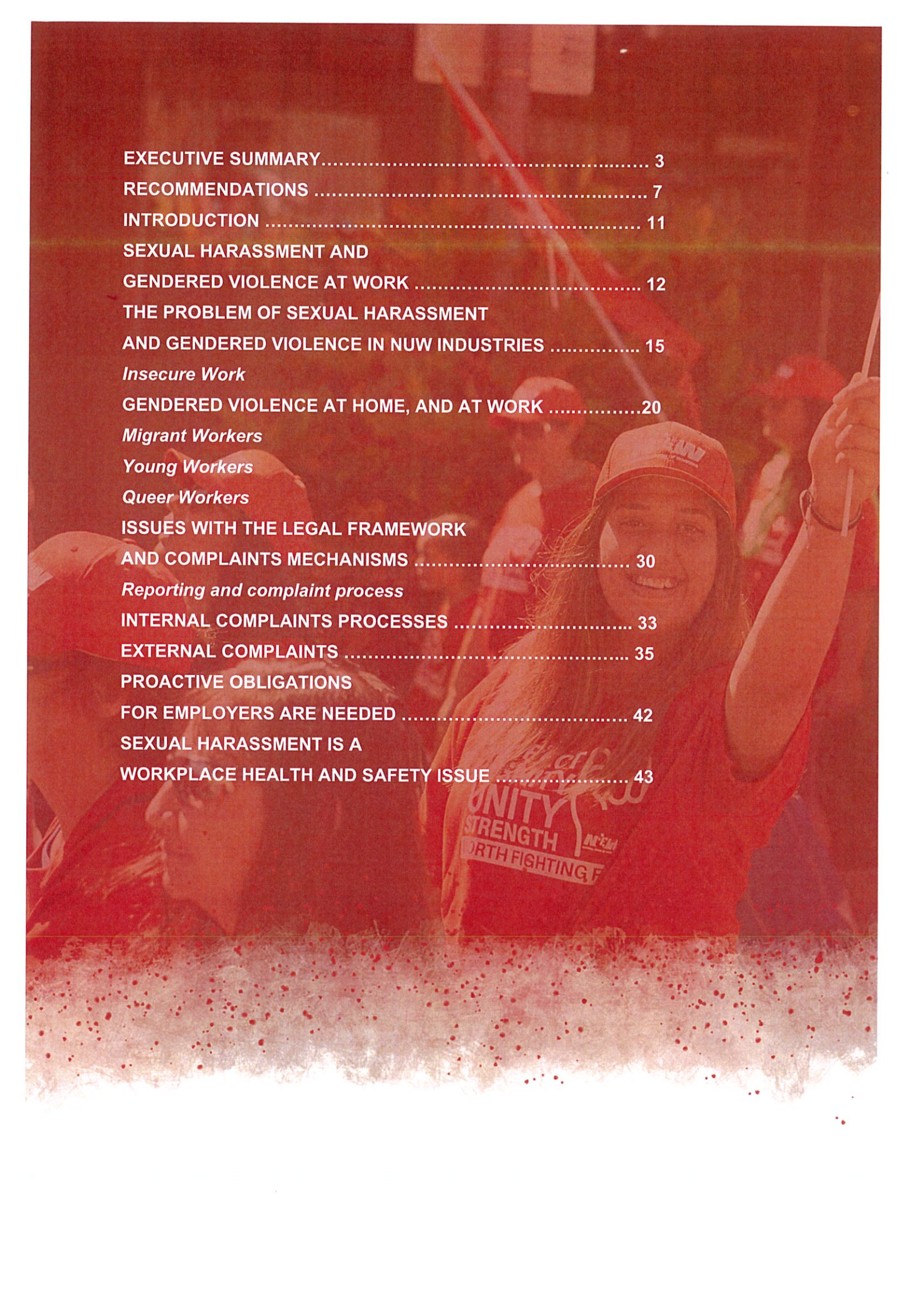


**AUSTRALIAN HUMAN RIGHTS COMMISSION NATIONAL INQUIRY
INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES**

**NATIONAL UNION OF WORKERS
SUBMISSION | FEBRUARY 2019**





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EXECUTIVE SUMMARY

The National Union of Workers (**NUW**) is a large Australian labour union registered under the *Fair Work (Registered Organisation) Act 2009* (Cth). The NUW represents workers in a range of industries including warehousing, cold storage, logistics, pharmaceuticals, oil refining and storage, manufacturing, poultry, dairy, market research, food processing, fresh food services and farms. The NUW is an active, campaigning union which organises workers in all forms of employment, including casual, seasonal and labour hire workers.

Current workplace laws do not adequately protect the 40% of Australian workers who are in insecure employment. Current regulatory frameworks – anti-discrimination laws, workplace health and safety laws and industrial laws – that assume permanent and direct employment as the mainstream are unable to properly address or remedy the experience of gendered violence at work for insecure workers. Workers engaged through a labour hire agency lack the jurisdiction to easily bring complaints against host employers, who are usually the decision makers, once a complaint of sexual harassment or gendered violence is brought in their workplace. Anti-discrimination and industrial laws, in particular, place the burden of redressing sexual harassment on an individual.

The experience of the National Union of Workers is that when insecure workers are subjected to sexual harassment or gendered workplace violence, they are less likely to report because they don't think they will be believed and sexual harassers are often directly employed and in a position of power in the workplace.

Workplace laws need to be radically recast to comprehend contemporary workplace relationships and emergent models of 'employment'. Sexual harassment is a workplace health and safety issue that happens to workers at workplaces not just to 'employees' and 'employers'.

Workplace laws need to place positive obligations on all employers at a workplace to protect the Complainant. Workplace health and safety laws should have specific sections requiring companies to perform risk assessments on perpetrators and situations in much the same way as they are currently required to with physical hazards like faulty machinery.

Insecure workers experiencing sexual harassment or gendered violence need the protection of immediate interim measures. Where there is an ongoing risk of sexual harassment or gendered violence, there should be an accessible jurisdiction/s available to them where workers can immediately obtain Orders that the sexual harassment or gendered violence stop and place obligations on the perpetrator to stay away from the Complainant. Because insecure workers have no entitlement to paid personal leave, dealing with the effects of sexual harassment often mean the victim bears a huge financial burden. Any genuine solution should necessarily ensure that complainants are not financially disadvantaged for reporting the harassment.

Employers 'self-regulation' approach to preventing and addressing sexual harassment in the workplace isn't working. Sexual harassment and other employer policies are more often used to defend a Company against a claim of sexual harassment rather than used pro-actively to prevent gendered violence. Training is 'tick and flick' and focused on avoiding liability, rather than aimed at affecting norms and behaviours.

Workplace sexual harassment is not confined to the bad behavior of individuals, nor is it usually motivated by sexual desire. Sexual harassment and gendered violence at work are creatures of unequal power relationships and manifestations of gender inequality at work.

Gendered violence at work is, more often than not, a collective issue affecting multiple complainants. The current legal framework relegates the pursuit of remedies to individuals, behind closed doors, in increasingly inaccessible, ineffective and bureaucratic processes. The framework hides the true extent and experience of sexual harassment and gendered violence at work.

The hidden nature of sexual harassment at work should be subject to frameworks that increase employer accountability and transparency. Workplaces should be required to design and implement policies on sexual harassment and gendered violence in line with a set of criteria established by a regulatory authority that can also audit and ensure ongoing compliance. Incidents of sexual harassment should be considered notifiable incidents which companies are obligated to report to WHS regulators and company boards.

Regulatory bodies should be empowered powers to investigate, enforce and seek penalties against perpetrators, as well as other tailored and collective public measures. Effective exercise of such powers would be capable of reshaping social understanding of workplace sexual harassment and gendered violence.

Domestic violence can be connected with workplace sexual harassment and gendered violence because the perpetrator is or was also personally involved with the victim or because the victim's capacity to work is impacted by an experience of domestic violence. There is no option in existing jurisdictions where the victim has experienced adverse action at work because of their involvement in a domestic violence matter. All forms of violence on the basis of gender, including domestic violence should both be considered 'protected attributes' to trigger a discrimination claim.

While the renewed interest in the problem of sexual harassment brought into focus by the #MeToo focus is timely, it should be noted that cultures of sexual harassment have continued to affect working women in Australian workplaces in much the same ways and forms that it has existed prior to the introduction of State and Federal anti-discrimination statutes. While discrimination laws have proliferated across jurisdictions in Australia, they have not yet developed into an adequate protection against sexual harassment and gendered violence at work.

The NUW welcomes the opportunity to share our members' stories with Commissioner Kate Jenkins in various public and private forums throughout the Inquiry, and to make these submissions to the Inquiry.



