Australian Human Rights Commission

Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces

AUSTRALIAN HUMAN RIGHTS COMMISSION • 2020

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Australian Human Rights Commission

Sex Discrimination Commissioner
Kate Jenkins

29 January 2020

The Hon. Christian Porter MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney,

Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces

I am pleased to present to you Respect@Work, the Commission's report of the National Inquiry into Sexual Harassment in Australian Workplaces 2020.

This Inquiry examined the nature and prevalence of sexual harassment in Australian workplaces, the drivers of this harassment and measures to address and prevent sexual harassment.

The report is furnished to you under the functions and powers conferred by sections 11(1)(a), 11(1)(e), 11(1)(f), 11(1)(g), 11(1)(j), 11(1)(k) and 11(1)(p) of the *Australian Human Rights Commission Act 1986* (Cth).

Yours sincerely,

Kate Jenkins
Sex Discrimination Commissioner

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Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces

Australian Human Rights Commission 2020

Contents

Commissioner's Foreword **9**

Section 1: Introduction **13**

1.1 Executive Summary 13
1.2 Recommendations 40
1.3 Terms of Reference 52
1.4 Methodology 53
1.5 Terminology used in the report 59

Section 2: The current context for this Inquiry **67**

2.1 Overview 69
2.2 Historical context 70
2.3 Sexual harassment in international and domestic law 72
2.4 Changing nature of work 74
2.5 Increasing transparency around sexual harassment 78
2.6 Understanding the cost of sexual harassment 81
2.7 A global response to sexual harassment 82

Section 3: Understanding sexual harassment in the workplace **91**

3.1 Overview 94
3.2 Prevalence of sexual harassment in the workplace 94
3.3 Nature of sexual harassment in the workplace 123
3.4 Cultural and systemic drivers of sexual harassment in the workplace 138
3.5 People who experience sexual harassment in the workplace 161
3.6 People who sexually harass in the workplace 198
3.7 Workplace settings where sexual harassment occurs 218
3.8 Impacts of sexual harassment in the workplace 257
3.9 National Sexual Harassment Research Agenda 299

Section 4: Prevention outside the workplace **351**

4.1 Overview 353
4.2 Primary prevention of sexual harassment 354
4.3 Effective approaches to primary prevention 358
4.4 Government action to prevent sexual harassment 376
4.5 Key areas for sexual harassment primary prevention 384

Section 5: The legal and regulatory framework **441**

5.1 Overview 444
5.2 Towards a new regulatory model 444
5.3 International human rights obligations 447
5.4 The Sex Discrimination Act and state and territory anti-discrimination frameworks 451
5.5 Fair Work system 514
5.6 Work health and safety 538
5.7 Workers' compensation 552
5.8 Non-disclosure agreements and defamation laws 556
5.9 Other legal and regulatory responses 574

Section 6: Preventing and responding to sexual harassment in the workplace **617**

6.1 Overview 620
6.2 A workplace prevention and response framework to address sexual harassment 621
6.3 Industry-based approaches to addressing workplace sexual harassment 718
6.4 Resources for workers and employers 727

Section 7: Support, advice and advocacy **753**

7.1 Overview 755
7.2 A holistic approach to support, advice and advocacy 757
7.3 Information and referral 762
7.4 Legal advice and advocacy 767
7.5 Support to promote recovery 770

Appendices

Appendix 1: Glossary, acronyms and abbreviations 783
Appendix 2: Submissions 785
Appendix 3: Consultations 805
Appendix 4: Key meetings 808
Appendix 5: Enquiries and complaints data from human rights and anti-discrimination agencies 814
Appendix 6: Overview of sexual harassment provisions by jurisdiction 845
Appendix 7: Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, February 2019) 854

Kate Jenkins

Sex Discrimination Commissioner
Australian Human Rights Commission

Commissioner's Foreword

Australia was once at the forefront of tackling sexual harassment globally.

Women's organisations in Australia began to press for the legal and social recognition of sex discrimination in the early 1970s. This movement built on Australia's ratification of two key international conventions:

- the International Labour Organization's Discrimination (Employment and Occupation) Convention in 1973
- the UN Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') in 1983.

States including South Australia, New South Wales and Victoria enacted anti-discrimination laws covering the ground of sex in the late 1970s.

In 1984, the Australian Government introduced the *Sex Discrimination Act 1984,* which specifically prohibited sexual harassment at work and established the role I currently occupy, as Australia's Sex Discrimination Commissioner.[1] Since that time, successive Sex Discrimination Commissioners have identified the elimination of workplace sexual harassment as a key priority.

However, over 35 years on, the rate of change has been disappointingly slow. Australia now lags behind other countries in preventing and responding to sexual harassment.

Since 2003, the Australian Human Rights Commission has conducted four periodic surveys on the national experience of sexual harassment. Our most recent survey conducted in 2018 showed that sexual harassment in Australian workplaces is widespread and pervasive. One in three people experienced sexual harassment at work in the past five years.[2]

Underpinning this aggregate figure is an equally shocking reflection of the gendered and intersectional nature of workplace sexual harassment. As the 2018 National Survey revealed, almost two in five women (39%) and just over one in four men (26%) have experienced sexual harassment in the workplace in the past five years. Aboriginal and Torres Strait Islander people were more likely to have experienced workplace sexual harassment than people who are non-Indigenous (53% and 32% respectively).[3]

Sexual harassment is not a women's issue: it is a societal issue, which every Australian, and every Australian workplace, can contribute to addressing.

Workplace sexual harassment is not inevitable. It is not acceptable. It is preventable.

As Australia's Sex Discrimination Commissioner, I deliver this report with a sense of urgency and hope.

I have been devastated by the experiences of sexual harassment within workplaces I have heard about through this Inquiry, the harms suffered by victims and the cost to the economy.[4] However, I have also been heartened by the whole-of-community response to the National Inquiry. Australia wants change.

The current legal and regulatory system is simply no longer fit for purpose. In this report, I have recommended a new model that improves the coordination, consistency and clarity between the anti-discrimination, employment and work health and safety legislative schemes.

The new model is evidence-based, victim-focused and framed through a gender and intersectional lens. It is also based on existing legal frameworks to avoid duplication, ambiguity and undue burden on employers. Importantly, it recognises the complementary and mutually reinforcing nature of the three schemes, while also recognising their distinctive features.

I call on all employers to join me in creating safe, gender-equal and inclusive workplaces, no matter their industry or size. This will require transparency, accountability and leadership. It will also require a shift from the current reactive model, that requires complaints from individuals, to a proactive model, which will require positive actions from employers.

Ultimately, a safe and harassment-free workplace is also a productive workplace.

I want to thank the Australian Government for supporting this ground-breaking and world-first inquiry. I also want to acknowledge the legacy and leadership of the people, especially women's advocates and women's organisations, who have fought against sexual harassment from the beginning. This report builds upon and advances your work. Finally, I want to thank the team of dedicated and passionate individuals at the Commission who worked on the Inquiry.

#MeToo, #LetHerSpeak, #TimesUp, #BalanceTonPorc, #NotYourHabibti, #Tekniskt fel, #QuellaVoltaChe, #YoTambien and similar movements have ignited a global discussion about sexual harassment and gender inequality.

Victims who have for too long been silenced have found their individual and collective voice.

There is an urgency for change. There is the momentum for reform.

By adopting the multifaceted and whole-of-community response outlined in this report, Australia can reclaim its position as leaders in tackling sexual harassment and provide employers with the guidance they need, and victims the support and redress they deserve.

1 Susan Ryan, 'The "Ryan Juggernaut" Rolls On' (2004) 27(3) *University of New South Wales Law Journal* 828. See also Commonwealth, *Parliamentary Debates*, Senate, 2 June 1983, 1185–7 (Susan Ryan, Minister for Education and Youth Affairs).
2 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 8.
3 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 8.
4 Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, February 2019).

Section 1: Introduction

1.1 Executive Summary

(a) The National Inquiry into Sexual Harassment in Australian Workplaces

Workplace sexual harassment is prevalent and pervasive: it occurs in every industry, in every location and at every level, in Australian workplaces. Australians, across the country, are suffering the financial, social, emotional, physical and psychological harm associated with sexual harassment. This is particularly so for women.

This behaviour also represents a very real financial impost to the economy through lost productivity, staff turnover and other associated impacts.

In June 2018, against the backdrop of the momentum of the #MeToo movement and recognition of the prevalence of, and immense harm caused by sexual harassment in Australian, and global, workplaces, the Sex Discrimination Commissioner, Kate Jenkins, and the then Minister for Women, the Hon Kelly O'Dwyer, announced the National Inquiry into Sexual Harassment in Australian Workplaces (Inquiry).

As Australia's national human rights institution, the Australian Human Rights Commission (the Commission) was tasked with undertaking this Inquiry. The Commission has an established record of undertaking initiatives aimed at addressing sexual harassment and promoting gender equality.

In the Terms of Reference, the Commission's task was to review and report on workplace sexual harassment and make recommendations in relation to:

- its prevalence, nature and reporting in Australian workplaces
- the role of technology
- its drivers, including risk factors for particular population groups or in different workplace settings

- the current legal framework
- existing measures to address it and examples of good practice
- its impacts on individuals and businesses, including its economic impact.

This report outlines the Commission's findings and recommendations. The full list of recommendations is set out at the end of this Executive Summary.

The purpose of this Inquiry is to improve how Australian workplaces prevent and respond to sexual harassment, including through an examination of the systemic issues set out in its Terms of Reference.

The Commission established a Reference Group to provide advice and guidance for the Inquiry. It included members from across government, business groups, unions, academia and the legal and community sector (see Section 1.4(b) for a list of members). The Commission acknowledges and thanks Reference Group members for their valuable assistance with engaging stakeholders and providing frank and robust advice and guidance on the Inquiry.

The Commission received 460 submissions from government agencies, business groups, community bodies and, above all, victims. From September 2018 to February 2019, the Commission conducted 60 consultations as part of the Inquiry, with more than 600 individuals participating in all capital cities and some regional locations across Australia. It also held three roundtables and numerous meetings with key stakeholders.

This report is a reflection of the contributions of many individuals and organisations and the Commission is grateful to those who took the time to attend a consultation, write a submission or assist the Inquiry.

There is an urgency and demand for change across all corners of society.

Australia is also being closely watched internationally. This is Australia's moment to be a global leader on this important and topical issue.

(b) A new approach to addressing sexual harassment in Australian workplaces

Overwhelmingly, the Commission heard that the current system for addressing workplace sexual harassment in Australia is complex and confusing for victims and employers to understand and navigate. It also places a heavy burden on individuals to make a complaint.

Yet most people who experience sexual harassment never report it. They fear the impact that complaining will have on their reputation, career prospects and relationships within their community or industry. Throughout the Inquiry, the Commission heard of the need to shift from the current reactive, complaints-based approach, to one which requires positive actions from employers and a focus on prevention.

Through the package of recommendations in this report, the Commission proposes a new approach for government, employers and the community to better prevent and respond to sexual harassment in the workplace and provide leadership and innovation in addressing this complex and difficult issue.

The new approach is:

- evidence-based
- victim-focused to enhance outcomes for people experiencing harassment
- framed through a gender and intersectional lens
- based upon existing legal frameworks to avoid duplication, ambiguity or undue burden on employers. It is consistent with the Australian Government's Deregulation Agenda of delivering more effective and efficient regulatory frameworks.

The new approach also draws upon, and furthers, existing policies and initiatives in this space. There are five key areas of focus which underpin the new approach:

1. Data and research
2. Primary prevention
3. The legal and regulatory framework
4. Workplace prevention and response
5. Support, advice and advocacy.

These areas are expanded upon below.

(c) Outline of the report

Through the recommendations in this report, the Commission seeks to make a significant contribution to reducing workplace sexual harassment and creating safer, more respectful and productive Australian workplaces.

The report outlines:

- the current context in which workplace sexual harassment occurs (see Section 2)
- what is currently understood about workplace sexual harassment, in terms of:
  - how prevalent it is
  - the behaviours that constitute sexual harassment and how it occurs
  - why it occurs
  - who experiences it
  - who carries it out
  - the workplace settings where it occurs
  - what impact it has on individuals, businesses and the broader economy (see Section 3)
- how primary prevention initiatives outside the workplace can be used to address workplace sexual harassment (see Section 4)

- the current legal and regulatory systems for responding to workplace sexual harassment and how these can be improved (see Section 5)
- a proposed new framework for workplaces to address sexual harassment (see Section 6)
- the support, advice and advocacy services that are available, and how access to these services can be improved (see Section 7).

(i) The current context

Under the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act), sexual harassment is:

- any unwelcome sexual advance
- unwelcome request for sexual favours, or
- other unwelcome conduct of a sexual nature in relation to the person harassed

in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.[1] The Sex Discrimination Act makes sexual harassment unlawful in certain areas of public life, including employment.[2]

Since the Sex Discrimination Act was introduced in 1984, there have been substantial changes to the nature of work. Temporary or agency work, part-time or on-call work, labour hire, independent contracting and other forms of 'non-standard' work are now common, particularly in the so-called 'gig' or 'sharing economy'.[3] Higher rates of self-employment and lower rates of union membership can create challenges when it comes to making a complaint of sexual harassment and holding workplaces accountable. Technological change has also blurred the distinction between the personal and the professional world, creating ambiguity about the boundaries of the workplace.

Australia's domestic legal framework with respect to workplace sexual harassment gives effect to broader international obligations to prevent sexual harassment and other forms of gender-based violence and discrimination.

The media and social media also play a role. It is important that they work to promote public awareness, accountability and transparency, while avoiding the risks and harms of reporting that occurs without the consent of the victim or that undermines procedural fairness for the harasser.

Workplace sexual harassment was estimated to cost the Australian economy approximately $3.8 billion in 2018.[4] This is Australia's opportunity to instead invest this money in better health and economic outcomes for its workers and workplaces.

(ii) Understanding sexual harassment in the workplace

Prevalence

The Commission conducts a world leading national survey on experiences of workplace sexual harassment in Australia every four years. These surveys are an important source of data on the prevalence, nature, reporting of, impacts and responses to workplace sexual harassment in Australia.

The results of the fourth national survey conducted by the Commission in 2018, *Everyone's Business: Fourth survey on sexual harassment in Australian workplaces* (the 2018 National Survey) have informed the Commission's findings as part of this Inquiry.

The 2018 National Survey provides a clear picture of the pervasiveness of sexual harassment in Australia workplaces. The results indicate that 33% of people who had been in the workforce in the previous five years said they had experienced workplace sexual harassment.[5] Women (39%) were more likely than men (26%) to have experienced workplace sexual harassment in this period.[6]

The Commission recommends that the national survey continue to be conducted every four years to allow trend analysis to inform policy decisions, and to inform employer initiatives.

There is currently little consistency in the collection, monitoring and reporting of data on workplace sexual harassment by anti-discrimination and other regulatory agencies.

Effective systems for collection and reporting of consistent, de-identified data on workplace sexual harassment by the Commission, state and territory anti-discrimination agencies, Fair Work, work health and safety (WHS) and workers' compensation agencies, are key to the success of the new regulatory model proposed by the Commission (see Section 5).

The development of formal information sharing and data exchange mechanisms regarding sexual harassment complaints between regulatory agencies, under guidance from the Workplace Sexual Harassment Council (see Recommendation 14), will also support the Commission's proposed new regulatory model.

Nature

Each victim's experience of workplace sexual harassment is unique and influenced by a range of factors. The 2018 National Survey identified a number of different types of sexually harassing behaviour including:

- verbal forms of sexual harassment, such as sexually suggestive comments or jokes, intrusive questions about private life or physical appearance, repeated invitations to go on dates, or requests or pressure for sex
- sexually explicit pictures, posters or gifts

- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, indecent exposure, or being followed, watched or someone loitering nearby
- inappropriate physical contact, such as unwelcome touching, hugging, cornering or kissing, or actual or attempted rape or sexual assault
- sexual harassment involving the use of technology, including sexually explicit emails, SMS or social media, indecent phone calls, repeated or inappropriate advances online, or sharing or threatening to share intimate images or film without consent.

The two most commonly reported types of behaviour were sexually suggestive comments or jokes and intrusive questions about private life or physical appearance.[7]

Many workers told the Commission about being subject to sexually harassing 'jokes', where the harasser later claimed to be surprised when their attempts at humour were met with offence or insult.[8] Several victims told the Commission about experiencing workplace sexual harassment which began in verbal exchanges and ended in rape or sexual assault.[9]

The Commission also heard that technology was often used to perpetrate sexual harassment.[10]

The frequency, duration and location of workplace sexual harassment also tells a story. In the 2018 National Survey, when people who said they had been sexually harassed in the workplace in the last five years were asked about the most recent incident they experienced:

- 49% said the same type of harassment had happened to them previously at the same workplace[11]
- 45% of those who said they experienced the same type of sexual harassment previously, said it had been ongoing for 12 months or longer[12]
- 52% said they were sexually harassed at their workstation or where they worked.[13]

Cultural and systemic drivers

Through the Inquiry, the Commission heard about the way in which power disparities in society, as well as in the workplace, enabled sexual harassment. Overwhelmingly, the Commission heard that gender inequality was the key power disparity that drives sexual harassment.[14] Gender inequality relates to the unequal distribution of power, resources and opportunity between men and women in society, due to prevailing societal norms and structures.[15]

The Commission also heard that while gender inequality is an underlying condition for sexual harassment to occur, it is not the only factor that drives it.

Other forms of discrimination and disadvantage that create power imbalances in the workplace and in society, can also drive sexual harassment.

When people experience multiple forms of intersecting discrimination and harassment, for example on the basis of gender, race, disability or sexuality, this is referred to as 'intersectional' discrimination. The Commission was told that 'intersectionality' is an important factor in understanding workplace sexual harassment and how to address it.[16]

Other cultural and systemic factors that contribute to the prevalence of workplace sexual harassment that were raised in consultations and submissions included:

- the culture or 'climate' of a workplace, including the critical role of leadership in setting workplace culture[17]
- a lack of understanding about what constitutes sexual harassment[18]
- use of alcohol in a work context.[19]

People who experience workplace sexual harassment

The Commission heard, and research also indicates, that women experience higher rates of workplace sexual harassment than men.

Beyond this, research on the experiences of different groups of people is limited. However, there is increasing evidence that sexual harassment affects some groups of people in disproportionate ways.

In addition to gender, other factors may increase the likelihood that a person may experience workplace sexual harassment. Workers who may be more likely to experience sexual harassment in the workplace include:

- young workers aged less than 30 years[20]
- lesbian, gay, bisexual, transgender, queer or intersex (LGBTQI) workers
- Aboriginal or Torres Strait Islander workers[21]
- workers with disability[22]
- workers from culturally and linguistically diverse (CALD) backgrounds[23]
- migrant workers or workers holding temporary visas
- people in working arrangements described as 'precarious' or 'insecure'.[24]

The Commission also heard that the existing research on the factors that make an individual or groups vulnerable to sexual harassment is very limited, and that further research is required to better understand this.

Harassers

Existing research has shown that in most incidents of workplace sexual harassment the harasser was male.[25] However, given the limited research on harassers beyond this, it is difficult to identify any typical characteristics of a person who engages in sexual harassment.

Harassers have diverse behaviours and motivations, and exist across all age groups, industries and social strata.

The 2018 National Survey does provide some insights into harassers in the Australian workforce. When people who said they had experienced workplace sexual harassment in the last five years were asked about the most recent incident:

- the majority (64%) said they were sexually harassed by a single harasser[26]
- most (79%) said that one or more of their harassers was male[27]
- where the most recent incident involved a single harasser, more than half (54%) indicated that the harasser was aged 40 or older[28]
- victims said that the harasser was most commonly a co-worker employed at the same level (27% for single harassers, and 35% for multiple harassers).[29]

Through the Inquiry process, the Commission also heard from individuals whose experiences reflected the National Survey data on harassers. However, better research is required to understand the behaviours and characteristics of harassers, as a means to develop targeted prevention initiatives and improved responses.

Workplace settings

Sexual harassment is more prevalent in some workplace settings than in others. The 2018 National Survey data, information from submissions and consultations, academic research and government reviews (both Australian and international) show that a range of characteristics and practices specific to particular industries, professions or workplaces may increase the risk of sexual harassment.

Workplace settings where there is a higher risk of experiencing sexual harassment include those that:

- have been found by the 2018 National Survey to have a higher prevalence rate of sexual harassment than the rate across all industries of 31% (for example, the information, media and telecommunication industry and the arts and recreation industry)
- are male-dominated (for example, the construction and mining industries), because of:
  - the gender ratio
  - the over-representation of men in senior leadership roles
  - the nature of the work being considered 'non-traditional' for women
  - the masculine workplace culture

- involve a high level of contact with third parties, including customers, clients or patients (for example, the retail and hospitality sectors, and the health care and social assistance industry)
- are organised according to a hierarchical structure (for example, in police organisations, the Australian Defence Force, and the medical and legal professions).

While there is limited data available on workplaces located in rural, regional and remote areas, particular factors such as geographic isolation, lower population density and cultural and social dimensions can increase the risk of sexual harassment in these settings and create barriers to reporting or challenging these behaviours.

Small businesses face particular challenges in addressing workplace sexual harassment. The small size of the workplace and high degree of informal and personal interactions can increase the risk of sexual harassment and create barriers to reporting.

Small businesses often lack the resources and skills to handle complaints. However, the size and make-up of small businesses also mean that business owners and managers are uniquely positioned to set and influence workplace culture and behaviour in a positive way.

The Commission recognises that further research is required to assist in identifying risk factors for different workplace settings, as well as developing tailored solutions.

Impacts of sexual harassment in the workplace

The Inquiry found that as well as having a devastating and profound impact on individuals, workplace sexual harassment also undermines workplace productivity and imposes a significant economic cost to Australian society.

Consultations and submissions described the complex and interconnected ways in which experiencing and reporting workplace sexual harassment can affect individuals, including through:

- negative impacts on health and wellbeing
- negative impacts on employment (both day-to-day and in relation to career progression)
- significant financial consequences.

The impact of workplace sexual harassment is not only limited to individual victims but extends to their families, friends, bystanders and other co-workers.

Sexual harassment also represents a cost to Australian employers through:

- lost productivity
- staff turnover

- negative impact on workplace culture
- resources associated with responding to complaints, litigation and workers' compensation
- reputational damage.

Under the Terms of Reference for the Inquiry the Commission was asked to consider the economic impact of workplace sexual harassment. The Australian Government Department of the Treasury engaged Deloitte Access Economics (Deloitte) to undertake the modelling. Deloitte estimated the total financial cost of workplace sexual harassment to the Australian economy as $3.8 billion, noting that this was likely to be a 'conservative estimate'.[30] Lost productivity ($2.6 billion) represented the largest component of the estimated economic cost of workplace sexual harassment, with the largest share of this borne by employers.

Together with the non-financial impacts on victims, the very significant economic costs provide a compelling case for investment by governments and employers in preventing and addressing workplace sexual harassment.

National Sexual Harassment Research Agenda

To address the evidence gaps identified through this Inquiry, a National Sexual Harassment Research Agenda should be developed.

The National Sexual Harassment Research Agenda should be guided by, amongst other things, findings of the Commission's 2018 National Survey, as well as the issues and evidence gaps emerging from this Inquiry, including:

- the prevalence and nature of sexual harassment, particularly technology-facilitated sexual harassment
- risk factors that lead to greater exposure to sexual harassment for particular population groups, including women, young workers, LGBTQI workers, Aboriginal and Torres Strait Islander workers, workers with disability, workers from CALD backgrounds, migrant workers or workers on temporary visas, and other vulnerable workers
- the prevalence, nature, reporting and impacts of sexual harassment for workers in these population groups
- behaviours, characteristics and trends in relation to sexual harassers
- risk factors that create an environment in which sexual harassment is more likely to occur in particular workplace settings, arrangements, industries and sectors

- the impacts (particularly long-term) of workplace sexual harassment on individuals, businesses and society more broadly and the economic costs of workplace sexual harassment
- the effectiveness of strategies for the primary prevention of sexual harassment.

(iii) Prevention outside the workplace

To prevent workplace sexual harassment, primary prevention initiatives must not only address the drivers of sexual harassment in a workplace context but also in society more broadly.

Sexual harassment is recognised as a form of gendered violence. The social norms, structures, attitudes and practices that drive violence against women are the same drivers that enable sexual harassment. Violence against women encompasses physical violence and other forms of gender-based harm including psychological harm.[31]

Primary prevention refers to initiatives that target the whole population and aim to transform the key drivers of violence against women, including sexual harassment, so that the violence or harassment does not happen in the first place.[32]

Effective primary prevention of sexual harassment requires strategies that recognise and aim to shift the gendered drivers that underpin sexual harassment and that promote gender equality.

This is the approach recommended in *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia (Change the Story),* which provides an evidence-based framework to guide efforts to prevent sexual harassment.

Change the Story sets out that:

- violence against women is driven by gender inequality
- violence against women is preventable
- the actions that will prevent violence against women involve challenging gender inequality (for example, challenging gender stereotypes) and promoting and normalising gender equality in public and private life
- actions must be taken by governments, organisations and individuals in the different settings where people live, work, learn and socialise, and must be tailored to the context and needs of different groups.[33]

The Commission heard from a number of parties, including a joint statement signed by more than 100 organisations and academics, that any primary prevention efforts developed to address sexual harassment should be informed by the *Change the Story* framework.

Effective approaches to primary prevention

There is a growing body of research on effective approaches to primary prevention in relation to violence against women. The evidence base on the prevention of sexual assault and intimate partner violence is better developed than other forms of violence against women.[34] However, given that sexual harassment and other forms of violence are driven by the same underlying societal norms and practices, a range of principles and approaches to primary prevention from this research are relevant to sexual harassment, including:

- addressing intersecting forms of harassment and discrimination (for example, relating to a person's race, sexual orientation or disability)[35]
- using a whole-of-community approach to address different aspects of the problem across multiple settings, including workplaces, media, education, arts, and sports[36]
- considering the effectiveness of strategies that have been implemented previously[37]
- encouraging bystanders to take action[38]
- engaging men and boys in prevention[39]
- monitoring and evaluation[40]
- dealing with backlash or resistance to prevention efforts.[41]

Government action to prevent sexual harassment

To be effective, primary prevention needs long-term sustained effort and a high level of leadership and political will.[42]

In Australia, a coordinated national policy approach to addressing violence against women is currently provided by the *National Plan to Reduce Violence against Women and their Children 2010–2022* (the National Plan), endorsed by the Council of Australian Governments (COAG).[43] The National Plan is supported by a series of four three-year Action Plans.

Neither the National Plan nor the first three Action Plans directly identify sexual harassment as an area for action. The Fourth Action Plan was endorsed in August 2019 and specifically includes the following actions which address sexual harassment:

- prevent sexual violence and sexual harassment before it happens through national and targeted initiatives that promote informed consent, bodily autonomy and respectful relationships
- deliver client-centred, trauma-informed, specialised and consistent support to victims and survivors of sexual violence
- strengthen the capacity of all sectors to address sexual harassment to ensure women are safe at work, while studying, in public and online.[44]

Recognising that the National Plan and the Fourth Action Plan expire in 2022, the Commission recommends that COAG incorporates sexual harassment as a key area for action and investment under any future national framework to address violence against women.

