National guidance material on [Work-related psychological health and safety - A systematic approach to meeting your duties](#).

This document was developed through tripartite consultation and can be considered as a position statement by business, government and employee representatives on how to manage psychological risk at work, including those related to sexual harassment. It provides recommendations for the prevention of psychological hazards throughout and deserves much more attention than it has received over its 18 months' existence.

Accepting the workplace context of this Inquiry there are a range of other publications from State and Federal workplace safety regulators that are directly relevant to the prevention of sexual harassment, including amongst others:

- WorkSafe Victoria's "[A guidebook for employers - Preventing and managing work-related stress](#)"
- New South Wales' "[Mentally Healthy Workplaces Strategy 2018–22](#)"
- Work Health and Safety Queensland's "[Mentally healthy workplaces toolkit](#)"
- WorkSafe ACT's "[Stresswise – Preventing Work-related Stress](#)"
- WorkSafe Victoria – "[Workplace Violence and Bullying](#)" (2005)
- Comcare – "[Working Well, An organisational approach to preventing psychological injury – A Guides for Corporate, HR and OHS Managers](#)" (2008)

It is requested that the Commission to give strong consideration to the mentions, or absence, of workplace health and safety research and guidance when reviewing other Submissions and considering its Recommendations.

Disruption

The prevention of sexual harassment is likely to be more disruptive on Australian workplaces than many expect, and there will be considerable opposition to change. A major element of this disruption is that a new set of expectations, behaviours and ethical standards is being imposed on established businesses. OHS has always had this struggle even though it has advocated for Safety in Design principles where safety and health is incorporated into the design and, hopefully, the original concepts of new businesses – the equivalent of instigating new conceptual structures to prevent the risks associated with sexual harassment.

These strategies are based on the fact that early costs, or early health and safety planning, reduces all types of costs for the life of that business or project. Professor Allan Fels recently reiterated this fact in a mental health presentation to the Committee for Economic Development of Australia⁹. The business case for this strategy was also illustrated by some research undertaken for Safe Work Australia in 2014 by Dr Sharron O’Neill¹⁰. Her research said:

“For too long, the business case for investing in measures to ensure the health and safety of workers has been viewed in restrictive, financial terms and based on inadequate and inherently biased data. Rather than strategically examining the cost-benefit to business of work health and safety, the typical ‘silo’-driven analysis produces a narrow focus on a very different concept; the cost-benefit to business of health and safety interventions. This has obscured much of the potential for improving organisational productivity and operational decision-making.”

Prevention is often confused with early intervention, partly, because the changes required to prevent psychological harm are seen as impracticable, costly, too disruptive and embarrassing. It is often easier to approach harassment-related psychological harm as a personal and inter-relational issue which, sadly, is an approach that perpetuates a toxic culture, inappropriate behaviours and harmful business practices.

OHS can be disruptive, and in many ways has always been disruptive, but this is often a consequence of insufficient attention being given to OHS when businesses are being created. The disruption may be embarrassing to the business owner as they feel they should have anticipated the hazard or are ashamed that sexual harassment has “appeared” in their workplaces. Business owners may react angrily to the intrusion of OHS as they felt that business was operating satisfactorily but this is indicative of a business operator who is out of touch with how their business has been working. In OHS parlance, they have been managing the ideal rather than the reality.

Multidisciplinary Approach Investigation

For many years the OHS profession has operated with a compartmentalised approach to worker health and safety. OHS dealt with preventing injuries and if injuries did occur, the injured worker would be handled by others – Human Resources, Return-To-Work Coordinators, Insurers... In terms of harassment-related psychological harm, this approach worked, as injured workers would almost always leave the employer. This “fixed” the immediate problem but allowed organisational factors or toxic culture to remain.

OHS investigated incidents, usually physical incidents, locating a root cause which was invariably an error by the worker that caused the injury or death. Investigation processes have changed to still identify the principal cause, but also to investigate organisational and cultural factors that may have made the worker’s bad decision to be more likely.

This approach is still immature in the investigation of psychological harm generated by sexual harassment, principally, because investigation of these incidents is conducted by Human Resource specialists who do not apply the formal OHS investigation techniques, such as ICAM (Incident Causer Analysis Method), which are increasingly contractually required by clients. This limits the consideration of organisational contributory factors and perpetuates the focus on the individual worker.