RECOMMENDATIONS

The NUW considers that the following priority reforms be pursued to create workplaces free from sexual harassment and gendered violence:

- **Strengthened legal frameworks across Anti-discrimination, Industrial and Workplace health and safety jurisdictions**
 - Recast legal frameworks that address sexual harassment to better comprehend insecure work and new employment models by broadening definitions to include concepts of 'workers' and 'workplaces';
 - Workplace Health and Safety laws (**WHS**) should be amended to provide for positive duties on persons conducting a business or undertaking (**PCBU**) to prevent sexual harassment and gendered violence at work and include effective worker mechanisms to mitigate the risk of sexual harassment in the workplace;
 - Significant legal penalties should be available to, and imposed on, employers who fail to take preventative action;
 - Concepts of 'notifiable incident', 'serious injury' and 'dangerous incident' in WHS laws need to be recast to specifically provide for sexual harassment as a workplace hazard;
 - WHS regulation must require PCBUs to report sexual harassment complaints and regulators to maintain data on sexual harassment incidents;
 - Create a stand-alone protection in the *Fair Work Act* 2009 (**FW Act**) for workers that have been sexually harassed;

- Provide a clear right of action and empower the Fair Work Commission (**FWC**) to conciliate and arbitrate sexual harassment matters, including exercising powers to make interim Orders that the sexual harassment stop and place obligations on the perpetrator to stay away from the complainant, as well as issue compensation orders;
 - Allow unions and other representative parties to bring actions on behalf of workers, or classes of workers, that have experienced sexual harassment;
 - Strengthen the *Sex Discrimination Act 1984* (**SD Act**) including by empowering the Sex Discrimination Commission to conduct own motion inquiries;
 - Strengthen Federal, State and Territory anti-discrimination legislation by including a positive duty on Employers to prevent gendered violence and sexual harassment;
 - Including domestic and family violence as a protected attribute under the SD Act.
- **Strong and effective regulators that prioritise preventative and enforcement measures**
 - Ensure the Sex Discrimination Commission (**SDC**) and WHS regulators receive adequate funding to conduct compliance, enforcement and education activities in respect of sexual harassment;
 - That the SDC take pro-active compliance and enforcement action in respect of employer breaches of their positive duty to prevent gendered violence and sexual harassment;

- Acknowledge and strengthen the role of WHS Regulators to prevent sexual harassment and gendered violence at work;
 - WHS regulation and regulators should develop, in consultation with workers, unions and employers, an enforceable Code of Practice specifically for sexual harassment and gendered violence at work.
 - Require WHS regulators to review current approaches to compliance and enforcement in respect of sexual harassment and gendered violence matters;
 - Require WHS regulators to develop a specific strategy to address workplace sexual harassment as a key workplace health and safety risk;
 - The Australian Human Rights Commission (**AHRC**) should undertake research and collect data on the incidence of sexual harassment of vulnerable cohorts including insecure workers, young workers and migrant workers.
- **Redress mechanisms that support complainants and provide timely and effective resolution of sexual harassment matters**
 - WHS and anti-discrimination regulators to educate employers on internal grievance processes that support sexual harassment complainants, rather than disadvantage them;
 - Simple and supportive internal complaints processes, followed by commensurate disciplinary outcomes for perpetrators, with the onus on the employer to support the Complainant as part of their positive duty;
 - Collective and worker-led WHS dispute resolution processes for sexual harassment matters affecting their workplace;

- Increased transparency of conciliation outcomes in external complaints processes;
- Reconsider regulatory complaints processes to ensure workers do not face significant barriers to pursuing legal rights;
- Workplaces be required to design and implement policies on sexual harassment and gendered violence in line with a set of criteria established by a regulatory authority.



INTRODUCTION

It is the view of the NUW that the legislative framework designed to deal with sexual harassment and gender-based violence in Australian workplaces does not contemplate current employment relationships, leaving workers vulnerable and wrongdoers unaccountable.

In the NUW's experience, workers in insecure forms of work, including seasonal worker programmes and labour hire arrangements, are more likely to experience exploitative practices including sexual harassment. For workers in secure forms of employment, poor in-house policies, unclear reporting channels and culture mean sexual harassment claims can also be difficult to pursue.

Despite the necessary and bold legal reforms achieved through the SD Act, sexual harassment remains prevalent in Australian workplaces. Recent data from the AHRC indicates that the incidence of sexual harassment in the workplace may in fact be increasing.¹

The 2018 AHRC report finds that 39% of women and 26% of men have experienced sexual harassment in the past five (5) years.² In 2018, the Australian Council of Trade Unions (**ACTU**) conducted a survey of more than 9, 600 Australian workers. Of the respondents, 54.8% had direct experience of sexual harassment in their workplace and 64% had witnessed sexual harassment at the current or a previous workplace.³

Despite the seemingly high rates of sexual harassment in the workplace, the majority of sexual harassment incidents in the workplace go unreported, and the number of complainants who make formal reports are decreasing.⁴ The ACTU survey found of

¹ Jenkins, K. *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (August, 2018) Australian Human Rights Commission, 7 – 8.

² Ibid.

³ Ibid.

⁴ The 2018 AHRC report found that only 17% of workers made a formal complaint of sexual harassment, as compared to 20% in the 2012 survey.

the 27% of people who complained of sexual harassment, 56% of them were not satisfied with the outcome and 45% said there was no outcome for the harasser.

Fixing the prevalence of sexual harassment and gendered violence at work will also require reforms beyond legal remedies, reform that challenge and address the conditions and cultures in which sexual harassment occurs.

SEXUAL HARASSMENT AND GENDERED VIOLENCE AT WORK

This submission deals with both sexual harassment and gender-based violence. Gender-based violence emerged from the term 'violence against women',⁵ to extend the definition to all forms of violence. Gender-based violence covers 'social expectations based on gender and not conforming to a socially accepted gender role'.⁶ Therefore, gender-based violence is centred on social power and can be defined as follows:

'Physical, psychological and sexual violence can be considered gender-based if it stems from unequal power relationships between men and women,⁷ or if it is perpetrated against people because they do not conform to socially accepted gender roles'.⁸

The term sexual harassment can have different meaning to different workers, depending on their cultural and discursive backgrounds and the recognition of any discrimination attributes. Behavioural and legal definitions of sexual harassment can also result in a range of responses from workers. The Australian Human Rights Commission (**AHRC**) lists a number of behaviours including unwelcome touching, hugging or kissing, inappropriate staring, sexual gestures, explicit images, invitations to go on dates, private questions, repeated online advances, being followed, intimate

⁵ Adrienne Cruz and Sabine Klinger, *Gender-based violence in the world of work: Overview and selected annotated bibliography*. ILO, 2011 at [8].

⁶ Gender Matters – Manual on gender-based violence affecting young people Council of Europe, Budapest, 2007 www.eycb.coe.int/gendermatters/chapter_2/1.html.

⁷ World Health Organization (WHO). 2009. *Promoting gender equality to prevent violence against women*, in *Violence Prevention: The Evidence* (Geneva) at [3].

⁸ Van der Veur, D. et al. 2007. "Gender-based violence", in *Gender matters: A manual on addressing gender-based violence affecting young people* (Budapest, Council of Europe) at [43]; ILO, 2018. *Ending violence and harassment against women and men in the world of work* at [32].

image sharing, requests or pressure for sexual acts and actual or attempted rape or sexual assault.⁹

These behaviours were put to respondents in the AHRC's fourth national survey. The survey also provided a simplified definition of sexual harassment as:

*'An unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which, in the circumstances, a reasonable person, aware of those circumstances, would anticipate the possibility that the person would feel offended, humiliated or intimidated.'*¹⁰

This simplified meaning is based on legislated definitions, such as the *Sex Discrimination Act 1984* (Cth) (**SD Act**). The SD Act considers sexual harassment as a form of discrimination, applying to 'persons' and states that a person sexually harasses another if:

- (a) The person makes an unwelcome sexual advance, or an unwelcome request for sexual favours; or
- (b) Engages in other unwelcome conduct of a sexual nature.

For a state based comparison, sexual harassment under the Queensland *Anti-Discrimination Act 1991* (Qld) (**ADA**) provides for more specific instances, such as if a person:

- (a) Subjects another person to an unsolicited act of physical intimacy;
- (b) Makes an unsolicited demand or request for sexual favours;
- (c) Remarks sexual connotations related to the other person;
- (d) Engages in unwelcome sexual conduct; or
- (e) With intention of offending, humiliating or intimidating.

⁹ Jenkins, K. *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (August, 2018) Australian Human Rights Commission
<https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_WORKPLACE_SH_2018.pdf> [1.3].

¹⁰ Jenkins, K. *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (August, 2018) Australian Human Rights Commission
<https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_WORKPLACE_SH_2018.pdf> [2.4].

Both jurisdictions consider a reasonable person test as to whether the person harassed would be 'offended, humiliated or intimidated' by the conduct.¹¹ The Acts take into account the sex, age, sexual orientation, race, impairment or religion of the person harassed, or any other relevant circumstance to determine reasonableness.¹²

The SD Act and ADA apply to all stages of employment, from those seeking to become employed to those going through dismissal.¹³ They also apply to all potential parties, such as volunteers, contractors, customers and clients.¹⁴ Vicarious liability can be established, on the balance of probabilities, unless the person took all reasonable steps to prevent the employee or agent from conduct contravening the Acts.¹⁵ The State and Federal Acts are largely the same in this respect. A relevant difference however is the element of intention. Queensland and Northern Territory are the only jurisdictions where the offence, humiliation or intimidation must have been intended by the person engaging in the conduct to be established.¹⁶ The SD Act has no such requirement.

These pieces of legislation are the main avenue for workers to pursue formal claims of sexual harassment. It is possible however to raise complaints via the *Fair Work Act 2009* (Cth) (**FW Act**) in the context of unfair dismissals.¹⁷ The FW Act does not consider sexual harassment as a form of discrimination, unlike sex discrimination.¹⁸

¹¹ Sex Discrimination Act 1984 (Cth) s 28A(1); Anti-Discrimination Act 1991 (Qld) s 119(f).