The Commission also recommends that all Australian governments have gender equality strategies that address sexual harassment and recognise that sexual harassment is driven by gender inequality and is a form of gender-based violence.

Many states and territories have plans for the prevention of violence against women. However, most of these plans do not include any specific actions to address sexual harassment, or only do so indirectly. The states and territories have an important role to play in the prevention of sexual harassment. The Commission recommends that all state and territory governments have strategies for the prevention of violence against women, modelled on *Change the Story*, that include the prevention of sexual harassment as a key area for action.

Key areas for primary prevention

Through this Inquiry, the Commission has identified a number of areas that should be immediately prioritised for the primary prevention of sexual harassment.

The Commission recommends that initial primary prevention efforts should be focused on:

- social change strategies on sexual harassment, including a national campaign to increase knowledge and change behaviours that drive sexual harassment
- interventions that address sexual harassment of populations at higher risk of sexual harassment, including those who experience intersectional discrimination
- prevention initiatives that reach young people, which focus on sexual harassment as a form of gender-based violence
- resources on workplace rights for young people
- respectful relationships education in schools that includes content on sexual harassment as a form of gender-based violence and recognises that sexual harassment is driven by gender inequality
- information and training for staff and students in tertiary education institutions that recognises sexual harassment as a form of gender-based violence and provides information on workplace rights
- guidelines and practical measures to ensure responsible reporting of sexual harassment by the media.

(iv) The legal and regulatory framework

Towards a new regulatory model

Currently, the key areas of legislation relating to sexual harassment in the workplace are the Sex Discrimination Act, state and territory anti-discrimination laws, the *Fair Work Act 2009* (Cth) (Fair Work Act), state workplace relations laws, and work, health and safety (WHS) laws. WHS laws are based on the Model Work Health and Safety Act in all states and territories, except in Victoria and Western Australia which have their own WHS schemes.

A consistent theme that emerged from submissions and consultations was that the interaction between the schemes is complex and confusing for workers and employers to navigate. As each of the schemes offers specific and differing benefits to victims, the Commission has identified the benefits of each scheme and how to:

- maximise and improve existing legislative frameworks
- leverage, rather than duplicate, the expertise of existing regulators, in line with the Australian Government's Deregulation Agenda.

The new regulatory model that the Commission recommends recognises that the right of workers to be free from sexual harassment is a human right, a workplace right and a safety right.

As the Sex Discrimination Act will continue to be the primary framework for addressing sexual harassment within a human rights context, stronger obligations under the Sex Discrimination Act are an important part of the new model.

Another key feature of the proposed new regulatory model is the establishment of a Workplace Sexual Harassment Council (Council). The Council would be chaired by the Sex Discrimination Commissioner and funded by the Australian Government. The Commission would provide a key leadership, advisory and educative role in the Council to ensure that sexual harassment continues to be understood within a human rights framework.

In addition to the Sex Discrimination Commissioner, the Council's core membership would comprise representatives from the Fair Work Ombudsman, the Fair Work Commission, Safe Work Australia, the Heads of Workplace Safety Authorities, the Heads of Workers' Compensation Authorities and the Australian Council of Human Rights Authorities.

The Council would also include associate members to provide expertise and advice on specific issues or areas of work relating to sexual harassment.

Associate members would include representatives across government, non-government, and independent organisations, including employer and union representatives.

The associate members would provide the Council with subject matter expertise and advice on specific issues or areas of work.

The Council would provide a coordinated mechanism for the existing policy and regulatory bodies with responsibility for sexual harassment to work together collaboratively. Importantly, by enabling cross-sector collaboration it would drive the effectiveness and efficiency of government operations. This would ultimately improve prevention of sexual harassment by employers and support an effective tailored response for workers and employers.

Consistent with the multi-faceted and whole-of-community response outlined in this report, the Council would also draw upon the expertise of key stakeholders.

International human rights obligations

Australia's domestic legal framework with respect to workplace sexual harassment must be understood in the context of Australia's broader international obligations to prevent sexual harassment and other forms of gender-based violence and discrimination.

Australia has ratified, and has therefore agreed to be bound by, a number of international treaties that recognise fundamental human rights relevant to workplace sexual harassment, including the right to:

- live and work free from violence and harassment[45]
- freedom from discrimination[46]
- security of person[47]
- work[48]
- just and favourable conditions of work.[49]

Australia continues to strengthen its international commitments, with Australia voting in favour of the International Labour Organization (ILO) adopting a new Convention and accompanying Recommendation Concerning the Elimination of Violence and Harassment in the World of Work (ILO Convention 190) in June 2019.[50] ILO Convention 190 broadly defines 'worker' and 'workplace' to capture the full range of traditional and non-traditional work arrangements and relationships, as well as the different workplace settings in which violence and harassment can be experienced.

Sex Discrimination Act and state and territory anti-discrimination laws

At the federal level, sexual harassment in the workplace and in other areas of public life is prohibited in the Sex Discrimination Act. The Sex Discrimination Act confers additional powers and functions on the Commission, including the power to conciliate sexual harassment complaints. It also establishes the office of the Sex Discrimination Commissioner.

Throughout the Inquiry, the Commission heard that the Sex Discrimination Act could be amended to better achieve its objects and clarify its underlying purposes and foundational principles, in order to provide guidance to workers, workplaces, the community and courts.

Accordingly, the Commission recommends changes to the Sex Discrimination Act that ensure:

- the objects include achieving substantive equality
- the definitions of 'workplace participant' and 'workplace' cover all people in the world of work, including those who are paid, unpaid and self-employed
- that public servants are covered
- sex-based harassment is expressly prohibited
- creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

The Commission frequently heard that the lack of a positive duty in the Sex Discrimination Act to prevent workplace sexual harassment means that employers place a higher priority on compliance with employment law and work health and safety laws than discrimination law. This also places a heavy onus on individuals to complain.

For this reason, the Commission recommends that the Sex Discrimination Act is amended to include a positive duty requiring employers, with the possible exception of micro-businesses, to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.

To support the implementation of this recommendation, the Commission also recommends that the Sex Discrimination Act is amended to provide it with accompanying enforcement powers to assess compliance with the positive duty.

As is evident throughout this report, sexual harassment has specific systemic and cultural drivers. Addressing these is key to primary prevention efforts. To facilitate this, the Commission recommends that the Australian Human Rights Act is amended to provide the Commission with an enhanced inquiry function to enable it to inquire into systemic unlawful discrimination, including systemic sexual harassment.

In line with the objective of promoting consistency and clarity within the Sex Discrimination Act, the Commission recommends that liability for sexual harassment be extended to those who aid or permit another person to sexually harass a person. Similarly, there is a need to clarify that the Federal Court and the Federal Circuit Court have jurisdiction to hear an application under the Sex Discrimination Act alleging victimisation as a civil cause of action.

There is no specific timeframe in which a complaint must be lodged with the Commission. However, the President of the Commission has the discretion to terminate a complaint lodged more than six months after the alleged unlawful discrimination took place.[51]

The Commission heard that the six-month timeframe associated with this discretion fails to recognise the complex reasons why a victim may delay making a sexual harassment complaint immediately following the alleged incident.

The Commission recommends this timeframe for exercising the discretion to terminate be extended to 24 months.

Similarly, following feedback and analysis, the Commission considers that unions and other representative groups should be able to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

The Commission also heard that the damages awarded by courts in sexual harassment matters were low, especially when compared with other causes of action such as defamation. Given the complexity and importance of this area, the Commission recommends that further research be conducted on the award of damages in sexual harassment matters.

This research should focus on whether current damages reflect contemporary understandings of the nature, drivers, harms and impacts of sexual harassment, and be used to inform judicial education and training.

Further, the Commission heard that the risk of a costs order acts as a disincentive to pursuing sexual harassment matters in the federal jurisdiction.

Consistent with its objective of promoting consistency between the main legislative schemes, the Commission recommends that a cost protection provision, consistent with the Fair Work Act, be introduced into the Australian Human Rights Commission Act.

To further support consistency, the Commission recommends that the Australian Government work with state and territory governments, through COAG or another appropriate forum, to amend their human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the Sex Discrimination Act. Consistency should be achieved without limiting or reducing protections.

Finally, a recurring theme that arose throughout the Inquiry was that, for many victims, this was the first time they had told anyone about their experiences. Given the profound and often devastating impacts on people affected by workplace sexual harassment, the Commission heard that the Inquiry process allowed people to feel listened to and to have their experiences acknowledged.

As demonstrated by other inquiries and restorative engagement processes, there is a healing power for victims in having their experiences heard, outside of formal complaint-handling processes, in a safe and supportive environment.

Building upon these learnings, the Commission recommends that a disclosure process be established that enables victims of historical workplace sexual harassment matters to have their experiences heard and documented with a view to promoting recovery.

Fair Work system

The Fair Work Act and the *Fair Work Regulations 2009* (Cth) establish the Fair Work system, which is the national framework governing the relationship between employers and employees in Australia.[52]

The Fair Work Act does not expressly prohibit sexual harassment. However, it can be raised indirectly in matters brought to the Fair Work Commission through a number of provisions:

- general protections against 'adverse action' on the basis of a workplace right[53]
- general protections against 'adverse action' on the basis of sex[54]
- the anti-bullying jurisdiction[55]
- unfair dismissal[56]
- unlawful termination on the ground of sex.[57]

Many submissions from legal organisations, unions, community groups and non-government organisations argued strongly in favour of explicitly including sexual harassment in the Fair Work Act to strengthen the Fair Work system's handling of sexual harassment matters. The Commission recommends the Fair Work system be reviewed to consider the most effective mechanism for prohibiting workplace sexual harassment.

The Commission also recommends a range of complementary amendments to ensure the Fair Work Act comprehensively addresses sexual harassment:

- introduction of a 'stop sexual harassment order' equivalent to the 'stop bullying order'
- clarifying that sexual harassment can be conduct amounting to a valid reason for dismissal
- updating the definition of 'serious misconduct' to include sexual harassment.

The Commission recommends that the Fair Work Commission, in consultation with the Workplace Sexual Harassment Council, provide additional guidance material to employers regarding unfair dismissal in relation to sexual harassment.

Given the Fair Work Ombudsman's role in providing information and guidance, the Commission recommends that the Fair Work Ombudsman update its employee information and guidance relating to workplace rights under the Fair Work Act to include sexual harassment.

It is crucial that the regulators within the new regulatory model have appropriate understanding, skills and knowledge in relation to sexual harassment. The Commission therefore recommends that the Fair Work Ombudsman and Fair Work Commission ensure that their staff undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work, and that statutory office holders are also encouraged to undertake this training and education. This should be undertaken with guidance from the Workplace Sexual Harassment Council. The training and education should include information on the role of gender inequality in sexual harassment, and make clear that it is a form of gender-based violence.

Work health and safety

Established in 2011, the Model WHS laws comprise the Model WHS Act, the Model WHS Regulations and 24 Model Codes of Practice. The Model WHS laws, implemented in all jurisdictions other than Victoria and Western Australia, do not expressly prohibit sexual harassment.

However, they impose a positive duty on employers to prevent sexual harassment in the context of the broad duty to eliminate or manage hazards and risks to a worker's health, which includes psychological health and therefore sexual harassment.

In consultations and submissions, the Commission heard that the lack of an express WHS Regulation, Code of Practice or guideline means that workplace sexual harassment is not being addressed by WHS regulators or employers in a consistent, robust or systemic way. There is an urgent need to raise awareness that sexual harassment is a work health and safety issue.

Relevantly, an independent review into the Model WHS laws, released in February 2019 (the Boland review), also recommended the development of additional regulations on how to identify psychosocial risks in the workplace and the appropriate control measures to manage those risks.[58]

Accordingly, the Commission recommends that WHS ministers agree to amend the model WHS Regulation to deal with psychological health, as recommended by the Boland Review, and develop guidelines on sexual harassment, with a view to informing the development of a Code of Practice. Sexual harassment should be defined consistently with the definition of sexual harassment in the Sex Discrimination Act.

The Commission acknowledges that this will require a cultural and institutional shift in a field that has historically focused on physical harm and risks. The Commission therefore also recommends that the staff of Safe Work Australia and other WHS regulators, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work.

This should include information on the role of gender inequality in sexual harassment, and make it clear that it is a form of gender-based violence.

Workers' compensation

Workers can claim compensation for an injury that has arisen out of, or in the course of, employment, including injury caused by workplace sexual harassment.

However, the Commission heard that despite one of the benefits of the workers' compensation framework being its 'no fault principle', victims are discouraged from making a workers' compensation claim, due to the onerous, lengthy and often re-traumatising process. As outlined above, the Commission recommends that workers' compensation bodies, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work in relation to assessing and determining claims. This should include information on the role of gender inequality in sexual harassment, and make it clear that it is a form of gender-based violence.

Non-disclosure agreements

The use of non-disclosure agreements (NDAs) in sexual harassment matters was a particularly topical and challenging issue that arose during the Inquiry.

The Sex Discrimination Commissioner wrote to large employers asking them to issue a limited waiver of confidentiality obligations in NDAs to allow people to make a confidential submission to the Inquiry. Ultimately, only 39 organisations agreed to issue a limited waiver.

The Commission heard about the benefits of NDAs in sexual harassment matters in protecting the confidentiality and privacy of victims and helping to provide closure. However, there were also concerns that NDAs could be used to protect the reputation of the business or the harasser and contribute to a culture of silence.

Given the complexity and importance of this issue, the Commission recommends that, in conjunction with the Workplace Sexual Harassment Council, it develop a practice note or guideline that identifies best practice principles to inform the development of regulation on the use of NDAs in workplace sexual harassment matters.

Defamation laws and protections for witnesses in civil proceedings

Each state and territory in Australia has substantially uniform defamation law. The Model Defamation Provisions (Model Laws) were endorsed by the former Standing Committee of Attorneys-General in November 2004 and each state and territory enacted legislation to implement them.[59]

In consultations and submissions, the Commission heard that Australia's defamation laws discourage sexual harassment victims from making a complaint. Further, the Commission heard about cases where the privacy and confidentiality of alleged victims of sexual harassment was breached, with no legal recourse. This included cases where private complaints had been made public by the media or others, sometimes even prior to the victim making any formal complaint.

In November 2019, the Council of Attorneys-General Review of the Model Defamation Laws (CAG Review) released the draft *Model Defamation Amendment Provisions 2020* (Draft Defamation Amendments). The Commission encourages the CAG Review to consider the operation of the Model Laws, as proposed to be amended by the Draft Defamation Amendments, as they relate to workplace sexual harassment matters.

The Commission also heard concerns about the lack of protection for alleged victims of sexual harassment where they are witnesses in defamation or other civil proceedings, and their sexual harassment allegations are raised in circumstances where they have not made a formal complaint or given permission for this to be made public.[60]

The Commission recommends that consideration be given to introducing protections for witnesses in this situation. Such measures could include a standard direction or presumption in favour of suppression of witness details in defamation proceedings, where the defamatory material includes allegations of sexual harassment.[61] Drawing upon developments in criminal law matters aimed at minimising the re-traumatisation of victims, consideration should also be given to providing witnesses with a broader range of additional safeguards.

Other legal and regulatory responses

While the Inquiry has focused on anti-discrimination, employment and WHS law, to provide a broader picture of the complex and intersecting legal and regulatory issues relating to workplace sexual harassment, the Commission has considered other general civil and criminal laws and regulatory responses that may also be relevant.

The Commission was also told about police and judicial responses in workplace sexual harassment matters which lacked sensitivity and understanding. The Commission heard the devastating accounts of victims who had been re-traumatised through their interaction with the legal system.

This underscores the importance of those working in the system having sensitive, trauma-informed and gender-responsive approaches to victims of workplace sexual harassment. The Commission recommends that education on the nature, drivers and impacts of sexual harassment be made available to judges, magistrates and tribunal members. This education should include that sexual harassment is driven by gender inequality and is a form of gender-based violence, be trauma-informed and be in line with the principles of *Change the Story*.

(v) Preventing and responding to sexual harassment in the workplace

As discussed in this section, there was widespread acknowledgement by employers, workers and their representative bodies, that current regulation and approaches by employers—which have remained largely unchanged for decades—have failed to prevent or reduce workplace sexual harassment.

The Commission heard that employers, and particularly small business owners, want greater guidance on what 'good practice' for addressing workplace sexual harassment looks like.

A new framework for workplaces

In response the Commission recommends a new framework for workplaces to better prevent and respond to sexual harassment.

The framework is structured around seven domains and is:

- victim-centred
- practical
- adaptable for businesses of all sizes and in all industries
- designed to minimise harm to workers.

It recognises that improving workplace prevention and responses requires a new and more holistic approach that looks beyond policies, training and complaint handling procedures.

To better **prevent** sexual harassment the Commission recommends action in the following areas or domains:

- **Leadership**—the development and display of strong leadership, that contributes to cultures that prevent workplace sexual harassment.
- **Risk assessment and transparency**—greater focus on identifying and assessing risk, learning from past experience and transparency, both within and outside of workplaces about sexual harassment, to mitigate the risk it can pose to businesses. This can help improve understanding of these issues and encourage continuous improvement in workplaces.

- **Culture**—the building of cultures of trust and respect, that minimise the risk of sexual harassment occurring and, if it does occur, ensure it is dealt with in a way that minimises harm to workers. This includes the role of policies and human resources practices in setting organisational culture.
- **Knowledge**—new and better approaches to workplace education and training, to demonstrate an employer's commitment to addressing harassment and initiate change by developing a collective understanding of expected workplace behaviours and processes.

To better **respond** to sexual harassment the Commission recommends action in the following areas or domains:

- **Support**—prioritising worker wellbeing and provision of support to workers, including before they make a report, as well as after they report and during any formal processes.
- **Reporting**—increasing the options available to workers to make a report of workplace sexual harassment and address barriers to reporting, and creating new ways for business owners and employers to intervene to address sexual harassment, other than launching a formal investigation. Adopting a victim-centred approach to the way investigations are conducted when a report is made can minimise unnecessary harm to workers.
- **Measuring**—the collection of data at a workplace-level and industry-level, to help improve understanding of the scope and nature of the problem posed by sexual harassment. This includes understanding the prevalence, nature and impacts of workplace sexual harassment as well as the effectiveness of workplace initiatives designed to address it.

To support the new framework, the Commission recommends:

- the Australian Institute of Company Directors and the Governance Institute of Australia develop education and training for board members and company officers
- the Workplace Gender Equality Agency work with the Workplace Sexual Harassment Council to consider how good practice indicators for measuring sexual harassment might apply under the *Workplace Gender Equality Act 2012* (Cth) (Workplace Gender Equality Act)
- the Australian Government amend the Workplace Gender Equality Act to require public sector organisations to report on their gender equality indicators

- the ASX Corporate Governance Council introduce sexual harassment indicators for ASX-listed entities to report against
- industry educational bodies, in consultation with the Workplace Sexual Harassment Council, develop accredited education and training for individuals who are responsible for advising employers on addressing workplace sexual harassment
- the Commission, in consultation with the Workplace Sexual Harassment Council, develop a set of good practice indicators for measuring and monitoring sexual harassment.

Industry-based approaches

While the 2018 National Survey showed that workers across all industries and sectors experience sexual harassment, those industries with the highest reported rates of sexual harassment are placing workers at higher risk and demand urgent attention.

Some industries are alert to these risks and are already actively collecting evidence and information to inform prevention initiatives and responses. Industry, profession and sector-wide initiatives play an important role in addressing the specific drivers and responses to sexual harassment. These may include action plans, campaigns, programs and codes of practice.

Professional registration, rules and codes, which underpin many licensing and accreditation schemes, are also helpful avenues for holding professionals to account for sexual harassment in the workplace. The benefit of these structures for employers is that they are already in place and are therefore aligned with industry drivers, and are simple and efficient.

Resources

The Commission heard that employers of all sizes want to take effective steps to address sexual harassment. The size and resources of an employer affects their ability to take these steps. Employers of all sizes have asked the Commission to provide guidance on best practice through this Inquiry, and also for direction to cost-effective and timely tools and resources to assist them.

The Commission recognises the importance of providing clear and practical resources in the seven domains to assist:

- workers to understand their legal rights, responsibilities and options in relation to workplace sexual harassment
- business owners and employers to understand the causes of sexual harassment, how to prevent it, and how to respond to it in a way that minimises harm to workers and also ensures they meet their legal responsibilities.

These resources must be clear, practical, victim-centred, easily accessible from a central location and widely publicised.

They also need to be flexible and appropriate for use in businesses of all sizes and in all industries—with particular effort required to ensure that resources support and are appropriate for use in small businesses.

To ensure employers and businesses of all sizes have access to high quality resources and tools to support all seven domains of the framework, the Commission recommends a collaborative approach to the creation and distribution of these resources. This can leverage the vast amount of resources already in existence and the expertise that resides in the collaborating parties.

The Commission recommends the establishment of a collaboration between unions, employers and employer associations to deliver information, education and resources for workers and employers through an online platform, *Respect@Work*.

(vi) Support, advice and advocacy

When sexual harassment occurs, victims need support, advice and advocacy. Throughout the Inquiry, the Commission heard that while there are services that do provide support, navigating the pathways to these services can be difficult, and they are often too expensive or affected by lengthy delays.[62]

Despite the broad-reaching detrimental impacts of sexual harassment, many people affected by it do not seek support. The 2018 National Survey found that fewer than one in five people (18%) who said they experienced workplace sexual harassment in the past five years sought support or advice in relation to the most recent incident.[63] When victims do seek support, it is often from friends and family, and not necessarily specialist professional services.[64]

A holistic approach

The Commission considers that support, advice and advocacy should be delivered through a holistic approach, providing as seamless an experience as possible for victims and other people affected by workplace sexual harassment.

This holistic approach may involve smooth and speedy referrals between services or access to an all-inclusive support, advice and advocacy service. Working women's centres are not-for-profit community organisations that are well placed to provide these services.[65] Australian governments should consider establishing or re-establishing working women's centres in jurisdictions where they do not currently exist to fulfil this role.

Information and referral

The Commission frequently heard that workers' needs were not being met for clear, up-to-date, relevant, easily accessible information to help them come to terms with their experiences and enforce their rights in relation to workplace sexual harassment.[66]

There are many service providers that provide different forms of information and referral services including the Commission's National Information Service (NIS), unions, working women's centres, community legal centres and legal aid. The Commission recommends further investment in these existing services.

The Workplace Sexual Harassment Council should assist with the development of guidelines and resources, to support the standardisation and enhancement of information and referral services provided to workers affected by sexual harassment. This is consistent with the Commission's recommended new legal and regulatory model.

Legal advice and advocacy

The Commission heard that victims have difficulty navigating options for taking action on sexual harassment, whether in the workplace, with external agencies or through the courts.[67]

While there are services that provide assistance with navigating these challenges, such as community legal centres and legal aid commissions, the Commission commonly heard that high demand and limited resources make providing quality services increasingly difficult.[68]

Legal advice and representation should be available to all victims of sexual harassment navigating legal and external complaint processes, including those who do not have the means to pay lawyers' fees.

Legal aid commissions and community legal centres should be adequately resourced to enable them to provide quality advice and representation in sexual harassment matters.

Support to promote recovery

The Commission heard repeatedly of the importance of timely access to specialist counselling for victims of sexual harassment.[69] Australia currently has no free and widely available counselling service tailored to the needs of people affected by sexual harassment.[70]

Given the prominence and existing expertise of the 1800RESPECT hotline (the national sexual assault, domestic and family violence counselling and information service), the Commission recommends the Australian Government ensure it is sufficiently funded and expanded to support sexual harassment victims. 1800RESPECT should also be resourced to collect de-identified data on the number of people who contact the service in relation to workplace sexual harassment.

Victims who require support beyond what 1800RESPECT can offer should have access to a well-resourced national network of other relevant services including employee assistance programs (EAPs), sexual assault support services, mental health helplines, and healthcare providers with the expertise to respond appropriately to workplace sexual harassment.

Financial and career support

Victims of workplace sexual harassment experience financial impacts in the form of healthcare costs, career interruptions, reduced earning capacity and legal expenses.

The Commission's recommendations to enhance psychosocial support, information, referral, advice and advocacy services for people affected by workplace sexual harassment will better support victims to access the redress and compensation they may need to address the often significant financial impacts of experiencing harassment.

1.2 Recommendations

SECTION 2: THE CURRENT CONTEXT FOR THIS INQUIRY

Implementation of recommendations

Recommendation 1: The Australian Government work with state and territory governments to implement the recommendations in this report and provide a joint funded package to ensure their implementation.

SECTION 3: UNDERSTANDING SEXUAL HARASSMENT IN THE WORKPLACE

National Sexual Harassment Survey

Recommendation 2: The Commission conduct a nationally representative survey every four years, funded by the Australian Government, that:

a. **provides data on sexual harassment, including the prevalence, nature, reporting, impacts of and responses to sexual harassment in the workplace, and identifies trends over time**
b. **provides detailed industry data which allows analysis across and within industries**
c. **is accessible and adequately captures experiences of sexual harassment across all population groups, including people of culturally and linguistically diverse backgrounds.**

Agency data

Recommendation 3: Agencies that handle workplace sexual harassment matters work with the Workplace Sexual Harassment Council (as recommended in Recommendation 14) to:

a. **collect an agreed de-identified data set relating to workplace sexual harassment enquiries, complaints, claims and settlement outcomes to contribute to a coordinated system of annual reporting on workplace sexual harassment metrics**
b. **establish formal arrangements for information sharing and data exchange on enquiries, complaints and claims relating to workplace sexual harassment matters.**

National Sexual Harassment Research Agenda

Recommendation 4: The Australian Government supports the development and implementation of a National Sexual Harassment Research Agenda, which will identify priorities for research relating to sexual harassment (in addition to the National Sexual Harassment Survey) and contribute to a national evidence base on sexual harassment that can guide policy and practice. ANROWS should lead this work in consultation with the Workplace Sexual Harassment Council.

SECTION 4: PREVENTION OUTSIDE THE WORKPLACE

National coordination of sexual harassment prevention

Recommendation 5: The Council of Australian Governments agrees to incorporate sexual harassment as a key area for action and investment under any national framework to address violence against women.

Government gender equality and violence prevention strategies

Recommendation 6: All Australian governments have gender equality strategies that address sexual harassment and that recognise sexual harassment is driven by gender inequality and is a form of gender-based violence.

Recommendation 7: All Australian governments have strategies for the prevention of violence against women that are based on *Change the Story*, recognise that sexual harassment is driven by gender inequality and is a form of gender-based violence, and include the prevention of sexual harassment as a key area for action.

Primary prevention initiatives

Recommendation 8: Our Watch lead the development of evidence-based strategies for the prevention of sexual harassment, including implementation, monitoring and evaluation. Immediate priorities for action should include:

a. **social change strategies on sexual harassment, including a national campaign to increase knowledge of, and change behaviours that drive, sexual harassment**
b. **targeted, evidence-based prevention strategies to address sexual harassment of populations who are at higher risk**
c. **initiatives targeted towards young people that focus on sexual harassment as a form of gender-based violence.**

Workplace rights education for young people

Recommendation 9: Educational resources for young people of working age on workplace rights be identified, adapted to ensure relevance to workplace sexual harassment and promoted by the Australian Human Rights Commission and Fair Work Ombudsman for use in schools, tertiary education institutions and other settings that reach young people.