⁹ <https://safetyatworkblog.com/2018/12/07/fels-sets-the-scene-for-inquiries-into-workplace-mental-health/>

¹⁰ [The Business Case for Safe, Healthy & Productive Work](#), 2014

HR as opposition to prevention

The Inquiry has already received submissions from people expressing dissatisfaction with how Human Resources professionals have (mis)managed their complaints of sexual harassment at work. This submission will not address the HR role in the past but notes this quote from The Economist in its December 23, 2017 edition¹¹

“What needs to change is the tacit complicity of managers and staff. HR departments often defend the boss – especially if he is seen as a rainmaker, as Mr Weinstein was. Managers want to keep their star employees, even if they are toxic, because they appear to do so much for the team.” (page 11)

The HR profession needs to review its role as it relates to the management and prevention of sexual harassment and in many areas, this is occurring, but dismissing an organisation’s Duty of Care in favour of some other perceived organisational need or managerial direction is a breach of OHS laws and must be seen as such.

It is requested that the Commission to instigate a process that bridges the disciplinary gap between the OHS and Human Resources professions on the investigation of sexual harassment incidents and other shared management responsibilities.

Australian/International Standards

ISO 45001

The auditing of the OHS management systems (OHSMS) of Australian businesses has been to Australian Standard AS4801 for almost two decades. AS4801 is often the prerequisite for tendering for government contracts, Australia recently agreed to replace this standard with the first ever international OHSMS Standard ISO45001. ISO45001 includes psychosocial harm as part of its description of “Hazards” and its definition of “injury and ill-health”:

“Hazards can be physical, chemical, biological, psychosocial, mechanical, electrical or based on movement and energy.” (page 29)

“adverse effect on the physical, mental or cognitive condition of a person.” (page 4)

It opens the Standard with this sentence:

“An organization is responsible for the occupational health and safety of workers and others who can be affected by its activities. This responsibility includes promoting and protecting their physical and mental health.” (page vi)

ISO45001 includes auditable elements which includes “Leadership and Commitment”. On Leadership the Standard says:

“Top management shall demonstrate leadership and commitment with respect to the OH&S management system by:

- a) *taking overall responsibility and accountability for the prevention of work-related injury and ill health, as well as the provision of safe and healthy workplaces and activities.....”* (page 9)

Given the inclusion of psychosocial and mental harm throughout the Standard, and that Australian OHS regulators accept that sexual harassment is one of the causes of psychological harm, ISO45001 offers great potential for change, particularly with its focus on prevention.

Part of the next phase of work related to ISO45001, the ISO Working Group is developing a Standard for “Psychological Health in the Workplace” (ISO45004).

¹¹ <https://shop.economist.com/products/december-23rd-2017?redirect=US>

International Standards

Canada was the first country to develop a (free) National Standard of Canada for Psychological Health and Safety in the Workplace¹² which is designed to

“...provide a methodology that will lead to measureable improvements in psychological health and safety for Canadian employees in their workplaces...”

One of the auditable elements is

“psychological protection from violence, bullying and harassment”

This Standard could be used in Australian workplaces but the application of ISO45004 in the future is more likely.

The significance of OHSMS Standards is that they are compatible with other audit standards for business operations. Their interoperability is part of the attraction as they have been designed around a core set of management practices that include quality, risk and more.

The usefulness of the Standards is almost solely reliant on the quality and independence of the auditors, both qualities which provide credibility and strength to those companies that want to prevent sexual harassment-related psychological harm.

It is requested that the Inquiry to anticipate the introduction of ISO45001 and the impending Psychological Workplace Standard (ISO45004) in its assessment of submissions and its recommendations.

Conclusion/Requests

It is requested that the Inquiry

- note that WHS/OHS legislation **already** includes a positive duty to provide work and workplaces that are free from the risk of sexual harassment and its psychological harm, when reviewing other Submissions and considering its Recommendations.
- give greater prominence to information it receives that relates, predominantly to
 - Australian legislative structures, **and**
 - Australian mental health strategies, **and**
 - Australian workplaces.
- give close attention to Safe Work Australia’s publication “National guidance material on Work-related psychological health and safety - A systematic approach to meeting your duties”
- consider the mentions, or absence, of workplace health and safety research and guidance when reviewing other Submissions and considering its Recommendations.
- instigate a process that bridges the disciplinary gap between the OHS and Human Resources professions on the investigation of sexual harassment incidents and other shared management responsibilities.
- anticipate the introduction of ISO45001 and the impending Psychological Workplace Standard (ISO45004) in its assessment of submissions and its recommendations

¹²<https://mentalhealth.apec.org/sites/default/files/CNSPHSW.pdf>