¹² Sex Discrimination Act 1984 (Cth) s28A(1A); Anti-Discrimination Act 1991 (Qld) s 120.

¹³ Sex Discrimination Act 1984 (Cth) s 28B(1), 28B(2).

¹⁴ Sex Discrimination Act 1984 (Cth) s 28B(3)-28B(6).

¹⁵ Sex Discrimination Act 1984 (Cth) s 106; Anti-Discrimination Act 1991 (Qld) s 133.

¹⁶ Anti-Discrimination Act 1991 (Qld) s 119(e).

¹⁷ *Crawford v Steadmark Pty Ltd (No.2)* [2015] FCCA 2697 (8 October 2015); *Luke Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174 (9 February 2018); *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156 (26 June 2015).

¹⁸ McDonald, Paula & Charlesworth, Sara (2019) *Academic evidence on the causes, manifestations and responses to workplace sexual harassment: Initial submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces* at [17].

THE PROBLEM OF SEXUAL HARASSMENT AND GENDERED VIOLENCE IN NUW INDUSTRIES

Insecure Work

It is estimated that 40% of work in Australia is insecure,¹⁹ and in our experience all industries we organise engage workers in precarious forms of employment. These precarious forms of employment include: engagement as contractors and subcontractors; casual workers employed directly; casual workers employed indirectly through labour hire companies; workers employed for a fixed term; and workers simply being paid in cash.

Most forms of precarious employment do not include paid entitlements such as personal leave, and termination of work can be sudden, without a need for an employer to justify this action.

Until recently though, insecure work has been poorly understood and the various types of employment that constitute insecure work have not always been viewed as a single category of employment. Australian Bureau of Statistics (**ABS**) surveys categorise most of these forms of work together, as “work without paid entitlements” as opposed to “work with paid entitlements”, which tends to be permanent work.²⁰

Without the equivalent legal protections afforded to permanent employees, insecure workers are more vulnerable to exploitation. Consider labour hire exploitation in the food supply chain, where farm workers earn as little as five dollars an hour in conditions likened to ‘modern slavery’.²¹ Or casual hospitality workers who are often expected to work unpaid overtime in workplaces that don’t pay the minimum wage.²²

¹⁹Ged Kearney, Address to Melbourne Press Club, RACV Club, Melbourne, Thursday 26th July 2012.

²⁰Australian Bureau of Statistics, 2014, *Characteristics of Employment*, 6333.0, ABS, viewed 18th November 2015.

²¹Meldrum-Hanna, A & Russell, C (2015) ‘Slaving Away: The Dirty Secrets behind Australia’s fresh food’, *Four Corners*, Australian Broadcasting Corporation, 4 May 2015.

²²Davey, M, (2018) ‘Thousands are having wages stolen by bosses in hospitality industry, says union’, *The Guardian*, accessed at: <https://www.theguardian.com/australia-news/2018/apr/11/thousands-are-having-wages-stolen-by-bosses-in-hospitality-industry-says-union> 11 April 2018.

Workplace injuries are under-reported because of the lack of employment security and a resultant fear of reprisal.²³

While insecure forms of work are problematic for all workers, precarious employment has a gendered dimension which paints an alarming picture for women in the workforce. Over the last 25 years, the number of women in full time-employment has decreased from 59%-55%.²⁴ Permanent part-time roles resulting in 'under-employment' are increasing²⁵ and tend to be concentrated amongst women and in female dominated industries.

Insecure work is a key driver of work-related sexual harassment. Women who are in insecure or precarious employment arrangements are at a higher risk of being sexually harassed than their permanent and directly hired colleagues.²⁶

Insecure work shifts risk away from the employer onto an individual employee in a manner that further exacerbates the inherent power imbalance in employee/employer relationships. Sexual harassers often use their position of power in the workplace to create opportunities for sexual harassment; for example, by offering job security or increased hours.

████████████████████ *is a toxic company. I regularly witnessed male supervisors preying on young women workers, offering them better job security and more shifts in exchange for "good times."*

(Female, labour hire worker, pharmaceutical logistics)

"It was all about control. If you don't play along with him he will use his powers as a supervisor to make you seem like you can't even do a basic task."

(Female, labour hire worker, pharmaceutical logistics)

²³ Underhill, E. and Quinlan, M. (2011), 'How precarious employment affects health and safety at work: the case of temporary agency workers', *Industrial Relations*, vol. 66, no. 3, pp. 397-421.

²⁴ Barns, A, Jefferson, T & Preston, A, Women's employment in the context of the economic downturn, *Women in Social & Economic Research (WiSER)*, for the Australia Human Rights Commission, 2009.

²⁵ Carney, T & Standford, J, *The Dimensions of Insecure Work: A Factbook*, May 29, 2018.

²⁶ Takao, S (2001) Increasingly less Equal, *Japan Quarterly*, 48, 24-30.

Women who are in insecure employment – who have no entitlement to secure hours or ongoing employment – become a target for sexual harassers because they are much less likely to make a complaint,²⁷ for fear of losing work. In increasingly casualised workplaces, a would be sexual harasser need not even hold a position of authority over the insecure worker, simply being a permanent worker – with guaranteed hours and entitlements – can be seen as a significant position of power.

Amongst those who do complain, the work-related outcomes are generally negative. In nearly all the case studies provided by the NUW, the complainant was either transferred to a less desirable role, dismissed or forced to resign.²⁸

“Because I am a labour hire casual, I have been too scared to say anything about the sexual harassment as I don’t want to lose my job.”

(Female, labour hire worker, logistics industry)



²⁷ Charlesworth, S & McDonald, P, *Academic Evidence on the Causes, Manifestations and Responses to Workplace Sexual Harassment*, Initial Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces, January 2019, p 15.

²⁸ Case studies in this submission.

CASE STUDY ONE

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CASE STUDY TWO

The National Union of Workers has engaged in extensive conversation and action with workers of [REDACTED] distribution centres regarding sexual harassment. A widespread culture of bullying, intimidation and sexual harassment has been identified across sites in [REDACTED]. Unacceptable behaviors span the entire spectrum of gendered violence—from sexist jokes and put downs, to inappropriate touching and physically intimidating behavior, to sexual assault. Overwhelmingly our members report that these behaviours are the norm rather than the exception.

For [REDACTED] workers, widespread casualisation and insecure work is a significant barrier to reporting sexual harassment. A disproportionate percentage of workers are employed as labour casuals, which means that workers do not have a direct employment relationship with [REDACTED]. This relationship is outsourced to third party labour hire companies such as [REDACTED] and [REDACTED] and their respective HR departments.

Labour hire casuals do not have a roster but wait each day for a text message to confirm if they have a shift the following day, which may continue for years on end. Such an extreme level of economic insecurity and power imbalance within the employment relationship fosters a culture in which workers are expected to comply with unfair treatment.

Our members often report feeling unable to speak up or report sexual harassment for fear of losing shifts, being moved to a different department, being ostracised or bullied by management, or losing their jobs entirely. For permanent workers also, the fear of losing secure work—which is considered increasingly rare—acts as a strong disincentive to report sexual harassment.

Such fears are well-founded. The NUW has spoken with numerous workers who have been unfairly treated following their complaint, and many who have stopped receiving shifts entirely. In such instances there are very limited effective avenues of legal redress for the victims of sexual harassment, particularly if they are in insecure employment.

Labour hire workers who experience sexual harassment whilst working for a host employer find themselves falling through the legislative gaps. 'Host' companies frequently claim they have no obligation to a labour hire worker, or worse, that they have a legal obligation to remove them from the site to *protect* their health and safety.

All that is required is an instruction to the labour hire agency to move that person on. Despite the complainant effectively losing their job for making the complaint, unfair dismissal isn't available, as the labour hire company will simply argue they have not been dismissed - only removed from the site.

There is no easy remedy for labour hire workers when they experience sexual harassment in the workplace, especially when the perpetrator is employed directly by the host company. Even where an enterprise agreement contains motherhood statements around freedom from discrimination and harassment in the workplace at which the labour hire worker works, this has limited benefit or protection. A host employer will generally instead conclude that these commitments do not apply to that worker, only to their employees – which often includes the perpetrator.

GENDERED VIOLENCE AT HOME, AND AT WORK (AVOs/DVOs)

Labour hire workers also fall through the legislative gaps when they are the victim of gendered violence outside the workplace and have secured a Domestic Violence Order (DVO) or an Apprehended Violence Order (AVO). There is a real connection between domestic violence and the workplace, not least of all because almost two thirds of women affected by domestic violence are also in paid employment.²⁹ The Human Rights Commission recognises the way in which experiencing domestic violence can impact on someone's ability to work:

²⁹ Australian Bureau of Statistics, 2005, *Personal Safety, Cat. No. 4906.0, ABS, 35, in Australian Human Rights Commission, Violence against women: Domestic and family violence – a workplace issue, a discrimination issue, Human Rights Commission*, < <https://www.humanrights.gov.au/violence-against-women-domestic-and-family-violence-workplace-issue-discrimination-issue>>

“Workplace discrimination as a consequence of domestic and family violence takes many forms. Research suggests that it is common for victims and survivors to be denied leave or flexible work arrangements to attend to violence-related matters; have their employment terminated for violence-related reasons; and be transferred or demoted for reasons related to violence.”³⁰

What we also see however is perpetrators who were both personally connected with the victim and professionally connected – creating an incompatible work situation.