School-based respectful relationships education

Recommendation 10: All Australian governments ensure children and young people receive school-based respectful relationships education that is age appropriate, evidence-based and addresses the drivers of gender-based violence, including sexual harassment.

Sexual harassment prevention by universities and other tertiary education institutions

Recommendation 11: Building on work already underway in response to the recommendations in *Change the course*, all tertiary and higher education providers deliver evidence-based information and training on sexual harassment for staff and students that addresses the drivers of gender-based violence and includes content on workplace rights.

Recommendation 12: Recognising that some smaller tertiary and higher education providers lack the necessary resources and expertise to deliver the information and training identified in Recommendation 11, the Australian Government should support those providers to do so, for example through the Tertiary Education Quality Standards Authority and the Australian Skills Quality Authority.

Media guidelines

Recommendation 13: The Workplace Sexual Harassment Council (as recommended in Recommendation 14) work with the Australian Communications and Media Authority, the Australian Press Council and Our Watch to promote and support best practice reporting on sexual harassment by the media, including through:

- **a. guidelines that promote the safe, responsible, victim-centred and gender-responsive reporting of sexual harassment**
- **b. practical measures that build the knowledge, skills and capacity of media professionals to implement best practice reporting on sexual harassment.**

SECTION 5: THE LEGAL AND REGULATORY FRAMEWORK

Workplace Sexual Harassment Council

Recommendation 14: The Workplace Sexual Harassment Council, supported by a permanent secretariat, be established immediately and funded by the Australian Government. Its objective is to improve coordination, consistency and clarity across the key legal and regulatory frameworks, to improve prevention and response to sexual harassment.

The Council is to be chaired by the Sex Discrimination Commissioner and its core membership include representatives from:

- **the Fair Work Commission and Fair Work Ombudsman**
- **Safe Work Australia and the Heads of Workplace Safety Authorities**
- **the Heads of Workers' Compensation Authorities**
- **the Australian Council of Human Rights Authorities.**

The Council will also include associate members to provide expertise and advice on specific issues or areas of work relating to sexual harassment. Associate members include representatives across government, non-government, and independent organisations, including employer and union representatives.

ILO Convention concerning the elimination of violence and harassment in the world of work (ILO 190)

Recommendation 15: The Australian Government ratify ILO Convention 190.

Sex Discrimination Act

Objects, definitions and coverage

Recommendation 16: Amend the Sex Discrimination Act to ensure:

a. **the objects include 'to achieve substantive equality between women and men'**
b. **sex-based harassment is expressly prohibited**
c. **creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited**
d. **the definition of 'workplace participant' and 'workplace' covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed**
e. **the current exemption of state public servants is removed.**

Positive duties

Recommendation 17: Amend the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:

a. **the size of the person's business or operations**
b. **the nature and circumstances of the person's business or operations**
c. **the person's resources**
d. **the person's business and operational priorities**
e. **the practicability and the cost of the measures**
f. **all other relevant facts and circumstances.**

Recommendation 18: The Commission be given the function of assessing compliance with the positive duty, and for enforcement. This may include providing the Commission with the power to:

a. **undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply**
b. **enter into agreements/enforceable undertakings with the organisation**
c. **apply to the Court for an order requiring compliance with the duty.**

Australian Human Rights Commission powers

Recommendation 19: Amend the Australian Human Rights Commission Act to provide the Commission with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment. Unlawful discrimination includes any conduct that is unlawful under the federal discrimination laws. The Commission should be given powers to require:

a. **the giving of information**
b. **the production of documents**
c. **the examination of witnesses**
d. **with penalties applying for non-compliance, when conducting such an inquiry.**

Aiding or permitting an unlawful act

Recommendation 20: Amend section 105 of the Sex Discrimination Act to ensure that it applies to sexual harassment.

Victimisation

Recommendation 21: Amend the Australian Human Rights Commission Act to make explicit that any conduct that is an offence under section 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination.

Timeframe as a ground on which the President can terminate an accepted complaint

Recommendation 22: Amend the Australian Human Rights Commission Act so that the President's discretion to terminate a complaint under the Sex Discrimination Act on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination took place.

Representative and/or collective claims

Recommendation 23: Amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

Damages and costs

Recommendation 24: The Australian Government conduct further research on damages in sexual harassment matters and whether this reflects contemporary understandings of the nature, drivers, harms and impacts of sexual harassment. This research should inform judicial education and training.

Recommendation 25: Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

Consistency of sexual harassment laws

Recommendation 26: The Australian Government work with state and territory governments, through the Council of Australian Governments or another appropriate forum, to amend state and territory human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the Sex Discrimination Act, without limiting or reducing protections.

Addressing historical complaints

Recommendation 27: A disclosure process be established that enables victims of historical workplace sexual harassment matters to have their experience heard and documented with a view to promoting recovery. The Australian Government should fund the Commission to facilitate this process.

Fair Work Act/Fair Work Commission

Prohibition against sexual harassment

Recommendation 28: The Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited.

Stop sexual harassment order

Recommendation 29: Introduce a 'stop sexual harassment order' equivalent to the 'stop bullying order' into the Fair Work Act. This should be designed to facilitate the order's restorative aim.

Unfair dismissal and serious misconduct

Recommendation 30: Amend Section 387 of the Fair Work Act to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.

Recommendation 31: Amend the definition of 'serious misconduct' in the Fair Work Regulations to include sexual harassment.

Recommendation 32: Additional guidance material for all employers relating to unfair dismissal, which includes dismissal relating to sexual harassment, be developed by the Fair Work Commission in consultation with the Workplace Sexual Harassment Council.

Fair Work Information Statement

Recommendation 33: The Fair Work Ombudsman update its employee information and guidance relating to workplace rights under the Fair Work Act to include sexual harassment, such as amending the Fair Work Information Statement.

Education and training

Recommendation 34: The Fair Work Ombudsman and Fair Work Commission, with guidance from the Workplace Sexual Harassment Council, ensure that their staff undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work. Statutory office holders in these jurisdictions should also be supported and encouraged to undertake this training and education.

Work health and safety

New Regulation, Code or guideline

Recommendation 35: WHS ministers agree to amend the model WHS Regulation to deal with psychological health, as recommended by the Boland Review, and develop guidelines on sexual harassment with a view to informing the development of a Code of Practice on sexual harassment. Sexual harassment should be defined in accordance with the Sex Discrimination Act.

Training and education

Recommendation 36: Safe Work Australia and WHS regulators, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work.

Workers' compensation

Training and education

Recommendation 37: Workers' compensation bodies, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work.

Other legal issues

Non-disclosure agreements (NDAs)

Recommendation 38: The Commission, in conjunction with the Workplace Sexual Harassment Council, develop a practice note or guideline that identifies best practice principles for the use of NDAs in workplace sexual harassment matters to inform the development of regulation on NDAs.

Defamation laws and protection for sexual harassment victims in defamation proceedings

Recommendation 39: The Council of Attorneys-General consider how best to protect alleged victims of sexual harassment who are witnesses in civil proceedings, including but not limited to defamation proceedings. Measures could include amending state and territory legislation governing defamation proceedings to introduce a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in any defamation court proceeding, where the defamatory material includes allegations of sexual harassment. Consideration should also be given to additional witness safeguards and protections including:

a. **having the proceedings conducted in a closed courtroom**
b. **giving evidence from a remote room**
c. **having their evidence in chief be audio-visually recorded prior to the hearing**
d. **having an audio-visual recording of their evidence during the hearing be re-used in any subsequent proceedings**
e. **being protected from direct cross-examination by a self-represented party**
f. **having a support person present while giving evidence.**

Judicial education and training

Recommendation 40: All Australian governments should:

a. **Ensure that relevant bodies responsible for developing training, programs and resources for judges, magistrates and tribunal members make available education on the nature, drivers and impacts of sexual harassment. This should be trauma-informed and in line with the principles of *Change the Story*.**
b. **Support and encourage judicial officers and tribunal members across civil and criminal jurisdictions who may come into contact with victims of sexual harassment to undertake this education and training.**

SECTION 6: PREVENTING AND RESPONDING TO SEXUAL HARASSMENT IN THE WORKPLACE

Board education and training

Recommendation 41: The Australian Institute of Company Directors and the Governance Institute of Australia, in consultation with the Workplace Sexual Harassment Council, develop education and training for board members and company officers on good governance in relation to gender equality and sexual harassment.

External reporting

Recommendation 42: The Workplace Gender Equality Agency work with the Workplace Sexual Harassment Council to consider how good practice indicators for measuring and monitoring sexual harassment prevalence, prevention and response may apply to reporting in relation to sexual harassment under the *Workplace Gender Equality Act 2012*.

Recommendation 43: The Australian Government:

a. **amend the *Workplace Gender Equality Act 2012* to require public sector organisations to report to the Workplace Gender Equality Agency on its gender equality indicators**
b. **fund the Workplace Gender Equality Agency adequately to meet these expanded reporting obligations.**

Recommendation 44: The ASX Corporate Governance Council introduce sexual harassment indicators for ASX-listed entities to report against, under its Corporate Governance Principles and Recommendations. This could include:

a. **specific mention of sexual harassment in guidance on company codes of conduct (ASX recommendation 3.2)**
b. **information about measures taken to address sexual harassment, as part of its requirements that listed entities have and disclose a diversity policy and set measurable objectives to achieve gender diversity (ASX recommendation 1.5).**

Accredited education and training

Recommendation 45: Industry educational bodies, in consultation with the Workplace Sexual Harassment Council, develop accredited education and training for individuals in roles that are responsible for advising employers on addressing workplace sexual harassment. The training should aim to:

a. **build skills and capacity on how to prevent and respond to workplace sexual harassment**
b. **be trauma-informed**
c. **include content on the nature, drivers and impacts of sexual harassment.**

Measuring and monitoring

Recommendation 46: The Commission in consultation with the Workplace Sexual Harassment Council develop a set of good practice indicators and methods for measuring and monitoring sexual harassment prevalence, prevention and response.

Industry-wide initiatives

Recommendation 47: Key industry and professional groups (unions, employer associations, employers and other industry bodies) collaborate to establish industry and profession-wide initiatives to address sexual harassment, for Australian workplaces of all sizes. Initiatives may include industry-wide prevalence surveys, awareness-raising campaigns on industry-specific issues, or the development of industry-specific policies or accreditation requirements.

Respect@Work

Recommendation 48: To support all workplaces to address sexual harassment, the Workplace Sexual Harassment Council will lead a new collaboration by unions, employers and employer associations called *Respect@Work*, which will deliver information, education and resources for workers and employers through an online platform.

SECTION 7: SUPPORT, ADVICE AND ADVOCACY

A holistic approach to support, advice and advocacy

Recommendation 49: Australian governments provide increased and recurrent funding to working women's centres to provide information, advice and assistance to vulnerable workers who experience sexual harassment, taking into account particular needs of workers facing intersectional discrimination. Australian governments should consider establishing or re-establishing working women's centres in jurisdictions where they do not currently exist.

Information and referral

Recommendation 50: The Commission be promoted as the central contact point for information on workplace sexual harassment rights and responsibilities, including information about options for action and referral to alternative regulatory schemes, and referral to a range of victim support services.

Recommendation 51: Hotlines and similar services provided by other agencies and regulatory bodies under the Commission's proposed new regulatory model (see Section 5) provide information and referral services in relation to workplace sexual harassment in a gender-responsive manner, including:

a. **detailed information about workplace sexual harassment under their regulatory schemes**
b. **information about options for action and referral to alternative regulatory schemes**
c. **referral to a range of victim support services.**

Recommendation 52: The Workplace Sexual Harassment Council:

a. **provide high-level advice on development of guidelines and resources to ensure that all services providing information, advice and support in relation to sexual harassment can provide accurate information, make appropriate cross-referrals, and collect consistent data**
b. **after three years, consider the need for a centralised, accessible service to provide information and advice in relation to workplace sexual harassment.**

Legal advice and assistance

Recommendation 53: All Australian governments provide increased and recurrent funding to community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid commissions to provide legal advice and assistance to vulnerable workers who experience sexual harassment, taking into account the particular needs of workers facing intersectional discrimination.

Psychosocial support

Recommendation 54: The Australian Government promote the 1800RESPECT hotline and ensure it is adequately resourced to expand its services to provide appropriate psychological support and referral to people affected by workplace sexual harassment, and collect and maintain de-identified and disaggregated data on contacts regarding workplace sexual harassment.

Recommendation 55: Psychosocial support for people affected by workplace sexual harassment be provided through a national network of services, including specialist sexual assault support services, mental health helplines, and healthcare providers with the expertise to respond appropriately to the gendered nature of sexual harassment. All Australian governments should prioritise funding to these services to ensure accessibility and capacity.

1.3 Terms of Reference

The National Inquiry into Sexual Harassment in Australian Workplaces (Inquiry) is being conducted pursuant to sections 11(1)(a), 11(1)(e), 11(1)(f), 11(1)(g), 11(1)(j), 11(1)(k) and 11(1)(p) of the *Australian Human Rights Commission Act 1986* (Cth).

The Inquiry will review and report on:

- a national survey of the prevalence, nature and reporting of sexual harassment in Australian workplaces, by sector
- online workplace-related sexual and sex-based harassment and the use of technology and social media to perpetrate workplace-related sexual and sex-based harassment
- the use of technology and social media to identify both alleged victims and perpetrators of workplace-related sexual harassment
- the drivers of workplace sexual harassment, including whether:
  - some individuals are more likely to experience sexual harassment due to particular characteristics including gender, age, sexual orientation, culturally or linguistically diverse background, Aboriginal and/or Torres Strait Islander status or disability
  - some workplace characteristics and practices are more likely to increase the risk of sexual harassment
- the current legal framework with respect to sexual harassment
- existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally
- the impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers' compensation claims, employee turnover and absenteeism, and
- recommendations to address sexual harassment in Australian workplaces.

In conducting the Inquiry, the Commission will have regard to the economic impact of sexual harassment in the workplace, drawing on economic modelling.

Additionally, three years after the release of the Inquiry report, the Australian Human Rights Commission will:

- conduct an assessment of any changes in the prevalence, nature and reporting of sexual harassment in Australian workplaces since the Inquiry, and
- make any further recommendations necessary to address sexual harassment in the workplace.

1.4 Methodology

The Inquiry was jointly announced by the Sex Discrimination Commissioner, Kate Jenkins, and the then Minister for Women, the Hon Kelly O'Dwyer MP, on 20 June 2018.

The Inquiry was conducted pursuant to the Commission's functions under the *Australian Human Rights Commission Act 1986* (Cth). The focus of the Inquiry was on the systemic issues set out in the Terms of Reference. For this reason, the Commission did not investigate or make findings about individual allegations of sexual harassment as part of the Inquiry.

The Commission gathered evidence for the Inquiry through the following key activities to inform the findings and recommendations in this report:

- a national workplace sexual harassment survey to understand the prevalence, nature and reporting of sexual harassment in Australian workplaces
- an online submissions process
- public consultations in all capital cities and some regional cities
- targeted roundtables and meetings with key stakeholders
- independent economic modelling on the costs of workplace sexual harassment
- extensive domestic and international research.

(a) Principles underpinning the Inquiry

The Commission's methodology for the Inquiry was based on the following principles:

- **Comprehensive and consultative**—the Commission aimed to consult as widely as possible and took measures to ensure that members of the public and a broad range of individuals and organisations from key stakeholder groups were invited to contribute to the Inquiry to hear their views, experiences and suggestions for change. Multiple avenues were available for people to engage with the Inquiry (these are discussed further below).
- **Voluntary**—the involvement of participants in the national workplace sexual survey, consultations and submissions process was voluntary.
- **Inclusive**—the Commission encouraged people from a diverse range of age groups, genders, backgrounds, industries, sectors and occupations across Australia to make a contribution to the Inquiry.

This included through community consultations open to members of the public, as well as targeted consultations with people with disability, people of culturally and linguistically diverse (CALD) backgrounds, Aboriginal and Torres Strait Islander peoples, and people who are lesbian, gay, bisexual, transgender, queer/questioning and/or intersex (LGBTQI).[71]

- **Evidence-based**—the Commission's findings and recommendations for action and change are based on the extensive quantitative data and qualitative information gathered through the Commission's national workplace sexual harassment surveys, submissions and consultations, as well as on existing academic and social policy research.
- **Confidential**—information gathered though the Commission's national workplace sexual harassment survey, confidential submissions and consultations were de-identified and confidentiality strictly maintained.
    - » Submissions received by the Commission were treated as confidential, unless the person making the submission requested that it be made public.
    - » The Commission recorded consultations wherever possible. Information from transcripts of consultations included in this report has also been de-identified.
    - » No personal or associated demographic information has been used in this report in a way that directly or indirectly identifies individuals. To protect the identity of victims and other people involved in incidents of workplace sexual harassment, this report uses pseudonyms in case studies from consultations and submissions. In some instances, organisations shared case studies in their submissions. Where these case studies have been used in the report, the pseudonyms used are those provided by the organisation.
- **Sensitive and supportive**—the Commission recognises that the process of sharing experiences in relation to sexual harassment can be very distressing. The Commission ensured that individuals who shared their experiences of sexual harassment were informed about support services available nationally and in their state or territory.

(b) Reference Group

The Commission established a Reference Group for the Inquiry with eight members who represented key stakeholder streams, including employer groups, unions, government, community organisations and academic and legal experts. The Reference Group convened four times over the course of the Inquiry, and provided advice and guidance on the Inquiry approach and methodology, consultation mechanisms, identification of best practice, analysis of findings and development of recommendations.

Reference Group members also provided assistance to the Commission by organising, hosting and facilitating the participation of stakeholders in consultations, hosting roundtable events, and helping to disseminate information and communications to support Inquiry processes.

The Reference Group was chaired by Kate Jenkins, the Sex Discrimination Commissioner. Other members of the Reference Group were:

- Professor Marian Baird AO, Head of the Discipline of Work and Organisational Studies, the University of Sydney Business School
- Michelle Baxter, Chief Executive Officer, Safe Work Australia
- Trish Bergin/Catherine Hawkins, First Assistant Secretary, Office for Women, Department of the Prime Minister and Cabinet
- Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre
- Theresa Moltoni OAM, President (and Non-Executive Director), Chamber of Commerce and Industry Queensland
- Michele O'Neil, President, Australian Council of Trade Unions
- Rachael Uebergang, Director, Northern Territory Working Women's Centre
- Innes Willox, Chief Executive, the Australian Industry Group.

(c) Consultation and engagement

The Commission aimed to consult as widely as possible about experiences of, and approaches to, sexual harassment in Australian workplaces. The Commission ensured that multiple avenues were available for people to engage with the Inquiry, including:

- a website and a subscription-based e-newsletter
- an online submissions process
- a Conversation Toolkit
- public community consultations across Australia
- targeted group and individual consultations with key stakeholders.

Key stakeholders were invited to participate in the consultation and submissions processes to hear their views, experiences and suggestions for change. These included employers, business and industry groups, unions and advocacy organisations, community groups, government, legal, academic and policy experts, and people affected by workplace sexual harassment.

The Commission promoted the consultations and submissions process through the Inquiry website and subscriber list, social media, media opportunities and industry journals. In advance of consultations in each location, targeted communications were sent to organisations and individuals to inform them about upcoming consultations and how they could be involved, and to encourage them or their networks and members to make submissions to the Inquiry. The consultations also provided the Sex Discrimination Commissioner with opportunities to engage with local media.

(i) Inquiry website and subscriber list

The Inquiry website went live in June 2018.[72] The website provided background information about the Inquiry and an option to subscribe for updates.

Over the course of the Inquiry, approximately 1,094 people registered their interest and received information and updates through a monthly newsletter. The Commission also provided regular updates and information about the activities of the Inquiry on social media platforms including Facebook, LinkedIn, Twitter and Instagram.

(ii) Submissions

Submissions were accepted from 9 July 2018 to 28 February 2019 and were received in various ways, including through an online form, email or verbally in cases where people needed assistance in making a written submission.

The Commission received 460 submissions as part of the Inquiry (Appendix 2). This included:

- 318 submissions from individuals, groups of individuals, academics and other experts
- 142 submissions from organisations and businesses.

Of the 226 submissions from individuals where information was provided about the gender of the person making the submission, the Commission received 190 submissions from women and 33 submissions from men.

The Commission also received submissions from people with disability, LGBTQI people, people of CALD backgrounds and Aboriginal and Torres Strait Islander peoples.

The Commission received 241 confidential submissions, and 219 submissions where the person making the submission requested that it be made public. Public submissions were published on the Inquiry website. As noted above, the Commission de-identified, edited or did not publish some public submissions to protect the identity of the authors and/or third parties or where otherwise appropriate. In total, 195 submissions were published on the Inquiry website.

(iii) Conversation Toolkit

The Commission prepared a 'Conversation Toolkit' to provide practical guidance for individuals and groups in workplaces or communities on how to have a structured conversation around issues surrounding sexual harassment in the workplace for the purpose of providing input into the Inquiry.[73] The toolkit had the benefit of assisting the Commission to reach people who may have otherwise been unable to participate in face-to-face consultations and facilitate their input into the Inquiry. The Commission received 53 submissions indicating that the toolkit was used in preparing the submission.

(iv) Consultations

The Commission conducted 60 group consultations as part of the Inquiry. More than 600 individuals participated in these consultations which were held in 12 locations around Australia (including all capital cities and some regional centres) between September 2018 and May 2019.

Locations for the regional consultations were identified based on a range of criteria, including demographic and industry data, geographic spread and learnings from previous Commission inquiries.

The Commission made every attempt to ensure that all consultation venues were as accessible as possible. This included hearing loop facilities and facilities that allowed for remote participation.

Inquiry consultations were held in the following locations:

- Adelaide
- Albury–Wodonga
- Brisbane
- Canberra
- Darwin
- Geraldton
- Hobart
- Melbourne
- Newcastle
- Perth
- Sydney (including Parramatta and Ashfield)
- Townsville (via videolink from Brisbane).

The Commission consulted extensively with the following key stakeholder groups:

- people who had experienced workplace sexual harassment (including their family or support networks) and other individuals including co-workers, bystanders and people who had been the subject of allegations
- unions and other organisations that work with people affected by workplace sexual harassment (including peak bodies, advocacy organisations, community groups and organisations in the human rights, justice and legal sectors)
- employers and business representatives (including industry and professional bodies and peak bodies)
- academics, legal and policy experts and specialists

- government departments and agencies.

The Commission worked in partnership with local community organisations and key stakeholders to facilitate engagement with diverse groups of people and conducted a number of targeted consultations, including with:

- people of CALD backgrounds, people from LGBTQI communities, people with disability, young people and Aboriginal and Torres Strait Islander women.
- employers and workers from specific industries, such as hospitality and retail, health and social services, mining and engineering, and media, arts and entertainment.

The Commission held a national unions roundtable, an academic roundtable and a roundtable with legal experts, as well as numerous meetings with key stakeholders.

A list of consultations and meetings can be found in Appendix 3 and Appendix 4.

(d) Research and data

(i) Everyone's business: Fourth national survey on sexual harassment in Australian workplaces (2018)

The Inquiry was informed by the findings of the Commission's fourth national survey on the prevalence, nature, reporting and impacts of sexual harassment in Australian workplaces, released on 12 September 2018.

Everyone's business: Fourth national survey on sexual harassment in Australian workplaces (2018 National Survey) discusses the survey methodology and detailed findings.[74]

The Commission has conducted four national workplace sexual harassment surveys in 2003, 2008, 2012 and most recently in 2018. The 2018 National Survey was the largest survey sample, with more than 10,000 people taking part.

For the first time, the 2018 National Survey was able to report on the prevalence and characteristics of sexual harassment in particular industries, across 21 industry groups.

Key findings of the 2018 National Survey are discussed throughout this report.

(ii) Other research and data

The Commission undertook an extensive review and analysis of Australian and international research and data relevant to workplace sexual harassment, including:

- academic and social policy literature
- reports and recommendations of national and international reviews and inquiries
- relevant Commonwealth and state legislative frameworks and key case law
- good practice approaches and strategies to address sexual harassment, including policies, practices or other measures being undertaken in Australia and overseas

- legal and regulatory approaches adopted in other jurisdictions
- available data from relevant regulatory agencies
- other sources of domestic and international data.

In particular, as part of the Inquiry, the Commission requested relevant data on enquiries and complaints received by the Commission and state and territory anti-discrimination agencies relating to workplace sexual harassment for the past three financial years (see Appendix 5).

(iii) Economic modelling

Under its Terms of Reference, the Commission was asked to consider the economic impact of workplace sexual harassment drawing on economic modelling. Deloitte Access Economics was engaged by the Australian Government Department of the Treasury to conduct this work to inform the Inquiry and its final report is in Appendix 7.

1.5 Terminology used in the report

A glossary and list of common acronyms and abbreviations used in the report appears in Appendix 1. It is useful to discuss at the outset some of the language the Commission has used in this report in connection with workplace sexual harassment and affected individuals and communities.

Victims

This report captures people's experiences of workplace sexual harassment that the Commission heard about in the course of the Inquiry. Some people when describing their experiences prefer to use the term 'victim' and others prefer the term 'survivor.' The Commission recognises that some people consider 'victim' problematic because it may suggest that people who have experienced workplace sexual harassment are helpless or lack agency. This is not the position of the Commission.

Similarly, other people prefer the resilience and empowerment associated with the term 'survivor'. In this report, the Commission generally uses the term 'victim', since this is most commonly used in the community, and intends this to be inclusive of victims and survivors.

The report also sometimes uses terms such as 'complainant', 'applicant' and 'alleged victim', in the context of formal reporting, complaints and other legal or administrative processes or proceedings.

Harassers

When describing what the Commission heard about people's experiences of sexual harassment, this report uses the term 'harasser' to describe a person who has had an allegation made against them, as well as a person who has been found or proven to have engaged in workplace sexual harassment through a formal process.

The use of the term 'harasser' is not intended to suggest that there has been a finding of unlawful sexual harassment under anti-discrimination legislation, or of guilt in relation to a criminal offence (or breach of any other relevant law).

The report also sometimes uses terms such as 'respondent', 'alleged harasser' and 'perpetrator', in the context of formal reporting, complaints and other legal or administrative processes or proceedings.

Women and men

People of diverse genders are affected by workplace sexual harassment. In this report, the terms 'women' and 'men' are used inclusively. In some instances, the use of these terms reflects the specific language used in submissions, consultations or other source material referenced.

Worker

This report uses the broad term 'worker' to describe a person who undertakes work in any capacity, including work that is paid or unpaid, full-time, part-time, casual, permanent or temporary, or where they are self-employed.

It is intended to include people engaged in a wide variety of work arrangements, including as employees or under other arrangements defined by relevant laws, people working in 'non-standard' arrangements, including temporary or agency work, on-call work, labour hire, independent contracting, or forms of other non-permanent or non-regular work in the so-called 'gig' or 'sharing economy'. It includes people working with temporary migration status in Australia, with full or partial work rights attached to their visa, or who may be unauthorised to work but do so. It also includes people who may be in training, apprentices, interns, students and volunteers.

The report considers people's experiences of sexual harassment while working in a wide range of work arrangements in Section 3.5, 'People who experience sexual harassment in the workplace', and discusses legal definitions, coverage and protections for workers in Section 5, 'The legal and regulatory framework'.

1 *Sex Discrimination Act 1984* (Cth) s 28A.
2 *Sex Discrimination Act 1984* (Cth) pt II div 3.
3 International Labour Organization, 'Non-Standard Forms of Employment', *Web Page* (2019) <www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm>.
4 Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, February 2019) 5.
5 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26.
6 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26.
7 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 40.
8 See, eg, Individual, Submission 133, *Sexual Harassment Inquiry*; Individual, Submission 231, *Sexual Harassment Inquiry*, 2; Diversity Council Australia, Submission 282, *Sexual Harassment Inquiry*, 10.
9 Individual, Submission 241, *Sexual Harassment Inquiry*, 1–3; Individual, Submission 163, *Sexual Harassment Inquiry*, 1; Individual, Submission 235, *Sexual Harassment Inquiry*.
10 Caxton Legal Centre, Submission 382, *Sexual Harassment Inquiry*, 2.
11 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 41.
12 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 46.
13 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 47.
14 Kim Webster and Michael Flood, *Framework Foundations 1: A Review of the Evidence on Correlates of Violence Against Women and What Works to Prevent It* (companion document to *Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and their Children in Australia*, Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and Victorian Health Promotion Foundation (VicHealth), 2015) 15, 21.
15 Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and the Victorian Health Promotion Foundation (VicHealth), *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (2015) 61.
16 Submissions highlighting the need for an intersectional lens or approach to sexual harassment are too many to list exhaustively. See, eg, Individual, Submission 236, *Sexual Harassment Inquiry*; Office of the eSafety Commissioner, Submission 253, *Sexual Harassment Inquiry*; Women NSW, Submission 268, *Sexual Harassment Inquiry*; Springvale Monash Legal Service, Submission 278, *Sexual Harassment Inquiry*; Diversity Council Australia, Submission 282, *Sexual Harassment Inquiry*; Women's Health East, Submission 286, *Sexual Harassment Inquiry*; Women with Disabilities Victoria, Submission 312, *Sexual Harassment Inquiry*; Science & Technology Australia, Submission 327, *Sexual Harassment Inquiry*; Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*.
17 Louise F Fitzgerald et al, 'Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model' (1997) 82(4) *Journal of Applied Psychology* 578, 579. For evidence on the relationship between organisational climate and workplace sexual harassment see, eg, Fitzgerald et al; Chelsea R Willness, Piers Steel and Kibeom Lee, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60(1) *Personnel Psychology* 127, 143; Louise F Fitzgerald and Lilia M Cortina, 'Sexual Harassment in Work Organizations: A View From the 21st Century' in Cheryl B Travis and Jacquelyn W White (eds), *APA Handbook of the Psychology of Women, Volume 2: Perspectives on Women's Private and Public Lives* (APA Handbooks in Psychology Series, 2018) 215, 219; Paula A Johnson, Sheila E Widnall, and Frazier F Benya (eds), *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Committee on the Impacts of Sexual Harassment in Academia and Committee on Women in Science, Engineering, and Medicine, Policy and Global Affairs, The National Academies of Sciences, Engineering, and Medicine, 2018) 47.
18 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 24. In total, 43% of respondents said they were sexually harassed when provided with a simple legal definition of sexual harassment; however, a much larger proportion (71%) of people then went on to say they had experienced one or more of 16 behaviours that would likely amount to sexual harassment.
19 See, eg, the following submissions from organisations: Law Council of Australia, Submission 249, *Sexual Harassment Inquiry*, 67; Victorian Women Lawyers, Submission 337, *Sexual Harassment Inquiry*, 6–7; Victorian Trades Hall Council, Submission 329, *Sexual Harassment Inquiry*, 12; Prof P McDonald and Prof S Charlesworth, Submission 170, *Sexual Harassment Inquiry*, 9; Diversity Council Australia, Submission 282, *Sexual Harassment Inquiry*, 27.
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21 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 28.
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23 Marian Baird et al, *Women and the Future of Work* (Report 1 of the Australian Women's Working Futures Project, 2018) 92.

24 Anthony D LaMontagne et al, 'Unwanted Sexual Advances at Work: Variations by Employment Arrangement in a Sample of Working Australians' (2009) 33(2) *Australian and New Zealand Journal of Public Health* 173, 175; Australian Council of Trade Unions, Submission 306, *Sexual Harassment Inquiry*, 14–15.

25 See, eg, Paula McDonald, 'Workplace Sexual Harassment 30 Years on: A Review of the Literature' (2012) 14(1) *International Journal of Management Reviews* 1, 7; Joni Hersch, 'Sexual Harassment in the Workplace' (IZA World of Labor, No 188, September 2015) 5; Afroditi Pina, Theresa A Gannon and Benjamin Saunders, 'An Overview of the Literature on Sexual Harassment: Perpetrator, Theory, and Treatment Issues' (2009) 14(2) *Aggression and Violent Behavior* 126, 129.

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35 Monique Keel et al, *Putting the Prevention of Violence Against Women into Practice: How to Change the Story* (Our Watch, 2017) 49.

36 Victorian Health Promotion Foundation (VicHealth), Submission 147, *Sexual Harassment Inquiry*, 11; Our Watch, Submission 281, *Sexual Harassment Inquiry*, 15–16; Victoria Legal Aid, Submission 283, *Sexual Harassment Inquiry*, 20; Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 4; Australian Chamber of Commerce and Industry, Submission 349, *Sexual Harassment Inquiry*, 10, 13.

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62 Individual, Submission 166, *Sexual Harassment Inquiry*; Individual, Submission 180, *Sexual Harassment Inquiry*, 1; Individual, Submission 231, *Sexual Harassment Inquiry*, 2; Women with Disabilities Victoria, Submission 312, *Sexual Harassment Inquiry*, 7; Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 16.
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65 Working women's centres 'support women employees or women who wish to work, whatever their age, ethnicity or work status, by providing a free and confidential service on work related issues.' 'About Us', *Working Women's Centres* (Web Page) <www.wwc.org.au/index.php?page=about-us>.
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SECTION 2:

The current context for this Inquiry

Thank you … for giving many of us a voice during this Inquiry, and I hope that those of us who have spoken out can find comfort in knowing that no matter how small or large your contribution … this Inquiry will bring [change] and by speaking out, others will be encouraged to also.[1]

SNAPSHOT

- Sexual harassment is a significant issue in Australian workplaces that affects people across all industries.
- Legislative and regulatory frameworks provide avenues for victims to seek redress, but there is often confusion among both employers and victims on how to navigate them.
- Since the *Sex Discrimination Act 1984* (Cth) was introduced, there have been substantial changes to the nature of work.
- The changing nature of work, with self-employment and other forms of 'non-standard' work becoming more common, along with lower rates of union membership, can create particular challenges for reporting sexual harassment.
- Technological change has blurred the distinction between the personal and the professional world, creating ambiguity about the boundaries of the workplace and new opportunities for sexual harassment to occur.
- There is increasing public awareness of sexual harassment, driven by media reporting and social media campaigns. There is also a growing understanding of the economic cost of sexual harassment.
- Australia is well positioned to take a leadership role in the global response to sexual harassment.

2.1 Overview

Sexual harassment is an urgent issue in Australian workplaces.

Since 2003, the Australian Human Rights Commission (the Commission) has conducted surveys to measure the prevalence, nature and reporting of sexual harassment in Australia. The Commission's *Everyone's business: Fourth national survey on sexual harassment in Australian Workplaces* (2018 National Survey) was released in 2018. Its findings indicate that sexual harassment is endemic in Australian society, across all areas of daily life.[2]

Sexual harassment in the workplace is a common experience which has increased in prevalence since previous years. Key findings from the 2018 National Survey included:

- One in three people (33%) said they experienced sexual harassment at work in the last five years.[3]
- Both women and men experienced sexual harassment at increased rates than in previous surveys—almost two in five women (39%) and just over one in four men (26%) said they experienced sexual harassment in the workplace in the last five years.[4]
- Four out of five people (79%) were sexually harassed by a male harasser.[5]
- Young people aged between 18 and 29 were more likely than those in other age groups to have experienced workplace sexual harassment in the last five years.[6] Young women were significantly more likely than young men to have been sexually harassed.[7]
- The risk of sexual harassment was much higher for people who already experience higher rates of disadvantage and discrimination, with 52% of workers who identify as lesbian, gay, bisexual, transgender or intersex; 53% of Aboriginal or Torres Strait Islander workers; and 44% of workers with disability indicating they were sexually harassed at work in the last five years.[8]

For the first time, the 2018 National Survey was able to report on experiences of workers in particular industries. It found that unwelcome sexual conduct was experienced across the full range of industries, occupations and employment status.

The majority of workplace sexual harassment took place within Australia's four largest industries,[9] indicating that the prevalence of sexual harassment mirrors the proportion of the Australian workforce employed in those industries.

However, rates were notably high in some industries. For example, while in 2018, the information, media and telecommunications industry accounted for just 2% of the Australian workforce as a whole, 5% of victims said they were working in this industry when they were sexually harassed.[10]

Concerningly, the 2018 National Survey found that fewer than one in five people (17%) said they made a formal complaint in relation to sexual harassment.[11] Of those who made a formal complaint, almost half (45%) said nothing changed at their workplace as a result.[12] Two thirds of the people who told the Commission they had witnessed sexual harassment in the last five years said they took no action.[13]

These findings make clear sexual harassment is a serious yet hidden issue in Australian workplaces.

In the years since the Commission began its work tracking the prevalence of sexual harassment, significant changes have taken place in both Australian workplaces and in society in general. These changes influence not only the nature of sexual harassment and where it occurs, but also whether and how victims talk about their experiences.

This section considers the context in which contemporary workplace sexual harassment is taking place, which raises both longstanding and fresh challenges for Australia in preventing and responding to this problem.

Section 2.2 begins by considering the historical context to the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) and efforts to address sexual harassment in Australia.

Section 2.3 provides a brief overview of Australia's international obligations and the domestic legal and regulatory frameworks that relate to workplace sexual harassment.

Section 2.4 considers how changes in the nature of work and declining union membership have affected the way in which sexual harassment is experienced by victims.

Section 2.5 looks at the growing global movement towards transparency around issues of sexual harassment, driven in particular by social media campaigns and media reporting.

Section 2.6 highlights the importance of understanding the costs of sexual harassment.

Section 2.7 concludes by considering the global response to sexual harassment and the potential for Australia to take a leadership role in this space.

2.2 Historical context

> 35 years later, we are still faced with alarming statistics on the prevalence of sexual harassment, with all the costs at individual, employer and macro-economic levels.[14]

Since the early 1970s, women's organisations have pushed for legal and social recognition of sex discrimination. While prohibiting sexual harassment is unremarkable today, the political landscape surrounding the introduction of the Sex Discrimination Act was, according to the Hon Susan Ryan AO—the then Minister Assisting the Prime Minister on the Status of Women—'explosive'.[15]

When Australia ratified the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) in 1983, there was sustained and vociferous opposition from powerful sectors in the community.[16] By the time the Sex Discrimination Act was introduced, Parliament was inundated with petitions and protests opposing the reform, arguing that it 'would bring about the end of the family, ruin the economy, undermine the male labour force, and destroy Christianity and the Australian way of life'.[17]

Despite this opposition, the Sex Discrimination Act became law in 1984. Yet it would take time for it to gain broader social, political and institutional support.

One of the earliest cases of sexual harassment brought under the Sex Discrimination Act demonstrated this tension.[18] The 1988 Human Rights and Equal Opportunity Commission decision in *Hall, Oliver & Reid v Sheiban*,[19] recognised that 'rampant discrimination in employment has been practised against women for generations' and that 'unsought and unwelcomed sexual suggestions or impositions … invade the dignity of the women involved and discriminate against them'.[20]

However, the Commission ultimately found that while the women had experienced sexual harassment, no damages should be awarded because the conduct had not been repeated or faced resistance or disapproval and was likely to only cause 'temporary aggravation'.[21]

The public outcry was swift in response to this decision, and an appeal to the Federal Court was successful.[22] Social, political and institutional progress has continued until today. Yet, as this Inquiry has shown, more work is needed to fully understand and address the far-reaching harms and impacts of workplace sexual harassment.

The Sex Discrimination Act established the independent statutory office of the Sex Discrimination Commissioner[23] and conferred additional powers and functions on the Commission.[24] The advocacy by successive Sex Discrimination Commissioners and the enduring work of the Commission have shown that the Sex Discrimination Act has been a practical and proportionate measure to achieve legal and social recognition of sexual harassment and drive gender equality more broadly.

The Sex Discrimination Act has been strengthened since 1984 through a number of amendments. For example, amendments in 2011 to prohibit sexual harassment through the use of technologies ensured the Sex Discrimination Act was modernised to account for the ubiquity of new and emerging technologies.[25] The 2011 amendments also provided protection for the first time against sexual harassment by customers.[26]

This Inquiry similarly presents an opportunity to ensure the legal framework established by the Sex Discrimination Act aligns with social change and community expectations and is operating effectively to fulfil its objectives.

2.3 Sexual harassment in international and domestic law

> [The Convention on the Elimination of All Forms of Discrimination against Women] requires States not only to protect individual women against discrimination, but to bring about structural change. This means it is not enough for States to simply ensure formal equality.[27]

(a) Human rights obligations

Australia's domestic legal framework with respect to workplace sexual harassment gives effect to broader international obligations to prevent sexual harassment and other forms of gender-based violence and discrimination.

Every person has the right to work free from sexual harassment.[28] Australia has ratified, and has therefore agreed to be bound by, a number of international treaties that recognise fundamental human rights relevant to workplace sexual harassment.[29]

Sexual harassment in the workplace is addressed in a number of international instruments as both a manifestation of sex discrimination and a form of violence against women.[30]

Various United Nations initiatives call for the elimination of sexual harassment as a gender equality issue.[31] Several non-binding declarations and principles on the role of businesses in the promotion of human rights complement the international legal framework on addressing sexual harassment at work.[32]

The recommendations of this Inquiry are in line with Australia's international commitments, human rights obligations and standards against violence and discrimination at work.

There has been a recent focus at the international level on measures to provide a clear framework for addressing sexual harassment. In December 2018, the UN General Assembly adopted the first resolution specifically focused on sexual harassment.[33] It urged States to accelerate and resource action to prevent and eliminate sexual harassment in the context of ending violence against women and girls.

The ILO, together with governments, employers and worker representatives, has developed a new international standard to combat violence and harassment in the world of work.[34] The ILO Convention acknowledges that sexual harassment cannot be adequately addressed without tackling the underlying causes and risk factors of sexual harassment: namely, sexism, discrimination and gender inequality.[35]

The Convention and accompanying Recommendation were adopted by Australia in June 2019 (ILO Convention 190).[36]

ILO Convention 190 encourages States to adopt a broad definition of 'worker' and 'workplace' in order to capture the full range of traditional and non-traditional work arrangements and different workplace settings in which violence and harassment can be experienced.[37] The implications of ILO Convention 190 are discussed in more detail in Section 5.3, 'International human rights obligations'.

Further discussion of the international response to sexual harassment is provided below in Section 2.7.

(b) Domestic legal framework

There are three key legal and regulatory schemes regulating workplace sexual harassment in Australia: anti-discrimination laws,[38] the Fair Work system[39] and work health and safety (WHS) laws.[40] This highlights that the right to be free from workplace sexual harassment is a human right, a workplace right and a safety right.

Laws prohibiting sexual harassment exist at the federal level and at each state and territory level in Australia. At the federal level, sexual harassment is prohibited in the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act). The Sex Discrimination Act, together with state and territory anti-discrimination laws, provide the primary framework for understanding and addressing sexual harassment as a form of sex discrimination, and recognises the right to work in an environment free from sexual harassment as a basic human right.

Under the Sex Discrimination Act, sexual harassment is any unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature in relation to the person harassed, in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.[41]

The Sex Discrimination Act makes sexual harassment unlawful in certain areas of public life, including employment.[42] Employers can be held vicariously liable for sexual harassment committed by their employees or agents, if they failed to take 'all reasonable steps' to prevent the sexual harassment from occurring.[43]

A person can make a complaint of sexual harassment in employment to the Commission. The Commission can investigate and attempt to resolve the complaint through conciliation. If a complaint is unable to be resolved or is finalised for some other reason, a person may take the matter to the Federal Court of Australia or the Federal Circuit Court for determination.

The Fair Work system is the national framework governing the relationship between employer and employee in Australia. The *Fair Work Act 2009* (Cth) (Fair Work Act) and the *Fair Work Regulations 2009* provide a safety net of minimum entitlements, enable flexible working arrangements and fairness at work, and prevent discrimination against employees.[44]

The Fair Work Act does not explicitly prohibit sexual harassment. However, some protections against sexual harassment in the workplace may apply through other provisions, including general protections against adverse action on the basis of a workplace right,[45] general protections against adverse action on the basis of sex,[46] the anti-bullying jurisdiction,[47] unfair dismissal[48] and unlawful termination on the ground of sex.[49]

Australia's WHS laws are based on the model Work Health and Safety Act, model WHS Regulations and model Codes of Practice (model WHS laws) in all states and territories, except in Victoria and Western Australia (which have their own WHS schemes). Under the model WHS laws, a 'person conducting a business or undertaking' has a primary duty of care to ensure, so far as is reasonably practicable, the physical and psychological health and safety of workers.[50]

These laws therefore place a duty on employers to prevent sexual harassment, as a risk to workers' health and safety. However, there is no express definition of sexual harassment in the model WHS laws, or Regulations or model Codes of Practice that focuses primarily on how to manage psychological health risks or hazards.[51]

A consistent theme emerging from submissions and consultations was that the interaction between the schemes is complex and confusing for both victims and employers to understand and navigate. Changes are required to provide greater clarity.

Section 5, 'The legal and regulatory framework', provides a detailed overview of these frameworks, including proposals to strengthen elements of Australia's response to the issue.

2.4 Changing nature of work

> Forms of labour such as domestic work, freelance work or work in the gig economy (such as car share or food delivery) lack legislative protections and/or access to well-equipped [human resources] departments.[52]

The nature of work has fundamentally transformed since the introduction of the Sex Discrimination Act. Traditional definitions of employment and sexual harassment have failed to keep pace with the evolving nature of work in the 21st century.

This section considers two particularly significant forces that have shaped the nature of work:

- the changing nature of work and work arrangements
- technological change, including the ways in which increased connectivity of workers and workplaces have changed when, where and how work is performed.

These changes are not unique to Australia. They are part of global trends that affect workforces around the world. By proactively addressing these issues, Australia has the opportunity to take on a leadership role at an international level.

(a) Changing nature of work and work arrangements

In 1984, the Australian Bureau of Statistics (ABS) data still distinguished between 'all females', 'married females' and 'not-married females' in its employment statistics. Statistics from the time highlight how significantly the world of work has changed in contemporary society.[53]

In March 1984, 94% of all men in the workforce were employed full-time, while the female workforce participation rate was 46.2%.[54] The notion of the male breadwinner was strong and workers were less likely to move between jobs or have multiple employers. In contrast, in September 2019, 80.9% of all men in the workforce were employed full-time,[55] while the female workforce participation rate was 58.1%.[56]

Work arrangements have also changed over time.[57] Temporary or agency work, part-time or on-call work, labour hire, independent contracting and other forms of 'non-standard employment' are now common.[58] This is particularly prevalent in the so-called 'gig' or 'sharing economy', enabled by the rise of digital platforms and marketplaces such as Uber, Airbnb, Deliveroo and Airtasker.[59]

The Commission was told about the types of work people do in the casual and gig economy, across a range of industries, as well as the way work is contractually organised.[60] The 2018 report of the Senate Select Committee on the Future of Work and Workers noted that 'at the core of gig economy work is the idea that workers are not employees, they are instead independent contractors'.[61]

As discussed in more detail in Section 3.5, 'People who experience sexual harassment in the workplace', people employed in non-standard employment arrangements or vulnerable workers can face a number of barriers when it comes to reporting incidents of sexual harassment.

For example, it may be challenging for a victim of sexual harassment working under these types of arrangements, such as labour hire or gig economy workers, to identify an employer, a workplace or personnel who are responsible for safety or human resources.

The Commission also heard that workers on temporary, labour hire, contract, casual or non-ongoing arrangements were reluctant to complain to avoid their contracts not being renewed or being assigned fewer hours of work.[62] This may place workers at higher risk of experiencing sexual harassment.[63] For example, women, migrant workers and young people commonly work in these types of arrangements in sectors where high levels of sexual harassment occur.

Rates of union membership have also significantly decreased since the introduction of the Sex Discrimination Act. In 1982, 49% of employees were members of a trade union.[64] By 2016, this had reduced to 14.5%.[65]

The Inquiry heard that workers who had experienced sexual harassment valued getting information and support about their options from a source independent from their employer. Overall, lower trends of union membership may have contributed to lower awareness among workers of their workplace rights, less collective action and support between workers, and less representative complaints and advocacy by trade unions.

As the nature and characteristics of the world of work evolve, so too must Australia's approach to preventing and responding to workplace sexual harassment. As discussed above, a broader approach to protections for workers against sexual harassment is consistent with the approach being taken at an international level to address violence and harassment in the world of work.

(b) Technological change

Digital disruption has not only changed the nature of the employment; it has also changed people's interactions in the workplace. The increased availability of digital communication channels—including emails, instant messaging, enterprise social media and other forms of online collaboration—have shifted and blurred the boundaries of the workplace. These digital technologies are also collapsing the distinction between online and offline mediums and private and professional lives.

Sensis conducts annual surveys of consumers and small, medium and large businesses to track social media usage. In 2018, nearly nine out of ten online consumers (88%) use social media sites and more than a third of people (34%) now access social media more than five times per day.[66] Social media use spans a number of locations, including the workplace.[67]

In 2018, Sensis found the proportion of businesses with a social media presence had reached the highest level recorded since they began reporting in 2010. Sensis found that 85% of large businesses surveyed maintained a social media presence, along with more than half the small (51%) and medium businesses (58%) participating in the survey.[68]

With businesses increasingly relying on social media for advertising and consumer engagement, many workers are increasingly expected to engage with these platforms in a professional context. Workers who rely on digital platforms for their work and social media to build their networks are particularly vulnerable to online sexual harassment. This issue is discussed in Section 3.3, 'Nature of sexual harassment in the workplace', particularly in relation to female journalists, politicians, commentators and activists.

Digital technology and social media have reconceptualised the contemporary employment relationship and fundamentally altered the reach, speed and permanency of work-related conduct and expectations.[69]

Online sexual harassment that occurs beyond the physical parameters of the workplace and beyond regular working hours can constitute workplace sexual harassment.[70]

While technological advancement and digital engagement undeniably bring benefits, they also increase the risk of technology-facilitated sexual harassment.[71] The Office of the eSafety Commissioner (eSafety) submission to the Commission provided insight into the growing and complex relationship between technology and online abuse and harassment:

> It is important to stress two points about the relationship between technology and cyber abuse: one, technology is a mechanism for the expression of *existing* forms of abuse; two, technology can facilitate *new* forms of abuse.[72]

The submission from Women's Health in the South East (WHISE) also explored the intersection of gender, technology and harassment and argued that technologies not only replicate and shape gender dynamics online, but also facilitate gender violence in specific and nuanced ways not previously seen:

> [T]he intersection between the social (that is social norms; what is acceptable and power dynamics) and how technology is utilised needs to be better understood because norms around gender roles and power structures do impact on the way in which these platforms are utilised.[73]

Professor Danielle Citron has connected the trivialisation of the cyber abuse of women online to the way in which sexual harassment of women was historically undermined:

> No term even existed to describe sexual harassment of women in the workplace until the 1970s. The refusal to recognize harms uniquely influencing women has an important social meaning—it conveys the message that abusive behavior toward women is acceptable and should be tolerated. Grappling with the trivialization of cyber gender harassment is a crucial step to understanding and combating the harm that it inflicts.[74]

Citron has highlighted the importance of grappling with technology-facilitated sexual harassment because it 'impedes women's full participation in online life, often driving them offline, and undermines their autonomy, identity, dignity, and well-being':[75]

> You can't leave online life and say there's no hit to your career and choices. In some professions, if you don't have an online presence, you don't have a career.[76]

A number of submissions also explored the factors and characteristics of online engagement that may facilitate abuse and harassment. The Commission heard that some aspects of technology can promote heightened forms of sexually harassing behaviours.[77]

Research has indicated that online anonymity can act as 'a catalyst for disinhibition', meaning that people are more willing to express views and engage in types of behaviour online than they would in face-to-face interactions offline.[78]

Sexual harassment involving the use of technology is discussed in more detail in Section 3.3(a), 'Types of behaviours'.

2.5 Increasing transparency around sexual harassment

> #MeToo and similar movements have shown us that no country or organization is immune to the occurrence of sexual harassment. It can happen to anyone and it can happen anywhere.[79]

Section 5 discusses the impact of non-disclosure agreements and defamation laws on victims' willingness to report sexual harassment, which has discouraged public discussion of allegations. The Commission heard from victims of workplace sexual harassment who felt silenced because of non-disclosure agreements or confidentiality clauses in settlement agreements:

> All the while going through this heinous process, I had no voice. I was silenced. I couldn't [because of my NDA] speak to friends, current and present. I had, and still have, no social media participation … I cannot, without severe implications, tell my story to either assist my healing or to help other survivors.[80]

However, recent years have seen an increased willingness among victims to share their experiences publicly through traditional and social media. This increased transparency has had a significant impact on both public awareness of the issue and the willingness of employers to respond to allegations.

This section considers the impact of media reporting and the use of social media, including global campaigns, in creating greater transparency around sexual harassment. This increased appetite for transparency reinforces the need to consider new approaches to respond to sexual harassment.

(a) Media reporting

Media reporting has played an important role in raising public awareness of sexual harassment and amplifying the voices of victims who share their stories.

Media reports involving prominent public figures across entertainment, politics, sport and business have reinforced both the prevalence and impact of sexual harassment across a range of sectors.

In 2017, *TIME* magazine's Person of the Year was 'The Silence Breakers', representing those people who came forward and spoke up about sexual harassment and assault as part of the #MeToo movement.[81] In 2018, the *New York Times* was awarded the prestigious Pulitzer Prize for public service for their reporting on sexual harassment.[82]

In Australia, a joint investigation by the *Sydney Morning Herald* and ABC won Walkley Awards for Excellence in Journalism in 2018 for reporting on sexual harassment and bullying by television personality Don Burke.[83]

In the months leading up to the 2018 National Survey, there was unprecedented media coverage of issues related to sexual harassment, driven by the global #MeToo movement (discussed below at Section 2.7).[84] The results of the 2018 National Survey suggest it is likely that media coverage has resulted in increased community awareness of the issue of sexual harassment.[85]

The impact of media reporting on sexual harassment extends beyond shaping community attitudes. The reputational risk posed by public allegations relating to sexual harassment[86] has led some employers to minimise allegations of sexual harassment and reduce transparency around these issues.