Case study three illustrates a case where a labour hire worker at a major distribution centre for a retail supermarket experienced this first hand. She was the victim in a DVO against a manager who worked at the same workplace as her. She had to leave that workplace and her job because of the order, as he was permanently employed and she was casual. The complainant secured another job in the same industry, however as the perpetrator also sometimes needed to visit the place where she performed work, she lost her job again. The second host employer claimed that they had no obligation to her as a labour hire worker and supported him to be able to ‘perform his inherent duties’. This position was confirmed [REDACTED] when the NUW attempted to bring a dispute on the complainant’s behalf.

³⁰ See Australian Human Rights Commission, *Submission to the Australian Law Reform Commission Inquiry into Family Violence and Commonwealth Laws: Employment and Superannuation* (2011), para 47, in *Ibid*

CASE STUDY THREE

The Complainant was working as a casual at a distribution centre for a [REDACTED] when one of the Managers (“the perpetrator”) began to pursue her. Unwanted attention escalated to a violent home break in, leaving the Complainant terrified. The police intervened and had an Apprehended Violence Order taken out against the perpetrator – leaving him unable to come within 10m of her, at her home or workplace.

The Complainant had no choice but to leave [REDACTED] – she was the casual, the Perpetrator was the permanent employee who was able to keep his job.

The Complainant later took a job with a labour hire agency, who placed her at a [REDACTED] distribution centre with the [REDACTED] supermarket retailer. The Complainant quickly developed one of the best work records at [REDACTED]. She was feeling good about the job and had been working as a labour hire casual for more than 12 months when she applied a permanent, direct role with [REDACTED]; encouraged to do so by [REDACTED] who recognised her dedication and skill.

It was around this time that she saw the Perpetrator at her workplace. It turned out he was now in management with [REDACTED], albeit at a different warehouse to the one the Complainant worked at. When she queried why he was there with management, she was told he worked at another [REDACTED] and had to attend her site for management meetings. The Complainant advised her manager at the labour hire agency about the AVO. The Complainant was concerned that if [REDACTED] found out she would lose her job, particularly given she had already lost one role because of her casual status and the AVO. Despite this, the labour hire agency set up a meeting with [REDACTED] for the Complainant to discuss her AVO.

During the meeting, she was encouraged to share her story, and made to feel that it was a safe space to do so. Despite this, [REDACTED] instructed the labour hire company that the Complainant could not come back to work at [REDACTED] also rejected her application for a direct job.

The Complainant had now lost her job again, while the Perpetrator kept his. In fact, when the NUW followed up the Complainant’s matter with [REDACTED], they were advised that given the Perpetrator was a permanent employee, they had no choice but to let the Complainant go, as her presence meant the Perpetrator “couldn’t fulfil the inherent requirements of his role”. They further suggested that their advice from the police was that the Complainant sought out employment with his workplace, effectively forcing him to breach the AVO. This was despite their knowledge that the Complainant was placed at the workplace by a labour hire agency.

The NUW brought an application against [REDACTED] on the Complainant’s behalf. The enterprise agreement which covers workers at the site has specific provisions for removing barriers for women, and ensuring equal opportunity and anti-discrimination. [REDACTED] disputed the application, citing a lack of jurisdiction – they said the Complainant wasn’t their direct employee, so had no obligations toward her.

The Complainant was effectively discriminated against because she had been the victim of domestic violence and sought redress through an AVO *and* because of her employment status as a labour hire worker.

The NUW attempted to pursue multiple legal avenues for the Complainant, including the anti-discrimination jurisdictions. However, when the NUW approached the Australian Human Rights Commission on her behalf they were told that, as having an AVO against someone was not a 'protected attribute', a discrimination claim was not available to her.

The Complainant had no legal options. She was a labour hire casual with no security, and no recourse, and the management colluded with her perpetrator to help him keep his permanent job.

Migrant Workers

In major industries such as poultry, food processing and the fresh food supply chain, the NUW represents permanent and temporary migrant workers who are particularly vulnerable to exploitation. In the NUW's experience, migrant workers are routinely paid less than the minimum wage, are denied superannuation, penalty rates and other minimum entitlements and are forced to work excessive hours in unsafe workplaces.

Predominantly employed in casualised workforces or by labour hire contractors, these workers are either unaware of their workplace rights, or afraid to raise concerns about their wages and conditions. This vulnerability tends to occur because permanent and temporary migrant workers can have limited English skills, may not be educated about their workplace rights and face barriers to enforcing their rights. While there is limited Australia data, international studies indicate that migrant status can create additional vulnerabilities in respect of sexual harassment.³¹

³¹ Moyce, S.C., & Schenker, M (2018) Migrant Workers and their occupational health and safety. *Annual Review of public health*, 39, 351-365.

Difficulty accessing justice due to language skills and knowledge of, and access to, the legal system—combined with insecure work—mean migrant women are reluctant to report sexual harassment and gendered violence at work. Many cases of sexual harassment do not get raised due to workers' not being able to speak to someone who understands their language and someone they can trust.

"I am a migrant woman. I'm worried that if I lose this job I won't be able to find another permanent job in Australia. That makes it hard to say anything."

(Female, permanent worker, warehousing industry)

"I know how hard it is to get a permanent job in Australia. If I lose this job, I will never be able to get another one again and then what will I do when I need to use annual leave to visit my family when they are sick back home?"

(Female permanent employee, food manufacturing industry)

For temporary visa workers, the interaction of precarious visa status and insecure employment status further compounds the workers' vulnerability to exploitation. These additional structural vulnerabilities create 'labour markets where precarious migrant status can become currency for noncompliance'³² and opportunities for the most egregious and blatant forms of sexual harassment and gendered violence at work.

In the Senate Education and Employment References Committee inquiry into the exploitation of temporary work visa holders, NUW Organiser George Robertson outlined why temporary visa holders engaged by labour hire companies are particularly prone to exploitation:

"...there are a variety of potential problems that can arise from relying on a particular contractor in order to apply for a second visa. We have heard stories from members saying you have to work for free for X amount of time in order to get a second Visa or you have to provide sexual favours to receive a second visa. That puts workers in a vulnerable position where their continued

³² Associate Professor Joo-Cheong Tham, Submission 3, 'A National Disgrace: The Exploitation of Temporary Work Visa Holders', Education and Employment References Committee, Report (March 2016), p 18.

*presence in the country and their ability to work....is contingent on whether they agree with the terms that are provided by the contractor”.*³³

‘Cash contracting’ is a rampant form of insecure and exploitative work concentrated in the horticulture industry that gives perpetrators an immense amount of power and opportunity to sexually harass and assault migrant workers. These contractors, or labour hire companies, control workers’ lives by holding onto their passports, holding on to their wages and charging excessively for transport and housing. It is in these circumstances that contractors, or employees of labour hire companies, make demands on workers to have sex with them in order to be paid or be given hours of work. The nature of this form of employment also means that the contractor, or labour hire employee, has access to the workers’ home, providing additional context and opportunity for sexual harassment and assault to occur.



³³ Mr George Robertson, Union Organiser, National Union of Workers, Committee Hansard, 18 May 2015, p17-Senate inquiry. Also ‘A National Disgrace: The Exploitation of Temporary Work Visa Holders’, Education and Employment References Committee, Report (March 2016).

CASE STUDY FOUR

When [REDACTED] arrived in Australia on a working holiday visa, her travel agent put her in contact with labour hire contractor. [REDACTED] work and accommodation was all organised through this contractor. [REDACTED] worked at [REDACTED]

While living in the house organised by the labour hire contractor, [REDACTED] was visited by a [REDACTED] supervisor. He asked to speak to [REDACTED] alone in her room. He proceeded to sexually harass [REDACTED] and pressure her into entering a relationship with him. [REDACTED] was scared. The supervisor physically assaulted the Complainant. . The sexual harassment escalated and continued in the workplace, with unwanted touching and text messages.

The Complainant rejected the supervisor many times. When [REDACTED] said she already had a boyfriend, the supervisor became angry and began picking on the Complainant at work. [REDACTED] reported the harassment to [REDACTED] management.

Then she was called to a private meeting with her labour hire contractor, where the Complainant was told there was no more work for her. [REDACTED] had made the complaint hoping that the perpetrator would be punished, so she could work safely but instead – through the arm's length process of a third-party labour hire contractor – [REDACTED] lost her job.

The supervisor kept his job.

CASE STUDY FIVE

In [REDACTED] [REDACTED], a temporary migrant worker on a 417 Visa, was working long hours on the [REDACTED] farm when she cut her index finger, severing nerves. A few days after having surgery on her finger, [REDACTED] labour hire contractor took her to his home so that [REDACTED] could get her pay.

[REDACTED] was waiting for him to get the money and she wanted to leave. [REDACTED] was sexually assaulted by her contractor, being pinned to the bed and splitting open the stitches on her injured hand. [REDACTED] managed to escape and reported the assault to police and [REDACTED] [REDACTED] Despite the assault being reported to management and the police, no action was taken against the contractor and the farm continued to use the contractor to employ workers.

In addition to the vulnerabilities and access to justice issues experienced by migrant workers, temporary visa workers are further impacted by their limited right of residency, which diminishes their access to formal rights that exist at law.

For example, in case study five, the Complainant was on a temporary working holiday visa whilst sexually assaulted by labour hire contractor at a farm. When the Complainant reported the sexual assault matter to the police, they expressed that there was little value in pursuing the matter as the Complainant's visa required her return to her home country before the matter would be finalised.