As discussed further in Section 3.8, 'Impacts of sexual harassment in the workplace', damage to the reputation of a business or business leader can have substantial financial impacts. For example, in 2010 David Jones's share price dropped more than 3% in the wake of media reporting on a sexual harassment claim against its then CEO.[87] Media reporting may also contribute to an employer's willingness to pay large settlement sums, where accompanied by strict terms of confidentiality, non-disclosure and restrictions on making adverse comments.[88]

However, the Commission heard about the potential negative impact of media reporting on victims of sexual harassment. Information published about high profile cases, without the consent of the victim, can cause significant distress.[89] For a victim to lose control over their narrative and story, when they may already feel their privacy and boundaries have been violated by their experience of harassment, can lead to re-traumatisation.[90]

Furthermore, while some victims want to share their stories, other victims turn to journalists because they have found workplace or legal processes to be lacking or unsatisfactory.[91]

There are also significant legal risks for a victim in raising allegations of sexual harassment publicly. The Commission heard that Australia's defamation laws can act as a disincentive to victims speaking out, and are also having a chilling effect on media coverage of sexual harassment issues.[92] Section 5.8(b), 'Defamation laws', provides more information about their impact in Australia.

Section 4.5(d), 'Media guidelines', provides a more detailed overview of the role of media in reporting sexual harassment, and proposes specific strategies to assist journalists and the media in fulfilling their important role.

(b) Social media

Social media campaigns, including the high profile #MeToo movement and related solidarity movements,[93] have generated a huge surge in public concern around sexual harassment and assault.

The #MeToo movement has seen victims of sexual harassment, especially women, turning to social media to raise allegations, share their experiences and find solidarity with other victims of sexual harassment. The hashtag is used regularly in more than 85 countries.[94]

The impact of the #MeToo movement reinforces the power of digital platforms as a means for victims to raise awareness about sexual harassment and gendered violence:

> In a sense, these emerging forms of cyber justice are really forms of collective justice. Victim-survivors are empowered to share their experiences and to be heard—at the same time as society more broadly is challenged to listen and to take action to stop sexual violence.[95]

Social media can be a means for victims to regain or retain agency over their story and recovery.[96] It can also provide victims a voice they would not have in non-digital contexts.[97]

However, victims of sexual harassment face both benefits and risks when they share their experiences online. For many victims, social media is a last resort. eSafety told the Commission that employer responses which focus on protecting the reputational brand of the company, rather than protecting and promoting the wellbeing of employees online, can drive victims to use social media.[98] WHISE argued that the internet:

> … can both empower [women] by giving them a space to speak out in way[s] that they may not be able to in the nondigital world, but it can also constrain them as sexist gendered norms are perpetuated online in the same way they are offline.[99]

Victorian Women Lawyers argued that while social media is a powerful medium for victims, 'traditional forms of justice must remain viable and accessible to ensure fairness for the victim, perpetrator and employer alike.'[100]

(c) Balancing transparency with other considerations

It is not only victims who can be harmed by media reporting or the use of social media to raise allegations of sexual harassment. There can be significant career, financial and psychological impacts on alleged harassers and costs to organisations.

Where allegations have been raised through social media, the lack of any formal process for testing these or natural justice can cause damage to all parties. eSafety, which has a number of programs and initiatives designed to protect and promote women's voices online, argued that a victim's agency and recovery need to be prioritised in conjunction with principles of due process and natural justice to the alleged harasser.[101]

The Commission agrees that it is important to balance the rights of victims and alleged harassers and uphold the law.

This is important in terms of fairness and justice, but also because a system that lacks procedural fairness risks creating a backlash that can result in further discrimination against women, such as practices where men feel uncomfortable working closely with or refuse to mentor women.[102]

Ultimately, the Commission considers that it is through the multifaceted reforms outlined in this report, including a victim-centred, trauma informed and gender-responsive approach to understanding the impacts of sexual harassment on victims, that the faith and trust of workers can be restored in workplace models and institutional processes.

2.6 Understanding the cost of sexual harassment

> Sexual harassment [has] serious and damaging effects on a workplace. Organisations and individuals pay a high price.[103]

There has been limited research into the economic costs of workplace sexual harassment to date.[104]

Under its Terms of Reference for the Inquiry, the Commission was asked to consider the economic impact of workplace sexual harassment drawing on economic modelling. In 2018, the Australian Government Department of Treasury engaged Deloitte Access Economics to conduct this work (the Deloitte Report).[105]

To the Commission's knowledge, this is the first time in any country that the cost of sexual harassment has been quantified across all sectors of the economy.

The Deloitte Report estimated that in 2018, workplace sexual harassment cost the Australian economy $3.5 billion annually, including approximately $2.6 billion in lost productivity.[106] The report found:

- The vast majority of the costs associated with lost productivity (approximately $1.8 billion or 70%) were borne by Australian businesses[107]
- The private sector shouldered the majority of lost productivity costs (approximately $2.2 billion) in comparison to the public sector ($393.7 million).[108]

The Deloitte Report also estimated that in 2018, victims of workplace sexual harassment spent $103.5 million in accessing the health and justice systems.[109]

Rather than costing employers, government and victims an estimated $3.5 billion annually, by taking action to prevent and address workplace sexual harassment, Australia has the opportunity to invest in better health and economic outcomes for its workers and workplaces.

Section 3.8, 'Impacts of sexual harassment in the workplace', provides a more detailed discussion of this economic analysis. While the costs to Australia are substantial, the Commission notes that these estimates likely represent only a fraction of the actual cost of workplace sexual harassment borne by victims and workplaces and affecting the broader Australian economy.

Improving transparency around the prevalence and cost of sexual harassment is an important aspect of Australia's response to the issue. Quantifying this cost will assist governments and the private sector in scoping the extent of the problem and formulating an appropriate response. This will also reinforce to employers the importance of taking action.

Combined with the information gathered by the Commission through its national surveys, future economic modelling will help create a comprehensive understanding of the nature, extent and impacts of sexual harassment in Australia. This report recommends more detailed and robust data collection to assist in future estimates of the cost of sexual harassment, as well as the benefits of a healthy and safe work environment.

2.7 A global response to sexual harassment

> 2017 and 2018 have seen a surge in public concern regarding sexual harassment. The global #MeToo and #TimesUp movements, championed in part by high-profile screen industry figures, have energised a cultural shift which has inspired a number of actions in Australia. Around the world, women and men are speaking up about experiences of sexual violence and harassment, and calling for fairness and safety in the workplace.[110]

International concern over sexual harassment in the workplace is not new.[111] Despite international standards guiding national legislation and policy efforts over many years to address sexual harassment, it remains a common and widespread problem.

As noted above in Section 2.5, the #MeToo movement exposed the extent to which sexual harassment pervades work and put sexual harassment on the global agenda. Public reports of sexual misconduct in the United Nations (UN) system and the aid sector showed the world that no institution, no sector and no country is immune.[112] Global civil society movements called for real change.

A number of governments and organisations have since commissioned reports into workplace sexual harassment, as well as other forms of harassment, abuse and discrimination.[113] There is growing awareness that a new approach is needed to address sexual harassment and create the change to make harassment-free workplaces.

Consensus is forming internationally that tackling sexual harassment requires leadership and organisation-wide approaches to break the culture of silence and drive cultural change.

Internationally, there have been a range of recent initiatives not only to break the silence on sexual harassment, but also to take proactive steps to stop it. For example, the UN has acknowledged unequal power relations, abuse of power and gender bias as factors that underlie sexual harassment.[114]

In response to accounts of sexual exploitation, abuse and harassment by UN personnel, the UN Secretary General launched a set of system-wide initiatives—including structural, legal and operational measures to drive change across the UN system—and called on States to pursue a range of common goals.[115] These included upholding international obligations to ensure accountability, holding perpetrators to account and ensuring effective remedies for victims.[116] Further, UN agencies have noted the importance of collective action by employers, civil society, governments and workers, and the need to provide opportunities for victims' voices to be heard.[117]

Australia has committed to the UN Secretary General's initiatives and joined other global leaders in the UN's Circle of Leadership.[118] It also signed the UN Voluntary Compact, signalling high-level political commitment to prevent sexual exploitation and abuse in UN operations, and contributed to a Trust Fund in support of victims of sexual exploitation and abuse.[119]

Australia is part of the new Group of Friends to Eliminate Sexual Harassment, which was set up to share national, regional and international good practices between UN Member States.[120]

Although the issue of sexual harassment is not new, best practices to reduce sexual harassment are still in development. The ILO and UN Women have compiled lessons on addressing violence and harassment in the world of work, arguing for a 'transformative' approach to sexual harassment that tackles the gender equalities and discrimination that underpin it.[121]

One of the most recent and comprehensive was the ILO and *UN Women Handbook: Addressing violence and harassment against women in the world of work*, which recognises that such violence and harassment is a serious violation of women's human rights and a major barrier to achieving equality of opportunity and access to decent and dignified work.[122]

In addition, a 2019 UN Women publication offering guidance for policy makers and employers on eliminating sexual harassment at work, emphasised:

> The task is not to protect an organisation by denying or minimising what is happening but to end sexual harassment by changing behaviour and culture: that is, ending skewed and rigid power distributions.[123]

The Commission recognises this is a developing area of research, policy and practice. Australia is poised to make a significant contribution to this work. This Inquiry is an important step in increasing the transparency around issues relating to sexual harassment—a vital component in changing behaviour and culture.

Across the globe, there has been an increasing call for the momentum, spurred by #MeToo, to translate into practical and meaningful changes. However, as the women's organisations who fought for the legal and social recognition of sex discrimination in the early 1970s experienced, Australia should also brace itself for a backlash. As discussed in Section 4, 'Prevention outside the workplace', initiatives to tackle gender inequality often meet resistance, especially when these challenge existing structures and social norms.

Australia must prepare for this backlash. Armed with effective tools and strategies, and the practical, measured and effective reforms recommended in the report, Australia has the opportunity to make significant progress and take a leading role in the global response to sexual harassment.

This is Australia's moment.

RECOMMENDATION 1:

The Australian Government work with state and territory governments to implement the recommendations in this report and provide a joint funded package to ensure their implementation.

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3 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26.
4 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26.
5 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 8.
6 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 21.
7 For example, in the 18–29 age group, 53% of women said they had experienced workplace sexual harassment in the last five years compared to 26% of men. In the 15–17 age group, 31% of women said they had experienced workplace sexual harassment in the last five years compared to 10% of men. Unpublished data from the 2018 National Survey on sexual harassment in Australian workplaces.
8 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 28.
9 Close to half of all sexual harassment perpetrated in the workplace in the last five years occurred within four industry groups: health care and social assistance, retail trade, education and training and accommodation and food services. See Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 60.
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11 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 67.
12 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 77.
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21 *Hall, Oliver & Reid v Sheiban* [1988] HREOCA 5.
22 *Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd; Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission* [1989] FCA 72; 20 FCR 217.
23 *Sex Discrimination Act 1984* (Cth) pt V.
24 *Sex Discrimination Act 1984* (Cth) pt III.
25 *Sex and Age Discrimination Legislation Amendment Act 2011*, sch 1, s 29; Explanatory Memorandum, *Sex and Age Discrimination Legislation Amendment Bill 2010* 10.
26 *Sex and Age Discrimination Legislation Amendment Act 2011*, sch 1, s 59.
27 Australian Council of Trade Unions, Submission 306, *Sexual Harassment Inquiry*, 16.
28 *Sex Discrimination Act 1984* (Cth) s 3(c).
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35 International Labour Organization, *Convention Concerning the Elimination of Violence and Harassment in the World of Work*, Convention 190, Adopted 108th sess, 21 June 2019 (not yet entered into force).
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37 International Labour Organization, *Convention Concerning the Elimination of Violence and Harassment in the World of Work*, Convention 190, Adopted 108th sess, 21 June 2019 (not yet entered into force) art 3. For example, it prescribes that violence and harassment in the world of work should cover situations occurring: (a) in the workplace, including public and private spaces where they are a place of work; (b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; (c) during work-related trips, travel, training, events or social activities; (d) through work-related communications, including those enabled by information and communication technologies; (e) in employer-provided accommodation when commuting to and from work.
38 *Sex Discrimination Act 1984* (Cth); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).
39 *Fair Work Act 2009* (Cth).
40 *Model Work Health and Safety Act 2011* (Cth).
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42 *Sex Discrimination Act 1984* (Cth) pt II div 3.
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59 Senate Select Committee on the Future of Work and Workers, Parliament of Australia, *Hope Is Not a Strategy: Our Shared Responsibility for the Future of Work and Workers* (September 2018) 73–4.
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61 Senate Select Committee on the Future of Work and Workers, Parliament of Australia, *Hope Is Not a Strategy: Our Shared Responsibility for the Future of Work and Workers* (September 2018) 74.
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SECTION 3:

Understanding sexual harassment in the workplace

[S]exual harassment was the overarching feature of my working experience as a young woman. In all of these workplaces, the managers or owners either perpetrated sexual harassment themselves, or were aware that it was happening and did nothing to prevent or respond to it. Sharing these experiences with female friends, I know that my experience is not singular or extreme—this is, in many ways, an unremarkable story.[1]

SNAPSHOT

- The Commission conducts a national survey on workplace sexual harassment in Australia approximately every four years. These surveys are an important source of data on the prevalence, nature, reporting, impacts of and responses to workplace sexual harassment in Australia.
- The Commission's 2018 national survey of sexual harassment in Australian workplaces (the 2018 National Survey), and other research and data, confirm that sexual harassment is a pervasive problem in workplaces. The 2018 National Survey found that:
    - » 33% of people who had been in the workforce in the last five years said they experienced workplace sexual harassment in that time.
    - » Women experienced higher rates of sexual harassment than men.
    - » Young workers aged 18–29 years had the highest prevalence rate of all age groups.
- The national survey should be as comprehensive as possible and conducted regularly to provide employers, governments, non-government organisations and the community with reliable data to inform policy, law and practice and help assess the effectiveness of measures to address sexual harassment over time.
- This should include provision of detailed industry data to allow analysis across and within industries, to identify areas of concern and better target prevention initiatives, resources and support. The survey should also be accessible to, and adequately capture the experiences of, people from all population groups.
- There is currently little consistency in the collection, monitoring or reporting of data on workplace sexual harassment by human rights, anti-discrimination and other regulatory agencies.
- The collection and reporting of de-identified data on workplace sexual harassment by the Commission, state and territory human rights and anti-discrimination agencies, Fair Work, WHS and workers' compensation agencies is key to the success of the new regulatory model proposed by the Commission (see Section 5).
- The development of formal information sharing and data exchange mechanisms regarding sexual harassment complaints between regulatory agencies, under guidance from the Workplace Sexual Harassment Council, will also support the Commission's proposed new regulatory model.
- Workplace sexual harassment can take many forms. It can be verbal, physical and involve the use of technology, and is often repeated and ongoing.
- Power disparities in society and in the workplace enable sexual harassment. Gender inequality is the key power disparity that drives sexual harassment, both in the workplace and more broadly in society.
- Other inequalities also play a pivotal role in driving sexual harassment, with some people experiencing 'intersecting' forms of discrimination that can increase their risk of experiencing sexual harassment and make it harder for them to report it (for example, Aboriginal and Torres Strait Islander peoples, people with disability, LGBTQI people and people of CALD backgrounds).

- Existing research has shown that in most incidents of workplace sexual harassment the harasser is male. Harassers are often co-workers, supervisors, senior people in the workplace, or third parties such as customers or clients. Some harassers have been able to sexually harass multiple victims, sometimes across different workplaces, over long periods of time.
- Sexual harassment is more prevalent in some workplaces than in others. Workplace settings where there is a higher risk of experiencing sexual harassment include those where the prevalence rate has been found by the 2018 National Survey to be higher than the rate across all industries; that are male dominated; that involve a high level of contact with customers and clients; or that are characterised by hierarchical workplace or training structures.
- In rural, regional and remote workplaces, factors such as geographic isolation, lower population density and cultural and social dimensions can increase the risk of sexual harassment and create barriers to reporting.
- Small businesses face particular challenges in addressing workplace sexual harassment. The small nature of the workforce, the workspace and high degree of informal and personal interactions, can increase the risk of sexual harassment and create barriers to reporting. Small businesses often lack the resources and skills to handle complaints.
- Workplace sexual harassment has significant health, employment, and financial impacts on individuals, on workplace productivity and on the broader economy. Economic modelling commissioned as part of the Inquiry conservatively estimates the total cost to the Australian economy as $3.8 billion.
- Additional data is needed to understand the full extent of the long and short term impacts of workplace sexual harassment, its costs and trends over time, and the level of investment to prevent and address this problem in Australian workplaces.
- A National Sexual Harassment Research Agenda should be developed to provide a coordinated method for identifying national research priorities. This will contribute to an evidence base that can inform policy and practice to address sexual harassment. In developing the National Sexual Harassment Research Agenda, consideration should be given to the findings of the 2018 National Survey and issues and evidence gaps identified in this Inquiry.

3.1 Overview

Throughout this Inquiry, the Commission has heard that to effectively address workplace sexual harassment we need to understand the nature, extent, drivers and impacts of this problem in Australian workplaces.

While the Commission's national surveys and data from other government agencies provide an important starting point, more information is required to understand workplace sexual harassment (see Section 3.2).

Understanding workplace sexual harassment requires building a comprehensive and consistent evidence base about:

- the nature of sexual harassment experienced by victims, including the types of behaviours and when, where and how it occurs (Section 3.3)
- cultural and systemic drivers that underlie these behaviours (Section 3.4)
- demographic profile of victims of these behaviours, including particular risk factors which mean that some individuals are more likely to experience sexual harassment (Section 3.5)
- behaviour and characteristics of harassers (Section 3.6)
- the range of workplace settings where these behaviours are most likely to occur and whether some workplace characteristics and practices are more likely to increase the risk of sexual harassment and (Section 3.7)
- the wide-reaching impacts that sexual harassment has on the individuals who experience it, on workplaces and the broader costs to the Australian economy (Section 3.8).

Further data and research on these factors are necessary to inform the development of targeted policies to prevent workplace sexual harassment and support victims who experience it. This section aims to:

- examine the data currently available
- identify gaps in the evidence base
- make recommendations to address this gap.

3.2 Prevalence of sexual harassment in the workplace

> Data collection and analysis—both by employers and regulatory bodies [helps] to provide a clearer picture of what is happening in workplaces, and to drive and monitor change over time. It is only if we can truly see the problems that we will be able to address them effectively.[2]

The Commission's national surveys on the prevalence, nature, reporting and impacts of workplace sexual harassment are world-leading as the first surveys of this scale and kind into the issue. The results of the fourth national survey conducted by the Commission, *Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces* (the 2018 National Survey), released in 2018, have informed the Commission's findings as part of this Inquiry.

The 2018 National Survey showed that rates of sexual harassment have increased significantly since the previous survey was conducted in 2012. During this Inquiry, the Commission has identified areas where the national survey can be further enhanced to better understand and respond to the pervasive nature of sexual harassment in Australian society.

This section presents findings from the 2018 National Survey on the prevalence of workplace sexual harassment. It also discusses sexual harassment prevalence data from a range of other sources, and outlines some of the challenges relating to survey methodology, accessibility and the collection of data when estimating and comparing the prevalence of workplace sexual harassment.

This section also examines complaints data relating to workplace sexual harassment collected by the Commission, state and territory human rights and anti-discrimination agencies and other regulatory agencies that handle sexual harassment matters. While not an indicator of prevalence, this type of administrative data can contribute to the evidence base to inform better prevention of and responses to sexual harassment in Australian workplaces.

(a) 2018 National Survey

(i) Key findings on prevalence of workplace sexual harassment

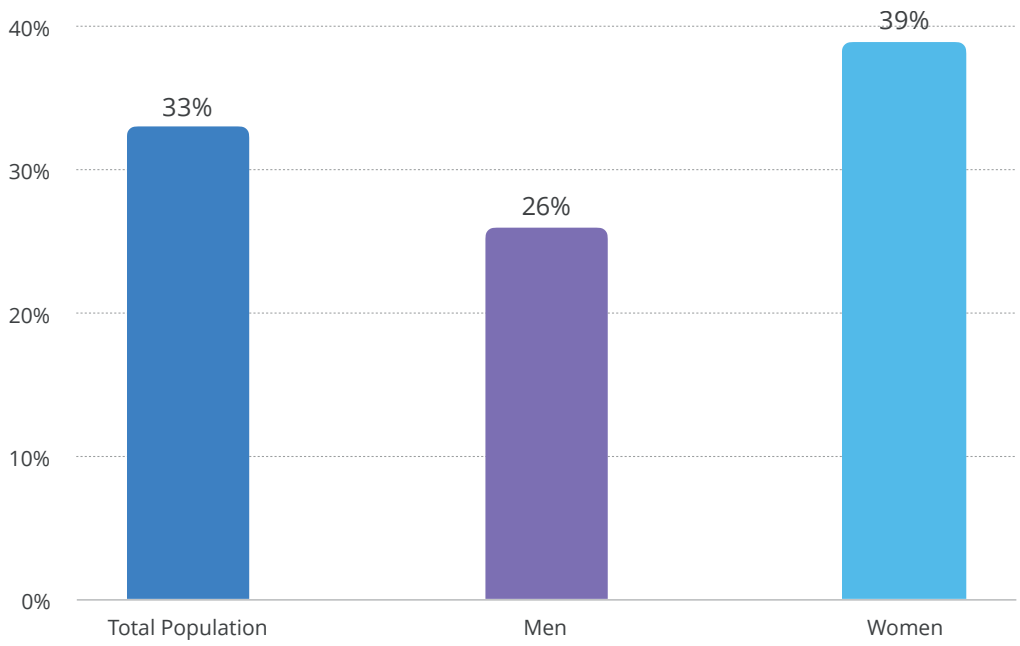
The 2018 National Survey was conducted both online and by telephone with a sample of more than 10,000 Australians aged 15 and over and was representative of the Australian population in terms of gender, age and geographic location.[3]

Of a total sample of 10,272 people, 7,813 people said they had been in the workforce in the last five years.[4] The survey asked those people who had been in the workforce in the last five years if they had experienced workplace sexual harassment at least once in that time.[5] It also captured the types of sexual harassment experienced and the characteristics of people who had experienced sexual harassment.

The 2018 National Survey provides a clear picture of the pervasiveness of sexual harassment in Australian workplaces. It found that workplace sexual harassment is a common problem, with one-third (33%) of people indicating they had experienced sexual harassment at work in the last five years.[6]

Women were more likely than men to have experienced sexual harassment. Almost two in five women (39%), compared to one in four men (26%), said they had experienced workplace sexual harassment in the last five years.[7] Further, 23% of women, compared to 16% of men, said they had experienced workplace sexual harassment in the last 12 months.[8]

Figure 3.1: Prevalence of workplace sexual harassment by gender in the past five years



Base: All respondents in the workplace in last 5 years (n=7,813); Men (n=3,932); Women (n=3,844).

Source: Australian Human Rights Commission (2018*) Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces*, p.26 (Figure 4).

The prevalence of workplace sexual harassment was higher amongst certain groups of people than in the sample as a whole: Aboriginal and Torres Strait Islander people, people with disability, lesbian, gay, bisexual and transgender people and people with intersex characteristics, all indicated experiencing higher rates of workplace sexual harassment in the last five years than the average rate of 33%.[9]

The 2018 National Survey found that the prevalence rate for people of culturally and linguistically diverse (CALD) backgrounds was similar to the average rate of 33%.[10] However, other studies have found that women of CALD backgrounds reported experiencing higher rates sexual harassment at work.[11] Issues relating to the accessibility and methodology of the 2018 National Survey which may have affected responses of people of CALD backgrounds are discussed below.

The 2018 National Survey also found that:

- Workers aged 18–29 years experienced a higher rate of sexual harassment than workers in other age groups (of people in this age group who had been in the workforce in the last five years, 45% said they had been sexually harassed in that period).[12] Women in this age group experienced workplace sexual harassment at a higher rate (53%) than men (36%).[13]
- Older workers (aged over 65 years) had the lowest prevalence rate (of people in this age group who had been in the workforce in the last five years, 16% said they had been sexually harassed in that period).[14] Women in this age group experienced workplace sexual harassment at a higher rate (20%) than men (13%).[15]

These findings and the drivers of workplace sexual harassment for particular groups of workers are considered in more detail in Section 3.5.

(ii) Higher rates of prevalence in 2018 National Survey

The prevalence rates of workplace sexual harassment recorded in the 2018 National Survey were higher than prevalence rates recorded in previous surveys. In the 2018 National Survey, based on questions about specific behaviours that would likely constitute sexual harassment, one in three people said they were sexually harassed at work in the last five years (33%). Prevalence rates in previous national surveys were 11% in 2003, 4% in 2008 and 21% in 2012.[16]

Although methodological differences between these surveys mean a direct comparison across years cannot be made, it is clear that there was a marked increase in prevalence in 2018.[17]

Responses to a simple legal definition of sexual harassment can provide a useful indicator of the level of community understanding of what constitutes sexual harassment.[18] These results can be directly compared across surveys, as the questions asked have not changed.

In the 2018 National Survey, before being asked about their experiences of sexual harassment 'behaviours', all survey respondents were provided with a simplified legal definition of sexual harassment and asked to indicate whether they had experienced such harassment at any time or anywhere (lifetime sexual harassment). In response, 43% of respondents said they had been sexually harassed on the basis of the legal definition.

In contrast, 28% of respondents said they had been sexually harassed at some point in their lifetime on the basis of the legal definition in the 2003 survey, 20% in the 2008 survey and 21% in the 2012 survey.[19] These results suggest an increase in 2018 of levels of awareness in the community of sexual harassment and increased understanding of what constitutes it.

There are a number of possible reasons for the markedly higher prevalence rate in response to the legal definition of workplace sexual harassment in 2018 compared to previous years.

As the 2018 National Survey findings suggest an increased level of community understanding of what constitutes sexual harassment, the higher prevalence rate may be at least partly related to greater awareness of the issue more broadly, rather than an increase in the behaviour. As the Commission observed in 2018 National Survey report, there was a substantial increase in media coverage of sexual harassment in the period between the 2012 and 2018 surveys, especially in the months leading up to the 2018 National Survey, as a result of the '#MeToo' movement. It is possible this increased media coverage contributed to greater community awareness of sexual harassment, reflected in the higher rates noted above.[20]

(iii) Importance of large-scale surveys in understanding sexual harassment

Surveys, such as the 2018 National Survey, are an important data source for understanding complex social policy issues such as sexual harassment.

The ABS explains that surveys are a tool to collect information from some or all units of a population and compile the information into a useful form. In a sample survey, only part of the total population is approached for information on the topic under study. The data collected from this 'sample' of the population are then 'expanded' or 'weighted' to make inferences about the whole population.[21]

The Australian Bureau of Statistics (ABS) has stated that surveys 'are a useful means of gathering information not otherwise captured by government agencies and NGOs [non-government organisations]'.[22]

For example, victims may be more likely to disclose incidents of family, domestic or sexual violence in response to a survey which provides them with the opportunity to remain anonymous. This may include incidents they have not reported to the police or other agencies.[23] For this reason, surveys can provide a clearer picture of prevalence than complaints or other government data, which only reflect those people who have made a formal complaint or engaged with a government service.

The 2018 National Survey found that most sexual harassment in the workplace is not formally reported.[24] This was consistent with what the Commission heard in consultations and submissions throughout this Inquiry. Given the lack of reporting and the absence of comprehensive data from human rights and anti-discrimination agencies and regulatory agencies that handle sexual harassment matters (discussed below), the Commission's national surveys provide the most comprehensive and robust data available in Australia to understand the prevalence, nature, reporting and impacts of workplace sexual harassment. Large-scale surveys, such as the Commission's national survey, can also assist in measuring progress to address sexual harassment. The United Kingdom (UK) House of Commons Women and Equalities Committee recently concluded that:

> It is crucial, if we are to gauge the effect of actions being taken now to stamp out sexual harassment in the workplace, that robust and comparable data is collected at regular intervals.[25]

This Committee recommended that as complaints or administrative data 'tells only a small part of the story', large-scale, government-funded surveys should be conducted regularly to determine the prevalence and nature of sexual harassment in the workplace.[26]

(iv) Capturing detailed industry data

The national survey can provide useful information to assist employers, governments, unions and others to better target prevention initiatives, resources and support. For example, it can highlight industries, occupations, or types of workplaces with higher prevalence rates of sexual harassment. It can also point to industries in which there is less formal reporting despite a high prevalence of sexual harassment, indicating there may be particular barriers to reporting. The Commission heard from employers that the national survey was:

> a fantastic opportunity to be able to go back to the workplace and say hey, look at these results, let's just have a chat about our workplace and what we can be doing.[27]

Giving employers robust and reliable data will help inform tailored actions and responses to workplace sexual harassment.

The national survey data is compiled into industry categories as defined by the ABS' *Australian and New Zealand Standard Industrial Classification* (ANZSIC) system.

ANZSIC classifications

ANZSIC is the standard classification system used in Australia and New Zealand. The system allows for the collection, compilation and publication of statistics by industry.[28]

ANZSIC provides a standard framework for grouping businesses which carry out similar activities into industries.[29] ANZSIC has 19 broad industry divisions and 96 industry subdivisions.[30] Subdivisions can also be further divided into groups, and groups into classes.[31]

The subdivision level provides more detailed information about distinct groupings of business activities within a broad industry division. For example, the industry division of arts and recreation services is comprised of four distinct subdivisions: heritage activities; creative and performing arts activities; sports and recreation activities; and gambling activities.[32]

The 2018 National Survey collected information from survey respondents on both the industry division and subdivision in which they said they experienced the most recent incident of workplace sexual harassment.[33] While data on industry division was reported on in the 2018 National Survey, the sample across different industries was not large enough to allow for statistically reliable findings to be reported at the industry subdivision level.[34]

It is important that the survey captures and reports industry data that is as detailed as possible, to ensure relevance and usefulness for employers, governments, researchers and others. This is especially important for industries that comprise a number of disparate subdivisions, such as arts and recreation services (discussed in the text box above).

More detailed industry data will assist in more accurately identifying whether there are different rates of prevalence and reporting of sexual harassment across different subdivisions within a particular industry grouping and will better inform action to prevent and respond to sexual harassment in industries with higher rates.

(v) Accessibility of the survey instrument

In the 2018 National Survey, the Commission noted that the survey was delivered in English and it is therefore possible that comprehension of the survey questions or cultural differences may have impacted responses for people of culturally and linguistically diverse (CALD) backgrounds.[35]

Some stakeholders raised concerns about the accessibility of the survey instrument for people of CALD backgrounds.[36] The Federation of Ethnic Communities Council of Australia (FECCA) noted that the national survey is delivered only in English, that some of the language in the survey instrument is 'technical and nuanced', and that there is no sample quota for people of CALD, migrant and/or refugee backgrounds.[37] FECCA also noted that the survey measured cultural and linguistic diversity by whether the main language spoken at home was a language other than English.[38] This would not capture other factors relevant to cultural and linguistic diversity (for example, religion, culture, country of birth or visa status).

FECCA argued that the survey should adequately capture the experiences of people of CALD backgrounds because:

> Australia is increasingly diverse with a quarter of Australia's population born overseas, 43 percent of people having at least one overseas-born parent and more than one-fifth (21 per cent) of Australians [speaking] a language other than English at home.[39]

FECCA explained that 'lack of English contributes to vulnerability and exploitation'. It suggested that 'the concept and definition of sexual harassment is nuanced and is better explained in the person's preferred language.[40]

For example, FECCA noted that words used in the survey instrument, such as 'inappropriate' and 'intrusive', are unclear and that 'the subjective nature of discomfort is difficult to articulate'.[41] FECCA suggested these issues might be addressed by the 'use of plain English and culturally appropriate translated survey questions'.[42]

Similar considerations may arise for some people with an intellectual and other disabilities, who may have difficulty with the survey instrument in its current format.

The Commission's view

The Commission considers that the national survey provides essential data to inform policy and practice by governments, employers, non-government organisations and the broader community to address sexual harassment.

In view of the evidence of under-reporting of workplace sexual harassment, and the limitations of administrative data (discussed below), a population-based survey delivers vital evidence to better understand the different facets of this complex issue, and to provide comparable evidence of changes over time.

The Commission's view is that the national survey should be conducted every four years to provide this data. Given its large sample size and broad scope, a survey frequency of four years is practical and balances the need to provide regular data on workplace sexual harassment that can allow analysis of trends over time, and the resources required to conduct and report on a survey of this scale.

The value of a data source such as the national survey is increasingly recognised internationally.[43] In this respect, Australia, as a country that already has a well-established national survey that can provide comprehensive data on workplace sexual harassment, is a global leader.

It is essential that the national survey reports data that is as detailed as possible at an industry level, to ensure relevance and usefulness for employers, governments and others.

In this report, the Commission has identified a number of other critical gaps in the evidence available on workplace sexual harassment (see Section 3.9). Some of these gaps may be addressed by enhancing the national survey. These include, for example, information relating to characteristics and trends in relation to harassers (see Section 3.6), and the long-term impacts of workplace sexual harassment (see Section 3.8).

Given the issues raised in relation to accessibility of the survey instrument, the Commission also recommends that future survey instruments are designed to ensure accessibility for people of CALD backgrounds.

RECOMMENDATION 2:

The Commission conduct a nationally representative survey every four years, funded by the Australian Government, that:

a. **provides data on sexual harassment, including the prevalence, nature, reporting, impacts of and responses to workplace sexual harassment, and identifies trends over time**
b. **provides detailed industry data which allows analysis across and within industries**
c. **is accessible and adequately captures experiences of sexual harassment across all population groups, including people of culturally and linguistically diverse backgrounds.**

(a) Survey methods that can affect prevalence rates

Estimates of the prevalence of workplace sexual harassment are drawn from population surveys. There can be considerable differences in survey results depending on the methods used to conduct the survey, including:

- the sampling method
- the timeframe the survey examines
- the types of questions asked.

(i) Sampling methods

Some surveys use 'convenience sampling' methods. Convenience sampling relies on collecting data from members of the population who are readily and conveniently available and randomly selected.[44] Examples of convenience sample surveys include street-corner interviews, magazine and newspaper questionnaires and phone-in polls.[45]

Convenience sampling is a less reliable way of estimating the prevalence of sexual harassment than surveys that use a randomly representative sample of participants (a probability sample), such as the Commission's national surveys.[46]

Convenience surveys are not representative of the population, as there is no control over the selection of survey respondents. Convenience samples can also be subject to bias, as it is more likely that people who feel strongly about the topic will respond.[47]

(ii) Timeframes

Surveys that ask about sexual harassment over a longer timeframe will result in higher estimates of prevalence than surveys that ask about sexual harassment experienced over a shorter timeframe.[48]

For example, the 2018 National Survey found that of people who had been in the workforce in the last five years, 20% said they had been sexually harassed in the workplace in the last 12 months, compared to 33% who said they had been sexually harassed in the workplace in the last five years (that is, the longer timeframe resulted in a higher prevalence estimate).[49]

The 2018 National Survey also asked respondents if they had ever been sexually harassed at any time or anywhere in their lifetime (not just at work). As expected, the prevalence rate was highest in response to this question, with 71% of people indicating they had experienced sexual harassment in their lifetime.[50]

(iii) Types of questions

Surveys that provide participants with a direct question and little or no explanation, such as 'Have you experienced sexual harassment in your workplace?', will result in substantially smaller prevalence estimates than surveys that ask about specific behaviours that are likely to constitute sexual harassment.[51]

Specific behaviours that are likely to constitute sexual harassment

In the Commission's 2018 National Survey, survey participants were asked if they had experienced the following specific behaviours. These behaviours are likely to constitute sexual harassment under the *Sex Discrimination Act 1984* (Cth).

The specific behaviours used in the 2018 National Survey were:

- unwelcome touching, hugging, cornering or kissing
- inappropriate staring or leering that made you feel intimidated
- sexual gestures, indecent exposure or inappropriate display of the body
- sexually suggestive comments or jokes that made you feel offended
- sexually explicit pictures, posters or gifts that made you feel offended
- repeated or inappropriate invitations to go out on dates
- intrusive questions about your private life or physical appearance that made you feel offended
- inappropriate physical contact
- being followed or watched or having someone loitering nearby
- requests or pressure for sex or other sexual acts
- actual or attempted rape or sexual assault
- indecent phone calls, including someone leaving a sexually explicit message on voicemail or an answering machine
- sexually explicit comments made in emails, SMS messages or on social media
- repeated or inappropriate advances on email, social networking websites or internet chat rooms
- sharing or threatening to share intimate images or film of you without your consent
- any other unwelcome conduct of a sexual nature that occurred online or via some form of technology.[52]

Surveys that estimate prevalence based on a direct question about sexual harassment (with little or no explanation, such as a simple legal definition of sexual harassment) rely on the participants' subjective assessments of what constitutes sexual harassment. By contrast, surveys that estimate prevalence based on questions about specific behaviours that are likely to constitute sexual harassment provide an objective method for measuring sexual harassment prevalence.[53]

Relying on participants' subjective assessments of sexual harassment (as with a simple legal definition) is problematic. Many individuals may not perceive the behaviour they have experienced as being sexual harassment.[54] Individuals have different levels of awareness of their legal rights and of the scope and effect of sexual harassment laws.[55] As discussed in Section 3.4, the Commission heard frequently in consultations and submissions that people did not understand what behaviours constitute sexual harassment.

For this reason, the 2018 National Survey asked survey respondents both if they had experienced sexual harassment based on a simple legal definition and if they had experienced any of the behaviours likely to constitute sexual harassment.

As noted above, 43% of respondents said they experienced sexual harassment in their lifetime, based on a simple legal definition. However, when the same respondents were asked if they had experienced a range of specific behaviours (all of which likely amount to sexual harassment) in their lifetime, a substantially higher proportion said they had (71%).[56]

In the workplace context, there is also evidence that people often minimise sexually harassing behaviours or are reluctant to label this as sexual harassment, where they fear their competence or ability to be a team player may be questioned or where sexual harassment is normalised and sanctioned in their workplace.[57]

(b) Other sources of prevalence data

Large-scale surveys, such as the Commission's national survey, provide a useful source of data for understanding the prevalence of sexual harassment and other facets of this issue.

There is some data on prevalence rates of workplace sexual harassment from other jurisdictions. However, the Commission's national survey is world-leading in providing access to large-scale, reliable data collected at regular intervals with a sample size broadly representative of society, which can inform us of the scale or prevalence of sexual harassment in the workplace and trends over time.

In the United States (US), a 2003 meta-analysis of numerous studies (involving, collectively, 86,000 participants) from the 1970s to the 1990s, found that an average of 58% of women reported experiencing workplace sexual harassment.[58]

In later studies conducted in the UK in 2016 and 2017 prevalence rates of women who had experienced workplace sexual harassment ranged from 20%,[59] to 40%,[60] to 52%.[61] Other surveys from the European Union (EU) and the US found broadly similar prevalence rates to the 2018 National Survey:

- One 2014 EU-wide survey estimated that between 45–55% of women had experienced sexual harassment since the age of 15, of which 32% indicated the harasser was a person from the employment context (such as a colleague, boss or customer).[62]
- In the US, one 2019 nationally representative survey found that 38% of women had experienced workplace sexual harassment,[63] while another conducted online in 2018 reported that 59% of women had experienced sexual harassment, in or outside of a work context (with 55% indicating this happened both in and outside of work settings).[64]

It is difficult to compare prevalence rates among jurisdictions meaningfully due to the significant variations in methodology, survey design, sample size, timeframes and types of questions asked. What can be inferred is that, although they vary in their estimates, these surveys, like the Commission's national survey, reflect the magnitude of the problem of workplace sexual harassment and its pervasiveness in workplaces in Australia and internationally.

In Australia, the findings from the ABS 2016 Personal Safety Survey provide another source of data to help understand the prevalence of sexual harassment more broadly. The survey collected information from men and women's lifetime experiences of sexual harassment and showed that:

- Two in five people (39% or 7.2 million) aged 18 years and over experienced sexual harassment during their lifetime.[65]
- One in two women (53% or 5 million) and one in four men (25% or 2.2 million) had experienced sexual harassment during their lifetime.[66]
- Between 2012 and 2016 there was a significant increase in the proportion of both men and women who experienced sexual harassment in the 12 months prior to the survey.[67]

While these prevalence rates are not specific to sexual harassment in a workplace context, the data provides a broader context against which to compare and analyse more detailed data on sexual harassment in a workplace setting. Methodological differences between the Personal Safety Survey and the Commission's 2018 National Survey mean that results from these two surveys cannot be directly compared. For example, the Personal Safety Survey asked respondents if they had ever experienced seven different types of behaviours that might constitute sexual harassment, while the 2018 National Survey asked respondents about 16 different behaviours.[68]

As discussed in Section 3.7 and Section 6, 'Preventing and responding to sexual harassment in the workplace', some unions, industry and professional bodies, have conducted their own surveys and collected data on prevalence of sexual harassment in their own industries and sectors. However, the same issues with methodology, survey design, sample size and timeframes make these difficult to compare.

The Commission has also conducted surveys on the prevalence, nature and reporting of sexual harassment as part of broader reviews into specific sectors, drawing on the format and methodology of the Commission's national surveys. These include:

- The 2012 *Review into the Treatment of Women in the Australian Defence Force*, which found that 25.9% of women and 10.5% of men in the Australian Defence Force (ADF) had experienced sexual harassment in an ADF workplace in the last five years.[69] This was compared to prevalence rates in the Commission's 2012 national survey of 25.3% of women and 16.2% of men in the last five years.[70]
- The 2017 *Change the course: National report on sexual assault and sexual harassment at Australian universities (Change the course)*, which found that in 2016, one in five (21%) students was sexually harassed in a university setting in the previous year.[71]
- In 2019, the Commission conducted a survey of Shop, Distributive and Allied Employees' Association (SDA) members, which found that 39% had experienced workplace sexual harassment in the last five years, higher than the prevalence rate for the general working population in the 2018 National Survey.[72]

As the ADF and SDA surveys illustrate, greater consistency in the methodology and design of surveys can better allow for comparisons to be made of sexual harassment across industries, sectors and data at a national level. This can highlight and expose particular challenges or barriers to addressing sexual harassment, and provide more useful information for industry stakeholders to develop targeted interventions, tailored to systemic drivers and conditions in specific industries.

Other important data sources for gaining an understanding of sexual harassment include administrative data collected by government agencies and regulatory bodies that handle sexual harassment matters, discussed below.

(c) Complaints data from human rights and anti-discrimination agencies

As discussed in Section 5, 'The legal and regulatory framework', the Commission and state and territory human rights and anti-discrimination agencies have powers to receive, investigate and conciliate complaints of workplace sexual harassment under relevant human rights and anti-discrimination legislation.

The Commission examined its own data on enquiries and complaints relating to sexual harassment for the past three financial years, 2015–18. Enquiries included contact made by individuals and organisations received by phone, in writing and in person, seeking information about the Commission's complaint-handling function. Complaints were matters accepted by the Commission as a complaint under the *Australian Human Rights Commission Act 1986* (Cth).

The Commission also sought data on enquiries and complaints relating to sexual harassment from state and territory human rights and anti-discrimination agencies for the past three financial years. The data provided by all jurisdictions is included at Appendix 5.[73] Key findings from the data are set out in this section.

The type of data collected and systems for recording data vary widely between jurisdictions. For example, some human rights and anti-discrimination agencies did not collect data on the industry in which a complainant worked, while other agencies could only extract data on the outcomes of a conciliation manually (by reviewing the case files), as these details were not recorded as part of a minimum data set for each complaint.

Enquiries and complaints data reveal the types of matters about which people most commonly seek assistance from human rights and anti-discrimination agencies. They are an important indicator relevant to understanding discrimination, including sexual harassment, and the contexts in which it occurs. However, not every perceived experience of sexual harassment results in an enquiry or complaint, so this data cannot be used to measure the overall prevalence of sexual harassment.

(i) Sexual harassment enquiries

Anti-discrimination bodies in larger jurisdictions generally received a higher number of enquiries overall relating to sexual harassment than those in smaller jurisdictions. For example, in 2017–18, the Commission, which has coverage across all of Australia, received 747 enquiries related to sexual harassment (5.3% of all Commission enquiries).

This was followed by the Victorian Equal Opportunity and Human Rights Commission (374 sexual harassment enquiries or 4.5% of all Victorian enquiries), Anti-Discrimination NSW (132 sexual harassment enquiries or 3.7% of all NSW enquiries) and the Queensland Human Rights Commission (132 sexual harassment enquiries or 4.8% of all Queensland enquiries).

Most jurisdictions did not capture sexual harassment enquiries as a subset of sex discrimination enquiries. However, data from the Commission showed that sexual harassment enquiries formed a substantial proportion of all enquiries received relating to sex discrimination over the past three financial years. For example, in 2017–18, sexual harassment enquiries made up just over 31% of all enquiries received relating to sex discrimination.

In all jurisdictions, the majority of sexual harassment enquiries related to employment, compared to other areas of public life (such as education, clubs or the provision of accommodation, goods and services). In 2017–18, at least three quarters (75%) of sexual harassment enquiries related to employment in most jurisdictions, with this figure rising to 90% in NSW and Tasmania.[74]

(ii) Sexual harassment complaints

As with enquiries, anti-discrimination bodies in larger jurisdictions generally received a higher number of complaints relating to sexual harassment. For example, the Commission received 321 complaints relating to sexual harassment (15% of all complaints received), while the ACT Human Rights Commission, with one of the smallest populations, received seven sexual harassment complaints (3% of all complaints received).

As with enquiries data, most jurisdictions did not capture sexual harassment complaints as a subset of sex discrimination complaints. The Commission's data showed that sexual harassment complaints made up a majority of all complaints received relating to sex discrimination over the past three financial years (for example, 58% of all sex discrimination complaints in 2017–18).

The vast majority of sexual harassment complaints in all jurisdictions related to the area of employment, compared to other areas of public life. The number of employment-related sexual harassment complaints received over the three-year period varied significantly in each jurisdiction.

The Commission, Anti-Discrimination NSW, South Australian Equal Opportunity Commission, Equal Opportunity Tasmania and ACT Human Rights Commission all recorded an increase in the number of sexual harassment complaints received over this period. For example, the Commission received 213 sexual harassment complaints in 2015–16, 232 in 2016–17 and 300 in 2017–18.

However, the WA Equal Opportunity Commission, Victorian Equal Opportunity and Human Rights Commission and Queensland Human Rights Commission received more employment-related sexual harassment complaints in 2015–16 than in 2017–18.

Table 3.1: Sexual harassment complaints received by Australian human rights and anti-discrimination agencies, 2017–18[75]

Agency	Number of sexual harassment complaints	Sexual harassment complaints in the area of employment		Gender of complainant	
		Number	%	Female %	Male %
Australian Human Rights Commission	321	300	93%	68%	32%
ACT Human Rights Commission	13	13	100%	69%	31%
WA Equal Opportunity Commission	26	26	100%	88%	12%
Equal Opportunity Tasmania	21	13	62%	62%	38%
Anti-Discrimination NSW	110	98	89%	72%	31%
Northern Territory Anti-Discrimination Commission	10	10	100%	100%	%
Queensland Human Rights Commission	78	58	74%	N/A	N/A
South Australian Equal Opportunity Commission	30	30	100%	53%	47%
Victorian Equal Opportunity and Human Rights Commission	90	86	96%	81%	19%

Source: Australian Human Rights Commission and state and territory human rights and anti-discrimination agencies.

Demographics of complainants

In all jurisdictions in 2017–18, the majority of employment-related sexual harassment complaints were made by women. Of employment-related sexual harassment complaints received by the Commission, 68% were made by women. The figures for each jurisdiction are presented in Table 3.1 above.

Most jurisdictions did not provide the Commission with consistent data on the age of complainants. Equal Opportunity Tasmania was the only agency that provided the age of each complainant in 2017–18, and the WA Equal Opportunity Commission provided the age of 23 out of 26 complainants.[76] In other jurisdictions, either age data was not provided, or there were too many complaints where the complainant age was unknown to allow for meaningful analysis.

While some jurisdictions provided data on the level of English spoken by the complainant, most jurisdictions did not provide the Commission with comprehensive data on other demographic characteristics of complainants, such as Aboriginal or Torres Strait Islander descent, country of birth or disability. In some jurisdictions this data was not recorded; in other jurisdictions the percentage of 'unknown' was too high to allow for meaningful analysis.

Only the Commission and Anti-Discrimination NSW provided data on the employment status of complainants. In 2017–18, the majority (78%) of employment-related sexual harassment complaints received by the Commission were made by complainants in either full-time or part-time employment,[77] and in NSW, 87% of employment-related sexual harassment complaints were made by complainants in full-time employment.

Industry

Industry data recorded for employment-related sexual harassment complaints (based on the industry of the respondent) also varied across jurisdictions. In 2017–18:

- Public administration and safety was the most common industry for complaints received by the ACT Human Rights Commission (four complaints or 31% of employment-related sexual harassment complaints).
- Retail trade was the most common industry for complaints received by the South Australian Equal Opportunity Commission (10 complaints or 33% of employment-related sexual harassment complaints) and the Victorian Equal Opportunity and Human Rights Commission (27 complaints or 31% of employment-related sexual harassment complaints).

- Accommodation and food services was the most common industry for complaints received by the WA Equal Opportunity Commission (six complaints or 24% of employment-related sexual harassment complaints).
- Health care and social assistance was the most common industry for complaints received by Equal Opportunity Tasmania (three complaints or 23% of employment-related sexual harassment complaints).

Industry data was not captured by the Northern Territory Anti-Discrimination Commission, and different categories were used by Anti-Discrimination NSW. In the case of the Commission, the industry of the respondent was unknown or not recorded in more than one-third (35%) of complaints, so it was not possible to identify the most common industry from the Commission's data set. See Appendix 5 for available data.

(iii) Data on the outcomes of complaints

In 2017–18, conciliation (resolution or settlement of the complaint) was the most common (or equal first) outcome for employment-related sexual harassment complaints in all jurisdictions except South Australia, where complaints were most commonly terminated and referred to the relevant tribunal.

For the two jurisdictions with the greatest number of conciliated complaints—the Commission and Anti-Discrimination NSW—financial compensation was the most common outcome of conciliation:

- Of the 166 employment-related sexual harassment complaints received by the Commission that were settled, 53 complaints (32%) resulted in payment of financial compensation to the complainant.
- Of the 53 employment-related sexual harassment complaints received by Anti-Discrimination NSW that were settled, 34 complaints (64%) involved payment of financial compensation.

Other outcomes for employment-related sexual harassment complaints commonly included provision of an apology to the complainant and anti-discrimination training. Data provided by the Commission and state and territory agencies on the outcomes of complaints is at Appendix 5.

(iv) The need for improved data collection by anti-discrimination agencies

Data collected by human rights and anti-discrimination agencies on sexual harassment complaints provides important evidence that can assist governments, employers, community organisations and researchers to address sexual harassment. For example, UN Women highlighted comprehensive data collection as a 'core element' of procedures to address sexual harassment:

> Data collected on the entire cycle of reports, disaggregated by intersectional identities for survivors and perpetrators, with official steps taken or not taken, must be built into the normal functioning of the process and transparently made available publicly at regular intervals.[78]

The need for improved data on sexual harassment complaints was also emphasised in submissions to the Commission. Women's Health Victoria noted that data on sexual harassment is limited because of low reporting rates, the lack of obligation on employers to publicly report cases of sexual harassment, the prevalence of non-disclosure agreements, and the absence of sexual harassment-specific data from regulatory agencies.[79]

Victoria Legal Aid told the Commission that improved complaint and settlement data 'could help identify trends, build deterrence, and encourage measures that tackle sexual harassment as a systemic issue'.[80] Professors McDonald and Charlesworth argued that complaints data is a crucial source of information for addressing sexual harassment.[81] They argued that, depending on the type of data collected, it can:

- provide evidence for organisations and researchers to generate strategies to address the problem
- assist in monitoring 'hot spots', such as over or under-reporting within particular industries
- enable identification of occupations that would benefit from targeted educational materials.[82]

However, as discussed above, there is little consistency in the data collected or reported by human rights and anti-discrimination agencies on sexual harassment complaints. For many indicators (such as the complainant's age and employment status and respondent's industry), data was not collected systematically by all jurisdictions.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) recommended 'harmonisation' of complaints data (collection and reporting of a consistent set of data) collected by anti-discrimination bodies. It recommended that the Australian, state and territory governments 'provide additional funding to anti-discrimination commissions to enable them to improve their data collection, analysis and reporting'.[83]

Professors McDonald and Charlesworth recommended that, at minimum, the data set collected and reported on by human rights and anti-discrimination agencies should include demographic characteristics of the complainant, such as sex, age, place of birth, occupation and employment status; characteristics of the respondent, such as industry and size of workplace; and the characteristics of the harassment itself.[84]

Another common theme raised in submissions was the importance of systematic collection and reporting of outcomes from complaints received by human rights and anti-discrimination agencies.[85] Victoria Legal Aid, drawing on a report by Kingsford Legal Centre, suggested that complaints data be collected in relation to:

- the nature of the complaint
- outcomes achieved
- how many parties were legally represented
- the number of complaints accepted, terminated, withdrawn or settled.[86]

Professors McDonald and Charlesworth noted that 'there is little publicly available data and only infrequent research that has addressed the outcomes of conciliation processes.'[87] They argued that this means complainants come to conciliations uncertain about what outcomes are possible or realistic, as they do not have access to 'information that could be used to guide their expectations or claims, evaluate the fairness of their settlements, or provide a deterrent for individuals and workplaces'.[88]

This information is especially important given that just under half (43%) of complainants had no legal representation at conciliations for employment-related sexual harassment complaints received by the Commission. This proportion was even higher in some other jurisdictions.[89]

As discussed in Section 5.4(i)(vii), 'Conciliation register', several submissions recommended collection and publication of uniform, de-identified data on sexual harassment complaints, including settlement outcomes, by all anti-discrimination bodies, with some suggesting this be coordinated through a centralised database.[90] The Northern Territory Anti-Discrimination Commission, for example, argued that this would 'support advocates in their work, provide data for researchers and enable a platform for greater public discourse about this issue'.[91]

Unions NSW further suggested that a centralised mechanism for reporting de-identified settlement data should include data from other regulatory agencies that have the power to deal with sexual harassment complaints, such as the Fair Work Commission.[92]

(d) Complaints data from regulatory agencies

Other key regulatory bodies that handle matters relating to sexual harassment include the Fair Work Commission, the Fair Work Ombudsman, state and territory work health and safety (WHS) regulators, and state and territory workers' compensation bodies. The roles of these agencies are discussed in detail in Section 5, 'The legal and regulatory framework'.

The Commission requested data collected by these bodies on workplace sexual harassment. Responses to these requests highlighted a considerable gap in sexual harassment data collected by most of these agencies.