Young Workers

AHRC's most recent prevalence study was the first to include 15-17 year olds, as noted by McDonald and Charlesworth (2019). Therefore, 'Australia lacks any in-depth evidence about the nature and extent of sexual harassment and sex-based bullying experienced by children and young adults in the workplace, and its consequences.'³⁴ This is unsurprising considering the low rates of reporting from this cohort.



³⁴ McDonald, Paula & Charlesworth, Sara (2019) *Academic evidence on the causes, manifestations and responses to workplace sexual harassment: Initial submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces* at [15].

CASE STUDY SIX

NUW member ██████ had been employed in a retail warehousing DC for more than two years and was in his early twenties when he experienced sexual harassment from a co-worker. The harassment occurred from ██████ by a male co-worker. It took this amount of time for ██████ to encourage himself to speak out.

On the ██████, during picking hours I had finished a task and was on my way to unload my boxes in the despatch area. I was approached by ██████ asking how I managed to catch up on the leader board. I hadn't replied and ██████ assumed that I had cheated. I reacted and told him to shut up; he walked towards me trying to hold my hand while calling me baby.

The harassment experienced by ██████ continued to escalate over this period.

In the past two months ██████ has touched me in the inappropriate places, using sexual slurs and commenting on my personal hygiene in a joking manner. For example; rape comments and physically touching my body parts.

This has happened during work hours and while pickers are in the aisles, which leaves me humiliated and embarrassed among my peers.

██████ made a formal complaint with the assistance of his organiser. The wrongdoer made subsequent complaints about ██████ 'shut up' comments. The company effectively ran the two complaints as one investigation, despite requests for them to be dealt with separately.

The investigation did not interview all relevant parties suggested by ██████ and a report was never provided. The outcome of the investigation was a first and final warning for both ██████ and the wrongdoer. The wrongdoer was placed in a different department, meaning ██████ would still see ██████ in the course of his employment.

██████ made a decision not to pursue the matter any further as it had caused considerable distress to him and his partner. The handling of the incidents by the Company was unacceptable and showed that in house policies are not followed or are difficult to apply to queer cases of sexual harassment and assault.

When insecure workers are subjected to sexual harassment or gendered workplace violence, they are less likely to report because they don't think they will be believed and sexual harassers are often directly employed and in a position of power in the workplace.

The current regulatory reliance on individuals pursuing legal remedies when they have experienced sexual harassment, are not sufficient in a world of work where an increasing number of workers are in insecure work arrangements.

Workplace laws need to be radically recast to comprehend that sexual harassment happens to 'workers' at 'workplaces', not just within the 'employee/employer' relationship so that insecure workers don't fall through legislative gaps. Similarly, addressing gendered violence at work requires that employer be prohibited from discriminating against workers who have, or are experiencing gendered violence at home and consideration should be given to including domestic and family violence as a protected attribute under the SD Act.

There needs to be clear, effective and accessible legal avenues for all workers regardless of their employment status, with additional safeguards to protect insecure and vulnerable workers. One such measure should be a stand-alone sexual harassment protection in the *Fair Work Act* 2009 (**FW Act**) and capacity for workers' unions to bring actions on behalf of individual workers - or classes of workers - that have experienced sexual harassment.

ISSUES WITH THE LEGAL FRAMEWORK AND COMPLAINTS MECHANISMS

"You become the problem for saying anything"

(Female, permanent, pharmaceutical logistics industry)

The current legal framework and complaints processes in the anti-discrimination jurisdiction are inadequate to address or provide effective remedies for sexual harassment and gendered violence at work. A key issue with the legislative scheme is that it places the onus of bringing a complaint on individuals who have been the victims of sexual harassment. Conceiving of sexual harassment in this discrete and

individual way conceals the systemic nature of sexual harassment at work, and shifts the burden of redress on to the party with the least resources—and limited capacity to address the conduct.

The individualised complaints mechanisms available to complainants cast sexual harassment and gendered violence as interpersonal disputes between a perpetrator and a complainant, to be managed through disciplinary processes by employers, or argued by represented litigants in a court or tribunal.

This approach ignores the collective implications of the behaviour on a whole workforce, and obstructs effective prevention measures required to bring about the cultural change that will stop gendered violence at work in the future. Legislation dealing with sexual harassment in Australia also fails to contemplate the broader work health and safety implications of gendered violence for the whole workforce.

Employers have the greatest power and influence over a workplace environment. They are best positioned to effect and maintain a working environment that is free from sexual harassment and gendered violence, however their legal obligations are not commensurate with their capacity to effect positive change.

Reporting and complaint process

Sexual harassment and gendered violence are work health and safety issues that present a risk to the well-being of all workers in a workplace. However the complaint processes at both the enterprise and legislative levels are accessible only by individual complainants. In the NUW's experience, workers subjected to sexual harassment perceive the complaints process to be lengthy, invasive, and risky for their ongoing employment.

For workers who are insecurely employed, the processes are simply not accessible. When employers outsource the provision of labour to labour hire companies, they also attempt to outsource the risk of managing sexual harassment onto the labour hire provider. Legal accountability through vicarious liability schemes and the notion of 'PCBUs' under WHS laws create practical difficulties for the management of

sexual harassment incidents in triangulated employment relationships, the brunt of which often get borne by the complainant.

The complexities of labour hire and host employer arrangements can further undermine the effectiveness of individual remedy frameworks. Where a labour hire worker experiences sexual harassment or gendered violence at work, it is often unclear whether they should report it to the labour hire company or the host.

Despite the doctrine of vicarious liability, host employers may push the responsibility of handling a sexual harassment complaint from a labour hire worker onto a labour hire company – even if it occurs at the Employer’s worksite. Labour hire companies are not well placed to properly investigate a complaint, as they have no or limited access to directly hired employees and little to no direct knowledge of the work site.

In most cases, when labour hire companies are confronted with the task of addressing a sexual harassment complaint, they simply move the complainant to another workplace, or stop offering the worker shifts at all.



INTERNAL COMPLAINTS PROCESSES

In most cases of sexual harassment encountered by the NUW, the perpetrator has a history of complaints or allegations, or a reputation for sexual harassment among the workforce. This is consistent with available data about the prevalence of sexual harassment, and offending trends relating to gendered violence more broadly.³⁸

In some instances, there are known previous formal complaints, but more often there is only a shared understanding among the workforce that a perpetrator is ‘someone to be avoided’. Rarely is anyone prepared to speak openly about past incidents witnessed or experienced directly in support of a complainant. There is no internal transparency relating to previous complaints. This is principally due to the implementation of internal company confidentiality policies and the absence of relevant reporting obligations at law.

As the complaints process is initiated and driven by the individual complainant, complainants feel as though they are creating the problem by reporting an incident.

Workers who take this risk to report sexual harassment are met with a tendentious and humiliating reporting process. The complainant is required to detail the sexual harassment in writing, to be reviewed and investigated by management and HR. Most often the complaint is immediately dismissed as “unsubstantiated.” When an investigation does proceed it is not impartial, and perpetrators may themselves be involved in their own investigation.

“I remember the effect these meetings had on me. One time my heart was beating so hard I couldn’t reach for a glass of water”

(Female, permanent, warehousing industry)

³⁸ See eg, key finding c), Perpetrators of workplace sexual harassment, *Everyone’s Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, AHRC 2018.

In our experience, confidentiality policies are often deployed against complainants to protect the privacy of the perpetrator and/or the reputation of the company. This is entirely inappropriate for a workplace health and safety issue. Confidentiality policies used in this way inhibit the ability of companies, individuals and unions to view the true scope of the problem and therefore to intervene effectively.

Confidentiality policies operate to dissuade workers from contacting the union or otherwise seeking assistance in relation to sexual harassment experienced for fear of disciplinary action. This fear is heightened among workers who are insecurely employed and/or made vulnerable by visa status, and language or cultural barriers.³⁹

The investigation process is not well-understood or transparent. Complainants are told they do not have the right to know the outcome of the investigation and are forced to sign non-disclosure agreements.

Institutional failure to adequately respond to one or more past complaints produces a culture of hopelessness and passivity among the workforce, who do not believe that they can influence change. Compounding this sense of hopelessness is the belief that the complainant will be victimised, isolated or dismissed for making the complaint, as will any other worker who speaks out in support of them.

"I made complaints about sexual harassment to management and nothing was done about it. The men responsible are still working there, still in positions of power, and still committing these acts of abuse."

(Female, labour hire worker, pharmaceutical industry)

The individualised complaints process masks the systemic nature of sexual harassment and leads to the mischaracterisation of the issue as a disciplinary issue to be managed and overseen by the employer, rather than a health and safety matter for which the employer must take an active, leadership role. As such, Federal,

³⁹ See eg, Howe, Joanna, "Examining a Temporary Migrant Worker's Ability to Make a Complaint of Sexual Harassment" (2016) *Alternative Law Journal* 41(2).

State and Territory anti-discrimination legislation should be amended to include positive duties on Employers to eliminate gendered violence and sexual harassment.

Employers should also be subject to reporting requirements in relation to incidents and complaints of gendered violence, similar to 'notifiable incidents' in the WHS context, to facilitate transparency where there are repeat offenders, and ensure consistency of approach. Employers should also be required to report complaints and incidents of sexual harassment to Company boards to ensure organisations have proper risk management strategies in place.

Employers should be required to report incidents of sexual harassment to a third party/regulator, and reports should be accessible to unions. A reporting mechanism to a third party would enable an employer to protect the privacy interests of individuals involved while providing for transparency and therefore facilitating better outcomes with respect to intervention and cultural change in the workplace.