(i) Fair Work system data

Neither the Fair Work Commission nor the Fair Work Ombudsman captures data on matters relating to sexual harassment. The Fair Work Ombudsman advised the Commission that this is because sexual harassment is not a matter falling within its jurisdiction.[93] The Fair Work Ombudsman was able to provide data on:

- completed workplace disputes relating to discrimination in 2017–18 (13 in total)
- finalised litigations of workplace disputes which included allegations of discrimination (from 2009 to February 2019, nine in total)
- matters involving discrimination currently before the courts (as of February 2019, four in total).

The Fair Work Ombudsman confirmed that none of these matters related to sexual harassment.[94]

(ii) WHS data

The only jurisdiction that provided the Commission with data on WHS matters relating to sexual harassment was WorkSafe Victoria. From October 2018, WorkSafe Victoria refined the categories used to capture calls made to its Advisory Services that related to psychosocial hazards (that is, whether the calls related to sexual harassment, workplace bullying, workplace stress, occupational violence, or other factors).[95]

WorkSafe Victoria's data show that from October 2018 to March 2019 (the period for which sexual harassment data was available), 55 calls were made to the Advisory Service that related to sexual harassment. This accounted for 1.8% of the total 3088 calls made to the Advisory Service during that time.[96]

People who have a complaint about a psychosocial WHS matter (including sexual harassment) can contact the WorkSafe Advisory Services with their complaint. WorkSafe Victoria then triages the complaint and determines whether to take action on a matter based on the information provided through an initial contact and/or a Summary of Events (SoE) form, and potentially suggest the complainant contact other agencies that can provide additional support such as VEOHRC.[97]

WorkSafe Victoria provided data on the number of SoEs relating to sexual harassment that were returned to the agency. Data shows that 17% of SoEs (six out of 36) returned to WorkSafe Victoria in March 2019 related to sexual harassment.[98]

(iii) Workers' compensation claims data

Safe Work Australia provided the Commission with data from the National Data Set for Compensation-based Statistics (National Data Set), which includes information on all workers' compensation claims made through jurisdictional workers' compensation schemes (data for Victoria was not included, but was provided separately to the Commission by WorkSafe Victoria).[99] Safe Work Australia informed the Commission that the National Data Set only captures data on claims that are accepted by a workers' compensation scheme.[100]

The category of data under the National Data Set most relevant to sexual harassment relates to claims for 'mental stress'. A sub-category of mental stress claims is 'other harassment', which includes claims relating to both sexual harassment and racial harassment.[101] As this data cannot be disaggregated, its usefulness in understanding the nature of sexual harassment claims specifically is limited.

Safe Work Australia told the Commission that 'other harassment' claims account for a small proportion of all claims (on average 140 claims per year between 2012–13 and 2016–17).[102] Despite the small number of 'other harassment' claims, the National Data Set does reveal:

- The average time lost for 'other harassment' claims was substantially higher than that of all accepted workplace compensation claims: 8.4 weeks compared to 0.7 weeks.
- The typical compensation paid for 'other harassment' claims was more than five times higher than that for all accepted claims: $14,073 compared to $2,448.
- The frequency rate of 'other harassment' claims for women was almost five times the frequency rate for men—1.9 claims compared to 0.4 claims per 100 million hours worked.

- The industries with the highest frequency rates of 'other harassment' claims (double that of other industries) were health care and social assistance (2.1 claims per 100 million hours worked), education and training (2.0 claims per 100 million hours worked) and public administration and safety (1.8 claims per 100 million hours worked).[103]

The Commission also received Victorian workers' compensation data from WorkSafe Victoria. This data shows that workers' compensation claims relating to possible sexual harassment/assault accounted for a small proportion of all claims (for example, 104 claims in 2017–18 representing less than 0.4% of all claims).[104] The WorkSafe Victoria data also showed that, over the three financial years from 2015–18:

- An average of 257 days was lost from work for sexual harassment/assault claims, compared to an average of 147 days for all other claims.
- The average compensation amount paid to people with possible sexual harassment/assault claims was $29,910, compared to an average $14,585 for other claims.
- The industries with the highest number of claims relating to possible sexual harassment/assault were: health care and social assistance (56 claims), public administration and safety (42 claims), and education and training (25 claims).
- The majority of possible sexual harassment/assault claims (85%) were made by women; for all other claims, the majority (64%) were made by men.[105]

These findings from the Victorian data are similar to those from the National Data Set (noting that the National Data Set included claims relating to both racial and sexual harassment), indicating:

- longer periods off work for sexual harassment claims compared to other claims
- higher average amounts of compensation for sexual harassment claims compared to other claims
- women accounted for the majority of accepted workers' compensation claims relating to sexual harassment
- the industries with the highest frequencies of sexual harassment claims were health care and social assistance, education and training and public administration and safety.

(iv) The need for improved data collection by regulatory agencies

There are substantial gaps in the sexual harassment-related data collected by Fair Work, WHS and workers' compensation agencies. Where data does exist, the number of sexual harassment-related matters is low compared to other types of matters. Reasons for this may include:

- The low numbers reflect the 2018 National Survey findings that only about one in five (17%) of people who said they experienced workplace sexual harassment in the last five years made a formal complaint or report.[106]
- The Fair Work and WHS jurisdictions have generally not, to date, dealt with sexual harassment as a main focus of their work. As a result, victims of workplace sexual harassment are more likely to make a complaint to a human rights or anti-discrimination agency.
- It is possible that when a complaint involves sexual harassment and other employment or WHS issues, the complaint is recorded under the category more frequently dealt with by the agency (for example, bullying).

However, there are compelling reasons for ensuring that Fair Work, WHS and workers' compensation agencies, as well as human rights and anti-discrimination agencies, collect consistent and comprehensive data on sexual harassment. As noted above, this data can contribute to the evidence base on sexual harassment to inform policy solutions, track trends over time and identify 'hotspots' to guide targeted prevention and education initiatives. Effective data collection can also help identify the level of demand for services provided by complaint-handling bodies and improve service delivery.[107]

A number of submissions also called for more robust data on sexual harassment as a WHS risk.[108] For example, the National Working Women's Centres recommended that 'WHS regulators collect and publish sex-disaggregated data on gendered occupational violence complaints and enquiries'.[109] Similarly, Gender Equity Victoria recommended that WHS regulators and other bodies should be 'obligated to collect data on sexual harassment at work in order to help design evidence-based prevention strategies'.[110]

Under the Commission's proposed new regulatory model for addressing workplace sexual harassment, outlined in Section 5, regulatory bodies in the Fair Work and WHS systems, together with human rights and anti-discrimination agencies, will take on an enhanced role in addressing workplace sexual harassment. The effectiveness of this major policy change cannot be adequately measured unless adequate data collection and reporting systems are implemented across all agencies that handle sexual harassment matters. This will enable agencies to track, for example, the extent to which people affected by sexual harassment use different agencies as an avenue to address their complaint.

(v) Information sharing between agencies

The redeveloped regulatory model to address sexual harassment, which will see the Fair Work, WHS and human rights systems working together in a coordinated way to deal with sexual harassment complaints, will operate most effectively if there are well-developed mechanisms for information sharing between the agencies involved.

The importance of information sharing between agencies that handle sexual harassment matters was highlighted in the submission from the Victorian Equal Opportunity and Human Rights Commission, which recommended that '[r]egulators with oversight of sexual harassment should continue to work cooperatively to share information and build capacity in relation to sexual harassment, including at work'.[111]

Victoria Legal Aid suggested that information sharing could 'be managed by memoranda of understanding between the regulators to ensure they share data and coordinate their activities'.[112] As an example, Victoria Legal Aid directed the Commission to memoranda of understanding (MoUs) between the US Equal Opportunity Commission and other US government agencies, which 'explain how two or more agencies will cooperate and interact when their enforcement responsibilities overlap'.[113]

WorkSafe Victoria also informed the Commission of MoUs it has entered into with other regulators and government agencies to clarify how the parties will work together to fulfil their responsibilities effectively. For example, in relation to allegations of bullying, the MoU between WorkSafe Victoria and the Victorian Police requires each party to 'notify the other about allegations of bullying which may fall within the other party's jurisdiction', immediately on becoming aware of them.[114] A number of MoUs between WorkSafe Victoria and other parties are accessible through Worksafe Victoria's website.[115]

The Commission's view

As discussed in Section 5, 'The legal and regulatory framework', there have been strong calls from employers, industry bodies, unions, community organisations and individuals for Fair Work and WHS bodies to play a stronger role in the regulation of workplace sexual harassment.

The Commission has made a range of recommendations to give effect to a new model to address workplace sexual harassment and ensure that the work of regulatory agencies in their handling of workplace sexual harassment matters is informed by an understanding of the nature, drivers and impacts of these behaviours.

The Commission agrees that data on sexual harassment complaints made to human rights and anti-discrimination agencies, including settlement outcomes, are a valuable source of information that can inform efforts to prevent and address sexual harassment. The Commission also recognises that there is currently no consistency across human rights and anti-discrimination agencies in the type of data collected, and that systematic consideration should be given to what data would provide useful measures to inform effective prevention of and response to workplace sexual harassment.

Metrics could include, for example, data relating to the people accessing the different systems and agencies, the nature of complaints being made and remedies sought, outcomes of complaints and identification of industry and demographic information. Metrics could also include measures of performance and progress in addressing outcomes related to workplace sexual harassment.

Effective systems for data collection and reporting on sexual harassment metrics will be critical to the success of the new regulatory model proposed by the Commission.

This data will contribute to long-term planning and policy development by governments, business and the community sector to address workplace sexual harassment and support industry workplace initiatives.

The Commission recommends that a coordinated and consistent set of sexual harassment metrics be developed to guide data collection by all agencies. Given the complexity of arriving at agreed measures across these jurisdictions, this work should be led by the Workplace Sexual Harassment Council, the new body recommended by the Commission which brings together representatives from human rights and anti-discrimination agencies and regulatory agencies in the Fair Work, WHS and workers' compensation systems (see Section 5).

This work to develop sexual harassment metrics may include, but is not limited to, consideration of:

- key research and policy questions that metrics can assist in answering/understanding
- identification of key measures
- agreement on data items to be collected
- definitions of key terms
- identification of data gaps
- mechanisms for data collection and validation
- data-sharing protocols
- reporting timeframes
- reporting methods (such as centralised reporting through a database).

Taking into account the varying roles and different purposes of each of these regulatory regimes, it is essential that clear and effective methods are developed for information and data sharing between agencies. As noted above, the development of MoUs between agencies is one way to achieve this outcome.

The Commission considers that agencies that handle workplace sexual harassment matters through the Workplace Sexual Harassment Council, should work together to establish formal arrangements for information sharing. This should take into consideration issues including:

- what information is to be shared
- the circumstances in which information should be shared
- who is authorised to share the information
- how the information should be shared
- for what purposes shared information may be used
- procedures for dispute resolution.

RECOMMENDATION 3:

Agencies that handle workplace sexual harassment matters work with the Workplace Sexual Harassment Council (Recommendation 14) to:

a. collect an agreed de-identified data set relating to workplace sexual harassment enquiries, complaints, claims and settlement outcomes to contribute to a coordinated system of annual reporting on workplace sexual harassment metrics

b. establish formal arrangements for information sharing and data exchange on enquiries, complaints and claims relating to workplace sexual harassment matters.

3.3 Nature of sexual harassment in the workplace

> During my time [in the workplace] sexual harassment has been rife. It has happened repetitively and by different perpetrators. The majority … were persistent with their efforts. A small number were 'one off' incidents. The incidents took place at work, at work social functions and outside of work.[116]

Throughout this Inquiry, the Commission heard that workplace sexual harassment is a complex and multifaceted phenomenon. Each victim's experience of workplace sexual harassment is unique and influenced by a range of factors, including the kind of behaviour it involves and when, for how long, and the location in which the sexual harassment occurs. As discussed in Section 3.8, these are some of the factors that can also influence the severity of impacts experienced by victims.

The nature of workplace sexual harassment has also changed over time. In particular, the Commission heard that women are increasingly experiencing online or technology-facilitated sexual and sex-based harassment.

The section below outlines what the Commission heard about the nature of workplace sexual harassment today. It discusses the experiences of victims that the Commission commonly heard about, including the types of behaviours, the frequency and duration of the sexual harassment, location of the harassment and the time of day when some workers were exposed more often to sexual harassment, such as during non-standard work hours or while working late shifts.

(a) Types of behaviours

In the 2018 National Survey, and throughout the Inquiry, the Commission heard from victims about the forms of workplace sexual harassment they most commonly experienced. This included:

- verbal forms of sexual harassment, such as sexually suggestive comments or jokes, intrusive questions about private life or physical appearance, repeated invitations to go on dates, or requests or pressure for sex
- sexually explicit pictures, posters or gifts
- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, indecent exposure, or being followed, watched or someone loitering nearby
- inappropriate physical contact, such as unwelcome touching, hugging, cornering or kissing, or actual or attempted rape or sexual assault
- sexual harassment involving the use of technology, including sexually explicit emails, SMS or social media, indecent phone calls, repeated or inappropriate advances online, or sharing or threatening to share intimate images or film without consent.

(i) Verbal forms of sexual harassment

In Australian workplaces, verbal forms of sexual harassment are among the most common types of sexually harassing behaviours experienced. Specifically, sexually suggestive comments or jokes were the behaviours that people said they experienced most commonly in most national surveys on workplace sexual harassment which the Commission has conducted.[117] In *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (the 2018 National Survey), one in four women (25%) and just over one in ten men (13%) said they had experienced sexually suggestive comments or jokes in the workplace in the last five years.[118]

In submissions and consultations, victims detailed examples of unwelcome comments which ranged from making them feel uncomfortable to making them feel highly distressed.

> I was propositioned by a manager I had a lot of respect for, saying he would take me to a hotel and fuck my brains out. It made me really uncomfortable to be near him after that.[119]

Many workers told the Commission about being subject to sexually harassing 'jokes', where the harasser later claimed to be surprised when their attempts at humour were met with offence or insult.[120] Some workers described feeling unsure how they should respond to this harassment, feeling that if they called out a harasser they might be accused of having no sense of humour and be further marginalised.[121]

Commentators have noted that sexual harassment considered to be on the 'lower level of the spectrum', such as joking behaviour, can have a significant impact on victims and the broader workplace, reinforcing gender inequality and marking spaces as 'masculinised' in a socially acceptable way (see Section 3.8).[122] The 2018 National Community Attitudes towards Violence Against Women Survey (NCAS), which measures community attitudes in Australia towards gender equality and violence against women, found that 24% of Australians agreed there is no harm in men making sexist jokes about women when they are among their male friends, and 50% agreed that many women mistakenly interpret innocent remarks as being sexist.[123] The role of gender inequality in sexual harassment, and further information about the NCAS, are in Section 3.4.

Other workers who experienced sexual harassment said they were subjected to intrusive or offensive questions about their private life or physical appearance. This was the second most commonly reported kind of sexual harassment across the Commission's last three national surveys on sexual harassment. In the 2018 National Survey, 19% of women and 10% of men who said they were sexually harassed in the last five years said they were asked intrusive or offensive questions.[124]

One worker provided the following example in their submission:

> Working in a cafe aged 20, a male colleague in his fifties one day asked if I had my period. I asked why, and he said that my breasts were slightly larger than usual. I mentioned this to the female manager and cafe owner and she said, 'He's just like that. Don't get so worked up.'[125]

The Commission heard about other forms of verbal sexual harassment. The 2018 National Survey indicated that in the last five years, 7% of women and 3% of men said they experienced repeated or inappropriate invitations to go out on dates, and 3% of women and 2% of men said they experienced requests or pressure for sex or other sexual acts.[126]

In a submission, one worker recounted that the owner of the business where she worked would sexually proposition her when they were alone, going into 'graphic detail about what he would like to do to me, including different sexual positions, oral sex, and things like wrapping me in glad wrap'.[127]

Being sexually harassed in situations where victims were isolated from co-workers who could witness or intervene to stop the harassment was a common theme in victims' accounts. A teacher working with young adults for a disability service provider told the Commission that one of her students would:

> make comments to me such as 'I know you want to kiss me' etc. One day, after my class … he entered the room. He locked the door behind him and began to approach me, making sexual comments and asking me to touch him. I told him that what he was doing was completely inappropriate. I was afraid because he had locked me in the room with him. I did not know at the time that any other staff were around and he was threatening me.[128]

Other workers told the Commission that harassers had requested a 'skinny dip',[129] or a threesome,[130] among other unwelcome requests. These were frequently repeated requests, with one worker telling the Commission:

> Throughout my career to date, [I] have lost count of the number of times I have been asked for sex. I have received these requests from both colleagues and supervisors, right up to the CEO.[131]

The Commission heard about workplaces where workers were subjected to verbal sexual harassment that occurred openly, pervasively and repeatedly. One worker described the sexually harassing remarks and sexist comments she experienced while working in a male-dominated industry:

> All of this happened in an open office where everyone can hear everything … they stayed silent or joined in to help [my manager] bully me because they thought it was fun, and they enjoyed being inappropriate in a sexist culture.[132]

For some victims, verbal harassment was a precursor to other forms of sexual harassment. One worker told the Commission that, 'From the very first day, my boss made a comment full of sexual innuendo when we were getting a coffee with the team … I brushed it off lightly at the time. But it was the start of much worse'.[133]

Another worker described the behaviour of a new co-worker as 'confronting', including 'persistent attempts to engage me with vile questions, suggestions and innuendo', which escalated into an encounter where the co-worker forcibly pinned her down and kissed her.[134] Several victims told the Commission about experiencing workplace sexual harassment which began with verbal exchanges and ended in rape or sexual assault.[135] Some of these experiences are described below in Section 3.3(a)(v).

(ii) Sexually explicit pictures, posters or gifts

The Commission heard from victims about sexually explicit pictures, posters, gifts or other material that they were shown, given, sent or that were openly displayed in their workplace. The 2018 National Survey indicated that of people who said they experienced sexual harassment in the past five years, 4% said the most recent incident involved sexually explicit pictures, posters or gifts that made them feel offended.[136]

In submissions and consultations, workers told the Commission that sexually explicit images were pinned to their lockers,[137] left on their desks,[138] or that they were given pornographic magazines to take home from work.[139] One woman working in the mining industry described that she and her female co-workers were exposed to 'pornography in our lunch rooms including posters on the walls and magazines'.[140]

The 2018 National Survey indicated that men and women experienced this type of workplace sexual harassment at the same rates.[141] However, in its submission, CARE Australia noted that men's experiences of harassment (such as being shown pornographic images) may differ from women's experiences, in that such forms of harassment 'may pressure [men] to participate in a workplace culture of sexual harassment'.[142]

The Commission heard about the role of pornography in workplace sexual harassment through its reinforcement of 'ideals of male dominance and female subordination'.[143] The submission from Collective Shout argued that while the display of explicit imagery in the workplace is the most obvious way pornography is used to sexually harass workers, its role in perpetuating sexual harassment goes further:

> The harmful gender stereotypes present in pornography contribute to a culture where women are disrespected and objectified. Even when they are not watching pornography in the actual workplace, many men who watch pornography—especially young men—carry the attitudes they learn from it into their interactions with women.

> In other words, we are concerned that pornography use outside the workplace contributes to attitudes held by sexually harassing workers which play out inside the workplace.[144]

The Commission also heard from workers who described receiving gifts from colleagues, often as 'Secret Santa' gifts or to celebrate birthdays, including 'dildos and edible underwear',[145] sex toys or objects such as handcuffs[146] and a vibrator.[147] One worker said, 'My boss bought me a "candy bra" for Kris Kringle and in front of the entire office yelled for me to put it on and could he have a bite of it while it was on and "can I eat your nipple?".'[148]

(iii) Intimidating, humiliating or threatening behaviours

The Commission heard that sexual harassment in the workplace also manifested as intimidating, humiliating or threatening behaviours that did not involve physical contact. According to the 2018 National Survey, of the people who said they experienced sexual harassment in the last five years:

- 16% of women and 5% of men said they experienced inappropriate staring and leering
- 5% of women and 4% of men said they were subjected to inappropriate gestures, indecent exposure or inappropriate display of the body
- 6% of women and 2% of men said they were followed, watched or experienced someone loitering nearby.[149]

A wide range of behaviours fell into the category of intimidating, humiliating or threatening conduct. In submissions and consultations, many workers told the Commission about the harasser standing too close to them or otherwise violating their personal space.[150] Others described finding sexually explicit objects or material in their work station or other places where they would find it, including pornographic images, semen and pubic hair.[151]

One worker told the Commission the harasser had accessed her human resources file to obtain information about her, including her personal contact details.[152] Another worker said that the harasser had 'admitted to monitoring my premises after hours',[153] while yet another described being stalked by a male colleague with whom I formerly had a personal relationship. I advised my employer and provided evidence and they refused to take appropriate action. In fact, they believed the perpetrator when he said I was a scorned woman and was making it all up.[154]

A number of submissions described sexually explicit or indecent behaviour by co-workers or others in the workplace. The Commission heard about an incident where a worker's colleague entered a room, 'casually chatting' with his 'testicles hanging out of his fly'.[155] A former nurse described the following experience with a patient:

> a middle-aged married man who had had a simple leg fracture used to show his balls and cock to all the nurses and not cover himself up in hospital and then made lots of inappropriate comments. All of the nurses that had to look after him felt uncomfortable and no one wanted to go in and do the nursing care that was required.[156]

(iv) Unwanted physical contact

The Commission heard that workers often experienced sexual harassment in the form of unwanted physical contact. According to the 2018 National Survey, of people who said they experienced workplace sexual harassment in the last five years:

- 13% of women and 8% of men said this involved touching, hugging, cornering or kissing
- 11% of women and 7% of men said they experienced a range of other kinds of inappropriate physical contact.[157]

Workers told the Commission about a wide range of experiences of being touched without their permission. A worker told the Commission that an ongoing pattern of harassment started in ways that appeared quite harmless:

> One of the Senior Managers … began to harass me in small ways which gradually become more serious. On one occasion he walked near my desk, put his hand on my shoulder as he greeted me. On another occasion when I attended a farewell lunch, [he] stood behind me and started playing with my hair. [On another occasion, he] walked in and gave me a hug. I didn't know what to say.[158]

Other victims told the Commission they were hugged for uncomfortably long periods of time,[159] given unwanted massages,[160] 'repeatedly groped by male co-workers',[161] slapped on the bottom,[162] and felt up their skirts.[163] One worker said she had her 'shirt pulled up for a tit inspection [and had been] bent over a desk forwards and backwards',[164] while another said she was subjected to 'degrading acts daily … each year, the acts became more violent'.[165]

Another worker told the Commission that a male colleague regularly came up behind her while she worked and put his hands on her breasts.[166] Other workers also described being approached from behind and touched inappropriately,[167] with one recounting that a co-worker 'came up behind me rubbing himself against me'.[168]

(v) Sexual assault

Although only a very small percentage of people said in the 2018 National Survey that the most recent incident of sexual harassment involved rape or sexual assault, a disturbingly high number of victims told the Commission in submissions about incidents involving rape or sexual assault in connection with the workplace.[169]

One victim said that her experience 'started with [my manager] asking me a lot of personal questions—questions about boyfriends, questions about family, questions about my sexual activity and experience'. She said that the harasser's behaviour became increasingly inappropriate and violent, eventually culminating in repeated sexual assaults.[170] Another victim told the Commission about the range of behaviours she experienced:

> The sexual harassment I was exposed to ranged from everything from comments in relation to my attire and appearance … questions in relation to where I was in my menstrual cycle, having my dress unzipped from behind whilst standing in a group of colleagues, to physical sexual assault whilst travelling with a senior male colleague for work.[171]

The Commission heard that some groups of workers facing intersectional discrimination, in particular women with intellectual disabilities, were at greater risk of sexual assault in the workplace.[172] A supermarket worker with an intellectual disability told the Commission in a consultation about two customers who tried to 'pick me up' because they thought 'I'm an easy target'.[173]

(vi) Use of technology

The Commission heard about workplace sexual harassment involving the use of technology and social media. The 2018 National Survey found that of people who said they experienced workplace sexual harassment in the last five years, 3% of people said this involved sexually explicit emails, text messages or social media communication.[174]

Smaller proportions of people said they received inappropriate advances on email or social networking websites (2%), indecent phone calls or voicemail messages (2%), or that intimate images or films were shared, or threatened to be shared, without their consent (or were threatened with the same).[175] The submission from Legal Aid NSW shared the experience of a worker known as Gail.

Gail's story[176]

Gail was employed as an office manager. Gail asked Claudio, the senior sales representative, to collect her smartphone, which she had left in another colleague's car. Claudio hacked into Gail's phone and found some naked pictures that she had taken to send to her boyfriend who was overseas. Claudio sent the naked pictures of Gail to other staff. One of the recipients of the pictures told management about it and Claudio was dismissed.

The Commission heard that technology-facilitated harassment, along with other types of sexual harassment, often occurred in conjunction with other forms of discrimination or sex-based harassment. The following example was provided in a consultation:

> A young woman with autism was working in a hotel, serving in the bottle-o. The owner of the business was stalking her on CCTV camera, sending really explicit texts, asking her lots of questions around going out with her. She disclosed that she was gay and that actually prompted him to be even more explicit.[177]

In October 2019, the Commission released a report undertaken on behalf of the Shop, Distributive and Allied Employees' Association, which outlined the results of a survey into the prevalence, nature and reporting of sexual harassment of its retail, fast food and warehousing members.[178] One worker spoke directly about how sexual harassment can extend from offline to online:

> Wearing a badge with our name on it makes customers and sexual predators feel comfortable enough to harass us under the guise of friendliness … Wearing a name badge also makes it incredibly easy for those same predators to go home and look us up online and then harass us from the comfort of their homes too.[179]

In its submission, the Office of the eSafety Commissioner (eSafety) outlined the nature and type of complaints and reports it receives.[180] eSafety's complaints and reporting schemes are outlined in Section 5.9, 'Other legal and regulatory responses'. eSafety's figures showed that the number of cyber-abuse complaints it handled in the second half of 2018 constituted an approximate 40% increase from the first half of 2018.[181]

While eSafety does not record as part of its complaints data whether cyber abuse occurs within the workplace—as this is not a requirement under its complaints or reporting schemes—it pointed to the gendered nature of its complaints. More than two thirds of complaints to eSafety relating to image-based abuse and cyber abuse are from women.[182]

eSafety explained that 'women are more likely to experience abuse that is personal, sexual and gender-based'.[183] It also observed that 'gendered double standards also mean women face more significant repercussions than their male counterparts for perceived online transgressions, especially when they are perceived to have violated gender stereotypes'.[184]

Consistent with other research and submissions, eSafety also noted the intersectional nature of the online abuse experienced by women, including 'abuse on grounds including sexual orientation, race, religion, disability and age'.[185] While one in 10 Australians aged 18 years and over have had their intimate image/s or video/s shared without their consent, this increased to one in four women between the ages of 18–24, one in five for those identifying as LGBTQI and one in four for Aboriginal and Torres Strait Islander people.[186]

The Commission heard that women with public personas and profiles are targets for online sexual harassment. eSafety outlined that its Women Influencing Tech Spaces (WITS) initiative is specifically targeted at women in leadership positions and with public personas, ranging from politics, business, media, sports and academia, who experience 'shockingly high levels of abuse'.[187] WITS provides women with tips and techniques to build their psychological armour and resilience online.[188]

Case study:

Tayla Harris[189]

In March 2019, Tayla Harris, a professional Women's Australian Football League player, was subject to sexual, gendered and offensive comments on a Channel 7 social media post that featured a photo of her kicking a football during a match.