EXTERNAL COMPLAINTS

As above, Australian legislative responses to the problem of sexual harassment in the world of work have failed both to prevent sexual harassment and to provide consistent satisfactory outcomes to individual complainants, especially those who are insecurely employed. While the legislative framework sets up avenues for conciliation and litigation, only a small percentage of individuals who have experienced sexual harassment or gendered violence at work participate in these formal processes.⁴⁰

Given the disparity between the amount of people who experience sexual harassment in the workplace as against the number of formal complaints to external agencies, it is clear that the current scheme isn't working.

As articulated above, individual complainants face considerable barriers to making internal complaints. These barriers are amplified in the complaint processes utilized

⁴⁰ McDonald, P., Charlesworth, S & Cerise, S (2011) Below the 'tip of the iceberg': Extra-legal response to workplace sexual harassment. *Women's Studies International Forum*, 34(4), 278-289.

by the AHRC or the various state and territory anti-discrimination commissions where individual complainants come up against the resources of the employer. The nature of the compulsory conciliation process fails to address this inherent power imbalance and many complainants who make a complaint to an external body are dismissed sometime after making the complaint.⁴¹

With respect to insecure workers, host employer liability for the discriminatory conduct of employees is enlivened only through the individual complaints process by way of claims for vicarious liability. This means that inevitably the complainant (often already made vulnerable by insecure employment) must litigate against the employer after the sexual harassment has occurred in order to obtain an outcome. Predictably this proposition is enough to prevent many workers from engaging in the complaints process.

The complaints process under the state and federal legislative instruments generally involves a conciliation process at a specialist human rights/equal opportunity body before a more standard hearing process through a court or tribunal. The conciliation process is usually voluntary, and it is not uncommon for delays of several months to pass before a listing is secured, or before it is established that the respondent will not participate.

There are no interim measures available to address the immediate health and safety risk presented by the gendered violence or sexual harassment that has occurred, and throughout this time the complainant – and other workers – are exposed to risk with no recourse for intervention.

Despite efforts by the state based EOC's and the AHRC to facilitate collaboration between parties in conciliation, the complaints process remains intensely

⁴¹McDonald, Paula & Charlesworth, Sara (2019) *Academic evidence on the causes, manifestations and responses to workplace sexual harassment: Initial submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces* referencing Charlesworth, S., McDonald, P., Worley, A, Graham, T. & Lykhina, A. (2012) *Formal Complaints of workplace sexual harassment lodged with Australian Human rights and Equal Opportunity Commissions 1 July 2009 - 31 December 2009*. Adelaide: University of South Australia.

adversarial, as it pits a worker against their employer in a lengthy and invasive process that can damage the employment relationship and lead to victimisation.

'I felt that the company was against me. That the company was on his side. Why would you keep someone there, why would you keep trying to keep him there?'

(Female, permanent, pharmaceutical logistics industry)

Importantly, the conciliation process relies on the willingness of an employer to participate. Without relevant legal obligations and corresponding enforcement mechanisms, effective intervention in the workplace to effect cultural change also relies purely on the willingness of the employer. Worker health and safety matters cannot and should not depend solely on the good will of an employers, whose business interests are often in conflict with matters of worker safety.

Dispute resolution through expert bodies, such as the various state based equal opportunity commissions, is not fast or effective enough in most cases to protect workers from the immediate or ongoing risks to their health and safety.

The NUW has previously utilised anti-discrimination clauses negotiated into enterprise agreements, like in case study eight, as the basis for disputes through the FWC, where matters are generally listed faster, but this jurisdiction can be limited in its enforcement measures for sexual harassment.

There remains however a distinct gap in available emergency/interim applications for the purpose of assuring the safety of complainants at work while the matter is litigated. In some cases, for example the [REDACTED] case study, complainants are left with no option but to access their personal/carer's leave simply to avoid interaction with a perpetrator and the risks to their health safety implicit in that interaction.

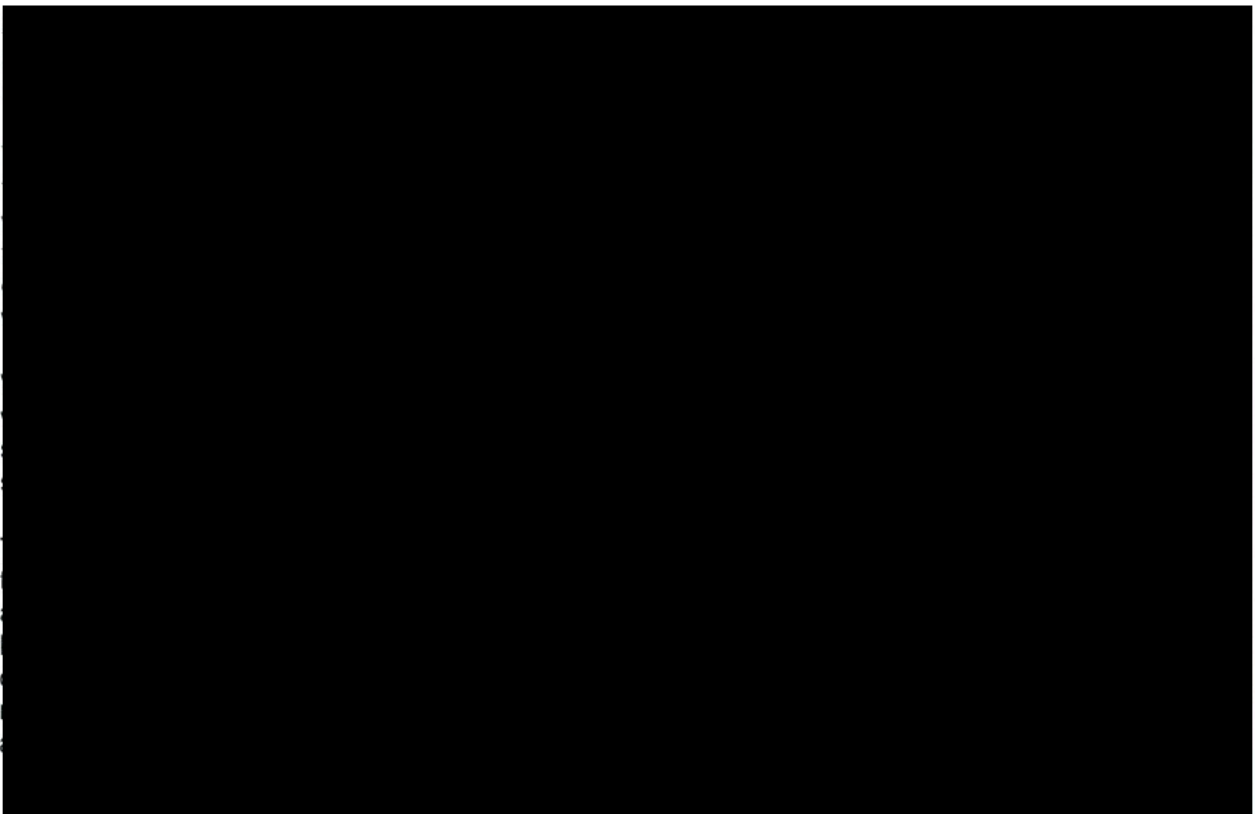
On some occasions, the NUW has negotiated extensively with the company to try to implement a working arrangement that would ensure a member suffering from

anxiety and depression as a result of sexual harassment would not need to work with the perpetrator.

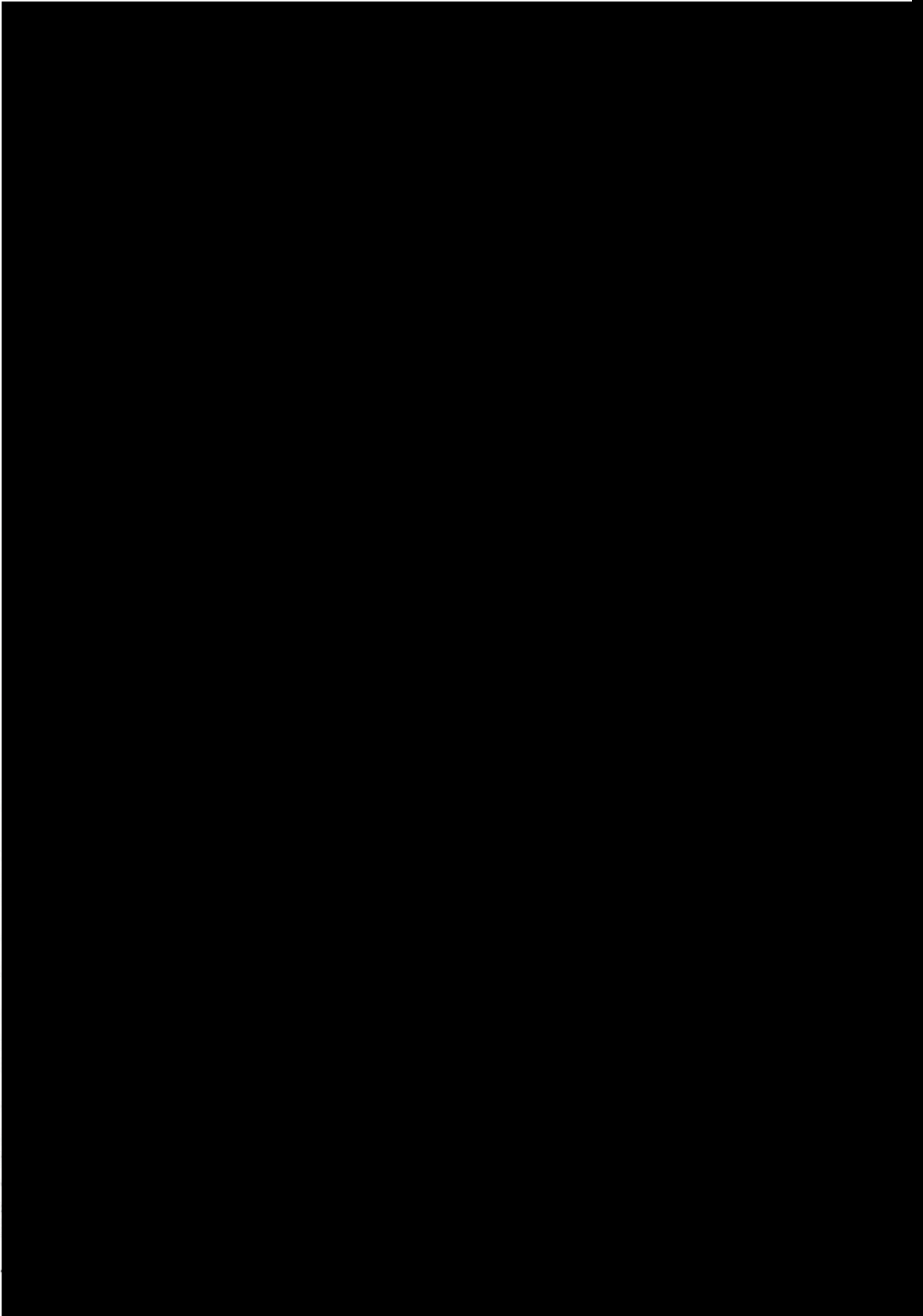
In other cases, the complainant is stood down with pay while the matter is dealt with, while the perpetrator – who, without meaningful intervention, continues to present a risk to the entire workforce – remains at work.

It is submitted that, in addition to strengthening anti-discrimination laws, there should be a clear right of action in the FW Act for workers to bring sexual harassment dispute in the FWC jurisdiction. To address the issues outline above, FWC should be able to conciliate and arbitrate sexual harassment matters, including exercising powers to make interim Orders that the sexual harassment stop and place obligations on the perpetrator to stay away from the complainant, as well as issue compensation orders.

CASE STUDY SEVEN



CASE STUDY SEVEN CONT.



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CASE STUDY EIGHT

In [REDACTED] the NUW was contacted by a member ('the complainant') to report sexual harassment and bullying by a supervisor at the [REDACTED] warehouse in [REDACTED] where she had worked as [REDACTED] for five years. A year prior, she had been transferred to an area of warehouse known as [REDACTED] at the request of the supervisor, who was more than [REDACTED] years her senior.

The harassment began almost immediately after the complainant was transferred, and continued on a daily basis. She was required to report to the supervisor's office several times a day, where he locked the door and told her sexually explicit stories. He regularly sought out reasons for the two of them to work together alone, and sent inappropriate text messages outside of work hours. The complainant also frequently witnessed the supervisor making sexist and homophobic remarks to other female colleagues, and even sexually touching a female colleague on at least one occasion.

The complainant was aware of bullying complaints made against the supervisor in the past, but despite complaints had continued in his role without intervention by the company. She believed many of her colleagues did not complain due to fear of losing their jobs. The supervisor had worked for the company for [REDACTED] years, and was an old friend of the owner of the company with whom he often had lunch at the site. Over the course of her employment, there were no women in the role of team leader, and only one woman employed in senior management.

When the complainant did not reciprocate the supervisor's advances, he used his position to undermine her work. He directed her to undertake tedious, repetitive tasks and subjected her to excessive performance management. The complainant reported feelings of humiliation, isolation and depression.

In [REDACTED], after a year of ongoing harassment and bullying, the complainant contacted the NUW and made a formal complaint to the human resources ('HR') department of the company. An extensive investigation process followed, and several employees were interviewed. During this process, HR advised the complainant that the process was confidential, and she was warned that she would be disciplined if she discussed the matter with any of her colleagues.

After the investigation was concluded, the complainant was advised that there was not enough evidence to dismiss the supervisor. However an arrangement was negotiated to ensure that the complainant would not work directly with the supervisor in the future. The complainant was returned [REDACTED] where she resumed work in her previous position. The arrangement worked well for the complainant, however every 3 to 4 months she was asked to meet with management to review the arrangement. When a new operations manager began working at the site, he sought to have the arrangement removed entirely. The NUW filed a dispute at the FWC and the arrangement was subsequently formalised by agreement between the parties at conciliation.

However, management sought to rescind the agreement several times per year thereafter, [REDACTED]. The supervisor continues to work at the company.

At all relevant times the company had a comprehensive equal opportunity policy in place, and staff were regularly required to undergo training to ensure familiarity with the policy. Training involved video aids which depicted sexual harassment, as well as written assessments as part of standard operating procedure.

**EXTRACT FROM EMAIL FROM NUW TO COMPANY RE: WORK ARRANGEMENTS FOLLOWING
SEXUAL HARASSMENT COMPLAINT**

Dear [REDACTED]

I refer to the meeting record issued to our member, [REDACTED] on [REDACTED]. In the record, the company proposes a number of alternate working arrangements intended to provide for [REDACTED] safety at work in response to her complaint regarding sexual harassment by company supervisor [REDACTED].

We have consulted with our member and consider that the arrangements proposed are inadequate and do not provide for [REDACTED] ongoing safety at work. Moreover, we have concerns for the safety of other employees who are exposed to [REDACTED] particularly female employees, given the company's failure to take any proactive steps to mitigate the risk his behaviour has presented.

Tea Break and Meal Breaks

While [REDACTED] has been directed not to initiate direct contact with our member, we are instructed that [REDACTED] has continued to encounter him and that he has stared at her inappropriately causing her to feel unsafe. In particular, on [REDACTED], [REDACTED] was walking into the warehouse towards the computer clock on station. [REDACTED] passed very close by [REDACTED] and stared at her. She instructs that this incident made her feel very uncomfortable.

[REDACTED] has been directed not to enter the tearoom while [REDACTED] is using the facilities during her meal break between [REDACTED]. This direction does not provide for circumstances where break times are altered for operational reasons or when breaks are running behind. Neither does it provide for [REDACTED] first break at [REDACTED].

[REDACTED] has been directed to avoid [REDACTED] however [REDACTED] may be subject to rotation. We are aware that staff have recently been subjected to rotation. The alternate arrangements make no provision for [REDACTED] in the event that [REDACTED] is rotated to another area.

Nominated Work Space

[REDACTED] has been directed to perform duties that do not require him to be in close proximity of [REDACTED] work station. It is unclear however what is meant by 'close proximity'. Please provide further details about the meaning of 'close proximity'.

The company asserts that [REDACTED] is not required to enter the office area in her ordinary duties, however the current arrangements would prevent [REDACTED] from applying for other positions within the company unless she is prepared to compromise her safety through exposure to [REDACTED]. [REDACTED] has made a complaint of sexual harassment which the company has failed to act on. We maintain that it is not reasonable that [REDACTED] should be prevented from pursuing opportunities within the company due to the unlawful conduct of [REDACTED] and the failure of the company to properly respond.

Scheduled Review and Confidentiality

Any proposed review mechanism should explicitly state [REDACTED] right to access a support person, and set down a process in the event that [REDACTED] is unhappy with the operation of the arrangements. Additionally, it is necessary for other staff members to be made aware of the arrangements in order that they are able to function effectively.

The proposed arrangements are insufficient

The arrangements proposed are insufficient to meet the company's obligations under the *Occupational Health and Safety Act 2004 (Vic)* and provide for [REDACTED] safety at work. [REDACTED] continues to feel unsafe in the presence of [REDACTED]. [REDACTED] should not be subjected to any detriment in her working environment as a result of [REDACTED] conduct and her subsequent complaint.

PROACTIVE OBLIGATIONS FOR EMPLOYERS ARE NEEDED

The current Australian legislative framework does not impose positive obligations on Australian employers to prevent gendered violence and sexual harassment. Employer policies and training are only subject to scrutiny in the context of a defence to a claim for vicarious liability. It is a defence to a claim for vicarious liability under the SD Act if the employer took 'all reasonable steps to prevent the conduct from occurring'.⁴² This has been interpreted by the judiciary to entail both a substantial compliance program is in place and that the compliance program is effectively implemented.⁴³ In the experience of the NUW, the presence of equal opportunity policies and procedures, and training in those procedures, does not mitigate the risk of sexual harassment and gendered violence.

The *EO Act 1984* (Vic) imposes a positive 'duty to eliminate discrimination, sexual harassment or victimisation'⁴⁴, however it is unclear what is the content and scope of the duty, and whether it is answered by way of a possibly ineffective and superficial workplace policy. Employers should be subject to greater regulation with respect to sexual harassment and gendered violence. Employer obligations should be commensurate with their power to intervene in the workplace and make the changes necessary to ensure a safe working environment free from gendered violence.

Reform is needed to reinforce existing obligations on employers and create new positive obligations. Reporting obligations and transparency measures, auditing and regulatory monitoring, expanded vicarious liability provisions, and the creation of new emergency/interim applications to secure the short term safety of a complainant are all required to address these concerns.

The personal risks involved for individuals with sexual harassment complaints pursuing them through HR or externally are prohibitive, with the consequence that

⁴² 1984 (Cth) s 106(2).

⁴³ Van Der Winden, Catherine, "Combating Sexual Harassment in the Workplace: Policy vs Legislative Reform" (2014) *Canberra Law Review* 12(1).

⁴⁴ s 15.

sexual harassment and gendered violence remains endemic to Australian workplaces in our industries.

To further counter individual risk and instead foster systemic change, the SDC should have a statutory role to undertake pro-active compliance and enforcement action in respect of employer breaches of their positive duty to prevent gendered violence and sexual harassment. We submit that such a reform would assist in re-positioning sexual harassment at work as a systemic and cultural issue connected to gender and power inequalities at work, rather than the deviant behaviour of an individual.

SEXUAL HARASSMENT IS A WORKPLACE HEALTH AND SAFETY ISSUE

“A male supervisor makes constant sexual comments about myself and other women in the workplace. I feel scared all the time. Lately I cannot stop crying, I just want him gone so I can be safe at work.”

(Female worker, permanent, warehousing industry).

‘I was extremely upset and terrified, his words earlier in the factory ‘while there’s no one around’ came flooding back into my head and all I could focus on was that no one knew I was out there alone.’

(Female worker, permanent pharmaceutical logistics)

‘The drive home was terrifying. I kept imagining every car was him. I pulled into my driveway, opened the door and vomited everywhere. Then I just sat there and cried.’

(Female worker, permanent, pharmaceutical logistics)

Sexual harassment and gendered violence at work are fundamentally workplace health and safety (“WHS”) issues that are reasonably likely to cause physical and psychological injuries - however, they are rarely addressed as breaches of a workers

right to 'quiet enjoyment' of their workplace⁴⁵ or an employers (or PCBUs) breach of their duty of care to provide a safe workplace.

In the NUW's experience, employers do not prioritise taking preventative measures, in a WHS context, to eliminate or manage the risk of sexual harassment at work. Rather, employers or PCBUs tend to rely sexual harassment or equal opportunity policies and training as the strongest, or only, risk mitigation strategies for preventing sexual harassment at work.

Many of the case studies relied on by the NUW occurred at workplaces where there were comprehensive sexual harassment policies, complaints processes and training. However, workers who experienced sexual harassment at these workplaces were highly sceptical about the effect, if any, that policies or training had on preventing sexual harassment.

"The [sexual harassment] training had absolutely no impact at all on workplace conduct"

(Female worker, permanent, pharmaceutical warehousing).



⁴⁵ Paula McDonald & Sara Charlesworth, Submission to Australian Human Rights Commission, *Inquiry Into Sexual Harassment in Australian Workplaces*, January 2019, 18.

It is clear that employers broadly rely on sexual harassment policies and training to mitigate against legal risk arising in the anti-discrimination jurisdictions, rather than to actively prevent gendered violence at work. This approach tends to view the Complainant as the key legal risk to the Company, rather than identifying perpetrator as a hazard to be eliminated or minimised. Often the complainant will be moved to a different department rather than address the serious WHS risk of allowing a perpetrator to remain in the workplace.

"I felt that the company was against me. That the company was on [REDACTED] side. Why would you keep someone there, why would you keep trying to keep him there?"

(Female, pharmaceutical warehouse worker – [REDACTED])

In fact, the policies and training put in place ostensibly to prevent sexual harassment are more often than not weaponised against complainants. In several instances at one employer, [REDACTED] female complainants have received formal warnings for making sexual harassment complaints (in line with their workplace policy) that were deemed 'unable to be substantiated', or for talking to other victims about their shared experiences of sexual harassment.

In the NUW's experience, despite the duty to ensure health and safety of all workers, employers do not often take any preventative or compliance measures beyond having sexual harassment policies, even after an incident involving sexual harassment has occurred. This can be directly contrasted to approach taken to *physical hazards* where a good employer will consult with HSRs and workers, conduct a risk assessment on the situation and implement measures to eliminate or confine the risk.

Further, complaint and investigation processes used by employers often exacerbates the risk to a complainant's workplace health and safety. Reporting sexual harassment or raising a complaint frequently results in detriment beyond the

behaviour itself, including a deterioration in workplace relationships⁴⁶ or being ignored, ostracised or victimised.⁴⁷ If an Employer views sexual harassment matters as a legal risk in anti-discrimination jurisdictions, management tend to protect the harasser and rationalise their behaviour.

“I wanted to leave (the job) so many times. Then there’s the other part that says why should I leave? And another part that says you’re going to make yourself sick if you stay. And this is just trying to do your job”.

“After constant bullying and harassment, working at [REDACTED] has left me completely emotionally exhausted. I am now taking anti-depressants to cope with the stress.”

WHS laws should be amended to provide for positive duties on persons conducting a business or undertaking (PCBU) to prevent sexual harassment and gendered violence at work and include effective worker mechanisms to mitigate the risk of sexual harassment in the workplace.

The NUW submits that WHS laws are well placed to assist vulnerable workers and protect against gendered violence at work. Unlike the individual approach to remedying sexual harassment matters through anti-discrimination legislation, WHS focuses on the role and function of an employer to keep provide a safe workplace. A primary objective of WHS statutes is ‘prevention’, which includes providing frameworks for the prevention of workplace ‘violence’.⁴⁸

WHS laws, which frame responsibility around the concept of a PCBU rather than ‘employer and employee’, are better formulated for contemporary workplace arrangements which may see hosts and labour hire employers both engaging workers at a site.

⁴⁶ McDonald, P & Charlesworth, S (2013) Settlement outcomes on sexual harassment complaints. *Australasian Dispute Resolution Journal*, 24(4), 259-269 and McDonald, P., Backstrom, S & Dear, K (2008) Reporting sexual harassment: claims and remedies *Asia Pacific Journal of Human Resources* 46(2), 173-195.

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

⁴⁸ CCH Commentary: *Australia Managing Work Health and Safety* at [35-300].

Their regulatory regime of distributed responsibilities and powers across employers and workers lends itself to addressing sexual harassment matters collectively. For example, WHS laws address the inherent power imbalance between management and workers by allocating powers to workers through mechanisms such as ‘workplace health and safety representatives’ (“HSRs”), ‘designated work groups’ (“DWGs”), safety committees and worker consultation.

Workplace HSRs assist worker participation in the workplace and have positive outcomes on workplace safety⁴⁹ through normative, economic and physical power. This allows workers and workplace representatives to take collective action themselves, within the framework of the Act, to implement measures to prevent gendered violence at work.

Preventing sexual harassment and gendered violence at work requires more than education and compliance; workplace norms and behaviours must be affected – and worker –worker-driven safety measures are an important component in driving systemic cultural change.

As illustrated by the case study below, workers taking collective action against sexual harassment and gendered violence results in appropriate outcomes for the victim and the broader workforce.

⁴⁹ Frick, K. (2011). Worker influence on voluntary OHS management systems- A review of its ends and means. *Safety Science*, 49(7), 974-987.



CASE STUDY NINE

The NUW was contacted by a member at a retail logistics warehouse and requested to attend the site as a support person for three members during scheduled meetings with HR. On arrival at the site, the Organiser met with three male union members who disclosed their intention to make successive complaints about the behaviour warehouse manager. The members had witnessed sexual harassment, racist slurs and bullying by the warehouse manager directed towards their colleagues for several months. They had discussed the situation with their colleagues and determined that they wanted to complain about several incidents.

The NUW Organiser attended each meeting with the individual members while they recounted substantially the same incidents of sexual harassment by the warehouse manager directed towards a number of young women and people of colour in the warehouse. The members were unwilling to name the individuals who were affected by the conduct of the manager, instead offering only their consistent witness accounts.

Having received successive complaints of serious misconduct, the HR department commenced an investigation, and the warehouse manager offered his resignation the following week. The NUW negotiated with the company to form a designated working group and the members elected a health and safety representative following the departure of the manager. No similar incidents have since occurred to the knowledge of the NUW.

The potential of WHS laws to prevent sexual harassment and gendered violence at work should be supported by specific amendments that acknowledge sexual harassment and gender-based violence as 'serious risks' that should be addressed through a systematic risk management approach. Similar amendments should flow to the concepts of 'notifiable incident', 'serious injury' and 'dangerous incident', and PCBUs should be required to report incidents and complaints of sexual harassment to the regulator. Legislation must also explicitly recognize sexual harassment as a hazard and provide clear mechanisms for workers to pursue injury claims where an injury has resulted from incidents of sexual harassment. PCBUs and duty holder should be guided by an enforceable Code of Practice developed in consultation with workers, unions and employers.

However, in order for WHS reforms to be successful, WHS regulators must actively develop a responsive regulatory model that encourages preventative measures by PCBUs, including by utilising 'direct compliance' measures for sexual harassment at work. This enforcement model should equally be aimed at supporting HSRs and individuals to address incidences of sexual harassment at work.

Regulators and inspectorates must be upskilled to better investigate and encourage PCBUs to take a risk management approach to sexual harassment in the workplace; and develop specific strategies to address gendered violence at work as a priority area for workplace health and safety reform.

Where employers do not meet their obligations to eliminate or prevent sexual harassment, WHS regulators should take enforcement action, including prosecution, and seek substantial penalties.