Channel 7 removed the post because of the inappropriate and offensive comments made on the post. Following backlash for removing the post, Channel 7 then reposted the image with an apology. It acknowledged that notwithstanding the 'reprehensible' comments from trolls, removing the post sent the wrong message and that its intention had been to highlight Harris's athleticism and celebrate women's football.[190]

Tayla Harris reportedly said, 'I saw it and I thought "this makes me uncomfortable." It's referring to my body, not what I was doing, which is playing footy.'[191] She described the online comments as 'repulsive' and 'sexual abuse on social media'.[192] She also said that these 'vulgar comments' were directed at her in her workplace.[193]

Caxton Legal Centre noted it often saw 'seemingly banal [online] conversations turn into conduct that forms the basis of a sexual harassment complaint'.[194] One victim's submission described ongoing workplace sexual harassment across different technological platforms:

> I was harassed by a doctor for six months. I worked for my father's medical-related business … There were numerous technologies (Skype, text messages, emails) used to perpetrate the harassment.[195]

The Commission was told that workers, especially women in industries for whom online spaces constitute a workplace, are experiencing increasingly high levels of technology-facilitated sexual and sex-based harassment.[196]

Maurice Blackburn Lawyers pointed to reports from journalists and those working in the media industry about the prevalence and impact of workplace-related online sexual and sex-based harassment. It expressed concern about the impacts of online workplace-related sexual and sex-based harassment in a 'mostly unregulated on-line environment'.[197]

In a submission to a 2018 Senate Inquiry on cyberbullying laws, the Media, Entertainment and Arts Alliance (MEAA) argued that many of their members working in the media industry regularly experienced 'harassment, abuse and threats on social media'.[198] Women in Media's submission to the same Senate Inquiry argued:

> More and more, a sad reality is faced by many of our female members in the digital space, particularly journalists, as they engage with audiences' harassment, abuse and threats due to their work or opinion.[199]

A Women in Media study provides further detail about the online abuse women experience within the media profession. The study found that 41% of women had experienced harassment, bullying and trolling on social media.[200]

Women's Health in the South East also drew specific attention to female journalists and feminist commentators and described the online environment as 'noxious'.[201] They argued that the gendered nature of online sexual harassment is evident in the explicit and sexualised forms of abuse targeted at women.[202]

The Municipal Association of Victoria noted that 'councillors, as local political figures, are increasingly subject to online threats'.[203] The Australian Women Against Violence Alliance also identified female journalists and female politicians as being disproportionate targets of technology-facilitated abuse.[204]

In addition, they drew attention to the emerging trend of technology-facilitated abuse of women human rights defenders, noting that: 'Women also become targets of trolling and cyberbullying online for promoting gender equality and rights of women and girls'.[205]

Project Respect provided examples of technology being used to sexually harass women working in the sex industry, such as clients threatening to use sexually explicit images or videos to expose them as sex workers, or leaving them degrading comments online.[206]

In a consultation on the implications of technology for workplace sexual harassment, the Commission heard that the proliferation of technology in the workplace was causing an increase in online sexual harassment of women generally, but also specifically and acutely to women with a disability, younger women and women in rural, regional and remote areas, who may lack access to adequate support and referral pathways.[207]

The Commission also heard that the impacts for victims, especially women, of technology-facilitated sexual harassment can have equally devastating impacts as other forms of sexual harassment on women's mental health and wellbeing, as well as their reputations, careers and lives (see Section 3.8).

In their submission, academics Professor Paula McDonald and Professor Sara Charlesworth argued that more empirically driven research is needed in the 'under-studied area of sexual and sex-based harassment which involves the use of digital technologies, including social media'.[208]

Given the seriousness and gravity of the issue, the Commission agrees there is a need for further research on the prevalence, nature and impacts of technology-facilitated sexual harassment to effectively prevent and respond to this in the workplace.

(b) Frequency

The 2018 National Survey found that the majority (60%) of sexual harassment victims experienced more than one form of sexual harassment in their lifetime.[209] When people who said they had been sexually harassed in the workplace in the last five years were asked about the most recent incident they experienced, half (49%) said that the same type of harassment had happened to them previously at the same workplace.[210] Behaviours involving technology, including inappropriate advances on email or social media platforms and other kinds of unwelcome sexual conduct occurring online, were most likely to occur repeatedly.[211]

The Commission heard in consultations and submissions from victims who experienced multiple incidents of sexual harassment across a series of successive workplaces.

One worker described three 'particularly harrowing' experiences across different workplaces: being touched by her manager in a storeroom as a 16-year-old supermarket worker; being locked in a toilet cubicle in her mid-twenties with a colleague who demanded to be kissed; and being publicly groped and insulted by the CEO at a work function some years later.[212] Another individual said:

> I am a retiree after having an extensive career in four disparate industries ... There is not one position I have held where I have not been sexually harassed. I have been sexually harassed by colleagues, by superiors, by customers, by residents, by Councillors, by suppliers and by junior men in my own workforce.[213]

(c) Duration

The 2018 National Survey found that, of people who said they had experienced the same type of sexual harassment previously at the same workplace, 45% said it had been ongoing for more than 12 months or longer,[214] and almost one in three (30%) said they had been subjected to the harassment for over two years.[215]

In submissions, workers described their experiences of sexual harassment over prolonged periods of time. One worker said she was 'sexually harassed and assaulted ... for a period of five months', despite attempts to report the behaviour.[216] Other workers told the Commission about their experiences of sexual harassment occurring over years. One said that her male colleague had:

> been hugging me for years. I feel uncomfortable about it and told him years ago that I didn't like it. He continued to do it ... [Recently] he came towards me and I held up my hand before him and loudly said 'no hugs'. He walked away, but later that day approached me and pinched my thighs twice ... He is a very big man, and I [am] nervous at the prospect of having to confront him again.[217]

(d) Location

Sexual harassment can happen anywhere people work in Australia. The 2018 National Survey reported that, for more than half of workers who said they had been sexually harassed in the last five years, the most recent incident occurred at their workstation or where they worked (52%).[218]

In consultations and submissions, workers told the Commission about being harassed in a broad range of workplaces, including in offices,[219] courtrooms,[220] classrooms,[221] commercial kitchens,[222] restaurants and cafes,[223] hotels,[224] construction sites,[225] mines,[226] hospitals, ambulances and other healthcare settings,[227] retail contexts,[228] farms,[229] a racing stud,[230] art galleries and studios,[231] police stations and watch houses[232] and sheltered workshops.[233] The Commission heard that workers—in particular, migrant and culturally and linguistically diverse (CALD) women—were subjected to sexual harassment in factories.[234]

(i) Confined or isolated work environments

While sexual harassment occurs in Australian workplaces across the board, some work environments may increase the risk of sexual harassment. In particular, the Commission heard that sexual harassment was more common when people worked alone or in a confined space with another person. The Diversity Council of Australia told the Commission about research showing that 'workers who are physically isolated or have few opportunities to work with others (such as cleaners working alone, people attending to hotel rooms alone, and agricultural workers) can … be at a higher risk of harassment'.[235]

Caxton Legal Centre also noted that people who experienced workplace sexual harassment tended to have experienced some form of isolation, such as spending 'long periods working solely with one other co-worker or a small group of co-workers'.[236]

Workers recounted incidents of sexual harassment which occurred in private homes and confined spaces such as hospital suites,[237] while touring with theatre productions,[238] on boats[239] and in trucks.[240] Science & Technology Australia told the Commission the STEM (science, technology, engineering and mathematics) sector is 'relatively unique in its prevalence of out-of-office work and the professional relationships that form its structure'.[241]

Its submission noted that fieldwork 'can often involve working in confined spaces, in remote locations, at odd hours and for long periods of time—all factors that present a higher risk for sexual harassment'.[242] Section 3.7 discusses the risk factors for people working in isolated and rural, regional and remote work settings.

Vered's story[243]

Vered told the Commission in a consultation that she worked as a butler in a hotel. Vered's job entailed time spent in guests' rooms to serve them meals and unpack their luggage.

Vered said that a female co-worker was sexually assaulted by a guest while unpacking their luggage. Vered said she was not the only one of her co-workers that had been sexually harassed by a guest while conducting their required tasks in their rooms.

(ii) Work-related travel

Victims also told the Commission about being sexually harassed away from their usual workplace, while travelling for work. The Commission heard many examples of workers who were sexually harassed while driving to different locations for work, which required them to spend periods of time in secluded or confined locations with co-workers.[244] One worker said that a senior salesman in her company 'would touch my legs and breasts and try to hold my hand whenever I went out with him in the car'.[245] Another worker told the Commission:

> I was in a vehicle on my way back from an end-of-year work event. The driver was my boss and a work colleague [was] in the back seat. My boss proceeded to ask me if I would give him a head job … I gave him another firm no and turned to face the window and ignore[d] him. We were still two hours from our destination.[246]

For other travelling workers, sexual harassment occurred in locations including restaurants,[247] conferences and function spaces[248] and hotel rooms.[249] One police officer told the Commission she had to take measures for her own safety while travelling for work:

> On an away job, I was told to lock myself in a car because I had been bought for the interstate detectives for four cartons of beer. I was given the heads up because a senior detective said I reminded him of his daughter and he wouldn't want his daughter in my situation.
>
> I woke up with some very pissed-off men licking the dew off [the] window of the police car wanting to get in. I had both sets of keys. Lucky for me.[250]

(iii) Work-related social events

The 2018 National Survey indicated that more than one in four people who said they experienced workplace sexual harassment in the last five years said the most recent incident occurred in a social area for employees (26%) while around one in five said it occurred at a work social event (18%).[251]

In consultations and submissions, workers told the Commission about being sexually harassed in lunchrooms,[252] at cafés and eateries during working lunches,[253] at restaurants and bars during work dinners and after-work drinks,[254] at Christmas parties,[255] and other similar functions.[256]

(iv) Other locations in workplaces

Some workers said they were sexually harassed in a meeting, or other locations in the workplace. The 2018 National Survey indicated that for 9% of women and 7% of men the most recent incident of sexual harassment occurred in a one-on-one meeting.[257]

In several submissions, workers said the harasser used meetings as an opportunity to isolate and then sexually harass them. For example, one worker told the Commission that over a period of months, a more senior colleague would 'invite me to his office as a teaching opportunity to talk about clients yet would spend the time talking … about sex he had with "friends" from work'.[258]

Meanwhile, the 2018 National Survey indicated that 9% of women and 5% of men said they were harassed at a meeting with more than two attendees.[259]

A smaller number of victims (4%) said in the 2018 National Survey that they were sexually harassed at a work-provided facility such as a change room or bathroom.[260] Toilet cubicles were also mentioned in a number of submissions,[261] with one worker describing a colleague following her into the bathrooms, barging into her cubicle and 'telling me I was "hot" as he groped me, tried to kiss me. He also barred me from leaving and shoved his hand down my pants.'[262]

(e) Time of day when people experienced sexual harassment

Just as workplace sexual harassment occurs across a vast range of locations, it can take place at any time of the day. The Commission heard, however, that sexual harassment frequently happened during non-standard working hours, such as during evening or overnight shifts.[263]

One worker, for example, said she was repeatedly harassed by a co-worker during 4 am cleaning shifts which she did before heading to university for a day of study.[264] Another worker told the Commission about being forced onto her knees and having her face pushed into a colleague's crotch at a remote scouts camp after 2 am.[265]

One retail worker told the Commission she was sexually harassed while stacking supermarket shelves on a night shift at age 19.[266] The Commission heard from other young retail workers who worked evening shifts that older male customers would choose this time to shop when they knew they could intimidate and proposition the young workers.[267] Section 3.5 discusses the range of factors which increase the risk of young workers who experience sexual harassment. Section 3.7 discusses the types of industries and workplace settings where workplace sexual harassment frequently occurs.

The Commission's view

The Commission's 2018 National Survey provides important insights into the nature of workplace sexual harassment in Australia. While the survey provides important information, further research and data is needed to shape a nationally consistent approach to address sexual harassment.

In particular, there is a need to better understand the way in which the changing nature of work—and particularly technological changes which impact on when, where and how work is performed—may impact on the nature of workplace sexual harassment and how it is experienced by victims. This should include further research on the prevalence, nature and impacts of technology-facilitated sexual harassment to effectively prevent and respond to this in the workplace.

3.4 Cultural and systemic drivers of sexual harassment in the workplace

> Placed in a social context, sexual harassment (whether in the workplace or elsewhere) can be understood not simply as individual behaviour, but as a social problem—part of a broader pattern of gendered violence that has complex drivers located at multiple levels.[268]

Under its Terms of Reference for the Inquiry, the Commission was required to examine the drivers of workplace sexual harassment. Identifying the drivers, or underlying causes, of sexual harassment is critical to inform the development of effective responses to address this problem in Australian workplaces.

In particular, the Commission was asked under the Terms of Reference to consider whether some individuals are more likely to experience sexual harassment, and whether some workplace characteristics and practices are more likely to increase the risk of sexual harassment. These issues are discussed in detail in Section 3.5 and Section 3.7.

This section considers what the Commission heard more broadly about the underlying cultural and systemic drivers of sexual harassment. Overwhelmingly, the Commission was told throughout this Inquiry that gender inequality is a core driver of these behaviours both in the workplace and across wider society.

The 2018 National Survey findings illustrate the gendered dimensions of workplace sexual harassment—that women are more likely to experience sexual harassment than men, and that most harassers are men.

Section 3.4(a) provides a brief overview of the way in which power disparities within society enable sexual harassment, with gender inequality identified as the key power imbalance driving sexual harassment in the workplace.

Section 3.4(b) discusses the ways in which gender inequality underlies broader norms, practices and structures in society that create the conditions which allow sexual harassment (and other forms of violence against women) to occur.

It also sets out what the Commission heard about using the evidence-based national framework, *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia* (*Change the Story*), as a basis for understanding the drivers of workplace sexual harassment and how to prevent it.

While gender inequality is an underlying condition for sexual harassment to occur, the Commission recognises it is not the only factor which drives it. The Commission heard that other forms of discrimination and disadvantage, which create power imbalances in the workplace, can also drive sexual harassment.

When people are subjected to multiple forms of intersecting discrimination and harassment, for example on the basis of gender, race, disability or sexuality, this is referred to as 'intersectional' discrimination.[269] During the Inquiry, the Commission was told that intersectionality is an important factor in understanding what drives sexual harassment. This is discussed below in Section 3.4(c).

Finally, Section 3.4(d) discusses other cultural and systemic factors contributing to workplace sexual harassment that were commonly raised during the Inquiry:

- a workplace 'climate' or culture that tolerates sexual harassment
- lack of awareness or understanding of sexual harassment
- use of alcohol.

The Commission heard that these factors can be found across all types of workplaces, regardless of industry, occupation or sector.

The Commission also heard about a range of other workplace characteristics and practices that contribute to the occurrence of workplace sexual harassment, including, for example, workplaces that are male-dominated or characterised by hierarchical structures or where there is a high level of contact with customers or clients. Many of these factors are prominent in particular industries, sectors or occupations, rather than affecting the workforce as a whole, and are examined in more detail in Section 3.7.

(a) The role of power in workplace sexual harassment

The concept of power and, specifically, disparities in power, is central to understanding what causes sexual harassment.[270] UN Women explains that '[s]exual harassment expresses and reinforces inequalities of power.'[271]

Many people told the Commission that a defining feature of the sexual harassment they experienced was their perception of a lack of power relative to their harasser. This might be due to the harasser's greater age, seniority, or value to the business; or it might be because the harasser was the owner of the business, their direct supervisor, a valued customer of the business, or was in a position to influence their future career prospects.[272]

It is clear, however, that sexual harassment does not only occur in situations where a harasser is in a position of seniority or authority, or indirectly exerts influence over the victim. For example, the 2018 National Survey found that the most common relationship between harassers and victims was that of co-workers at the same level in the organisation.[273] Other research has found that, despite their more senior position in the workplace, female supervisors were more likely to report experiencing sexual harassment than female non-supervisors.[274]

These factors reinforce the weight of evidence that suggests that the key power imbalance driving sexual harassment in the workplace relates to gender.[275] Other power disparities in society, including those stemming from race, disability, sexual orientation, visa status or economic vulnerability, also drive sexual harassment when they intersect with gender inequality.[276] These issues are discussed below in Sections 3.4(b) and 3.4(c).

Understanding the role of gender inequality in driving sexual harassment helps make sense of sexual harassment in circumstances where the imbalance in power between the harasser and victim does not fit a commonly recognised pattern (for example, where it is not based on disparities in age, seniority or authority): 'in society, the balance of power lies with men and even if women are in more senior positions they are made more vulnerable by the fact they are women.'[277]

For example, in finding that female supervisors were more (not less) likely to be sexually harassed, researchers have noted that 'interactions between workers are not driven strictly by organizational rank':

> Instead, co-workers' relative power is also shaped by gender. Although women supervisors' authority is legitimated by their employer, sexual harassment functions, in part, as a tool to enforce gender-appropriate behavior.[278]

UN Women has also recognised the importance of power disparities in driving sexual harassment, emphasising that sexual harassment is not about 'random micro-aggressions', but that 'people are targeted for their membership of groups which are relatively less powerful than the aggressor':[279]

> Power's many dimensions are played out by ethnicity and immigration status, race, age, LGBT+ status. Unmasking and naming where power resides and how it operates will help understand why some people are targeted and why they might be reluctant to report.[280]

(b) Gender inequality

(i) Overview

Many organisations and experts argued strongly that to understand what drives sexual harassment, it must be recognised as a form of violence against women, with many of the same underlying drivers as other forms of violence against women.[281]

Sexual harassment is also recognised at an international level as a form of sex discrimination and violence against women.[282] Violence against women refers not only to physical violence, but also encompasses other forms of gender-based harm including psychological harm or suffering.[283]

Evidence has suggested that all forms of violence against women share a common root cause in gender inequality. A comprehensive 2015 evidence review examining the drivers of violence against women concluded that, while it is not necessarily the only cause in every context, 'the consensus in the literature is that gender inequality is both a root cause or underlying condition of violence against women'.[284] Similarly, recent international instruments have recognised gender inequality as an underlying cause of sexual harassment.[285]

Gender inequality – definition[286]

The unequal distribution of power, resources, opportunity, and value afforded to men and women in a society due to prevailing gendered norms and structures.

A view sometimes put forward was that sexual harassment 'was an aberration perpetrated by deviant individuals' or resulted from 'feelings of sexual desire'—that is, a problem caused by the isolated actions of particular individuals, rather than a broader cultural and systemic issue.[287] However, research has indicated that factors relating to the characteristics of particular individuals—such as uncontrollable feelings of sexual desire, alcohol or drug use, or poor anger management—are not sufficient on their own to explain sexual harassment, or other violence against women.[288]

The 2018 'Open statement on sexual harassment from employment discrimination law scholars' emphasised that sexual harassment is 'about upholding gendered status and identity' and not about 'sexual desire'.[289] UN Women have similarly recognised that sexual harassment 'is not simply about the misbehaviour of a few misguided or malicious individuals':[290]

> The prevalence and persistence of sexual harassment, together with widespread impunity of perpetrators, manifest a systemic, structural problem linked to broader social, economic and political distributions of power that vest authority, decision making and belief in men. It is discrimination. These cultures and structures of inequality need to be recognised and dismantled if sexual harassment, and other gendered violence, are to be ended.[291]

This view was also reinforced to the Commission throughout this Inquiry, with numerous academics and a range of government and non-government organisations arguing that gender inequality is central to understanding what drives sexual harassment, including at work.[292]

A number of business, professional and industry bodies also recognised the gendered nature of sexual harassment in their submissions.[293] For example, the Law Council of Australia told the Commission that sexual harassment 'is heavily gendered' and 'causes considerable harm to women as a group',[294] while AMMA (the Australian Resources and Energy Group) told the Commission:

> AMMA acknowledges the Inquiry is intended to be non-gender specific, and that men are often also victims of sexual harassment in the workplace, however the influence of gender and gender equality to the prevalence of sexual harassment is incredibly important.[295]

Understanding sexual harassment as driven by gender inequality also recognises that men experience and are affected by sexual harassment.

The 2018 National Survey clearly showed that sexual harassment is an issue for men as well as women—26% of men who said they were in the workforce in the last five years said they experienced sexual harassment during that period. UN Women has noted that sexual harassment is 'a human rights violation of gender-based discrimination, regardless of sex, in a context of unequal power relations.'[296]

A key factor that drives sexual harassment of all people, regardless of their gender, are norms, practices and structures in society that shape (and are shaped by) gender inequality. Studies have consistently found that men who experienced sexual harassment are more likely to be targeted by other men than by women, and that men are most often sexually harassed when they are considered to have violated traditional masculine social norms.[297] These issues are examined further in Section 3.5(a)(ii).

(ii) Gendered drivers of sexual harassment

Research has suggested that gender inequality in our society is reinforced and maintained through social norms, practices and structures that are highly gendered.[298]

Gendered norms: the most common and dominant ideas, values or beliefs about gender in a society or community. This includes ideas about what is 'normal' in relation to gender, and beliefs about what people should do and how they should act—for example, the belief that mothers should be the primary carers of children, and the expectation that 'boys don't cry'.[299]

Gendered practices: the everyday practices and behaviours that reinforce and maintain gendered norms—for example, parents telling boys to 'toughen up', or the over-representation of women in the childcare sector.[300]

Gendered structures: the laws and systems that organise and reinforce an unequal distribution of economic, social and political power, resources and opportunities between men and women—for example, lower pay rates in female-dominated sectors such as child care.[301]

Gendered norms, practices and structures influence the beliefs and behaviours of individuals on different levels:

- on an individual level (in individuals' interactions and relationships with others)
- at an organisational level (for example, in workplaces and schools)
- at a system and institutional level (for example, in laws and government policies)
- at a broader societal level.[302]

They encourage people to adopt distinct gender roles in society and have historically assigned superiority to men over women and masculine over feminine roles.[303]

Gendered social norms are reflected in, and also reinforced by, community attitudes towards violence against women.[304] VicHealth told the Commission that social norms influence 'the prevalence of sexual harassment, including the attitudes of the general community towards sexual harassment', and that community attitudes also contribute to its prevalence.[305]

A large national survey of community attitudes towards violence against women, conducted in 2017, found that most Australians do not endorse violence against women and do support gender equality, but a concerning proportion of Australians believe that gender inequality is exaggerated or no longer a problem.[306]

National Community Attitudes to Violence against Women Survey

The *National Community Attitudes to Violence against Women Survey* (NCAS) measures community attitudes in Australia towards gender equality and violence against women. It was conducted most recently in 2017 and collected information from a representative sample of 17,500 Australians aged 16 years and over.[307] Of relevance to the issue of workplace sexual harassment, the NCAS found that:

- Two in five Australians (40%) believed many women exaggerate how unequally women are treated in Australia.[308]
- One in seven Australians did not agree that women are as capable as men in politics and in the workplace.[309]
- Nearly one quarter of Australians saw no harm in telling sexist jokes.[310]
- Many Australians believed sexual aggression can be attributed in part to men's 'natural sex drive'. In particular, one-third (33%) of Australians believed that rape results from men being unable to control their need for sex; and more than one-quarter (28%) believed that, when sexually aroused, men may be unaware a woman does not want to have sex.[311]
- Nearly one-quarter (23%) of Australians believed women find it flattering to be persistently pursued, even if they are not interested.[312]

The accepted framework in Australia for understanding what drives violence against women, and how to prevent it, is *Change the Story*.

Change the Story is informed by the international evidence base on the underlying causes of violence against women, and identifies four 'particular expressions' of gender inequality 'that have been shown in the international evidence to be consistently associated with higher levels of violence against women', referred to as 'gendered drivers'.[313]

Gendered drivers of violence against women

'Gendered drivers' are 'the specific elements or expressions of gender inequality that are most strongly linked to violence against women. They relate to the particular structures, norms and practices arising from gender inequality in public and private life.'[314]

Change the Story identifies the gendered drivers of violence against women as:

- rigid gender roles and stereotyped constructions of masculinity and femininity
- male peer relations that emphasise aggression and disrespect towards women
- men's control of decision-making and limits to women's independence in public and private life
- condoning of violence against women.[315]

Many submissions suggested that the evidence-based framework in *Change the Story* should form the basis for understanding the drivers of sexual harassment and how to prevent it.[316] The sections below discuss how the gendered drivers identified in *Change the Story* apply in the context of workplace sexual harassment.

(iii) Rigid adherence to gender roles and stereotyped constructions of masculinity and femininity

A strong belief in stereotyped constructions of 'masculinity' and 'femininity' and rigid distinctions between the roles of men and women are consistently associated with higher levels of violence against women.[317] These stereotypes relate to the idea that men and women are 'naturally' suited to different tasks and responsibilities, and have naturally distinctive personal characteristics.[318]

This influences how people believe 'proper' or 'real' men and women should think, feel and behave.[319] Dominant forms of masculinity are associated with characteristics such as strength, independence, confidence and aggression, while femininity is associated with sensitivity, passivity, dependence and moral purity.[320]

Gender stereotypes affect the way in which roles and responsibilities are distributed between men and women in the family and in public life, including at work.[321] The Commission was told that gender stereotypes contribute to gender segregation in the workforce with, for example, a far higher proportion of women than men in lower-paid 'caring' work such as child care and aged care.[322] Data from the Workplace Gender Equality Agency confirms that the Australian labour market is highly gender-segregated by industry and occupation (Section 3.7(b)).[323]

Some reasons why gender stereotypes may increase the risk of violence against women include that they contribute to:

- gender hierarchies based on men having power over women, which supports a sense of male entitlement over women (including entitlement to sex)[324]
- the view that men are driven by uncontrollable sexual urges[325]
- the objectification and sexualisation of women, who are seen (according to gender stereotypes) to be 'naturally' passive and submissive[326]
- the use of violence to reinforce divisions between gender roles or to 'punish' women who do not conform to expected gender roles.[327]

The 2018 'Open Statement on Sexual Harassment from Employment Discrimination Law Scholars' noted that gender stereotypes 'foster harassment', as they encourage men to view and treat women as 'different' and 'second class':

> By harassing women who dare to enter traditionally male jobs and roles, or imposing sexist demands that remind women they are still women in a man's world, men can shore up their masculine status and sense of masculine superiority at work.[328]

The Commission heard about the extent to which rigid gender roles and stereotyped ideas of masculinity and femininity are entrenched in Australian workplaces. The Victorian Trades Hall Council said that the attitudes that underpin gender divisions in the workforce 'also underpin gendered violence at work.'[329]

A female professional told the Commission how gender stereotypes affected her experiences as a young member of her profession:

> We were continually harassed, sexually harassed, touched … I had to go out and get dressed in a dress and go out to lunch with a client because, otherwise, they were going to lose the job … as a woman, you were told you had to make tea and be the secretary if the secretary was sick.[330]

In another example, a female lawyer at a work-related dinner reported that a 'senior member of the profession' kissed her on the hand and told her she would need 'more than blonde hair if you want to be taken seriously'.[331]

The Commission was told that stereotypical conceptions of masculinity, such as men's overpowering sexual urges, could lead to a sense of sexual entitlement and drive sexual harassment. For example, a female worker said in her submission:

> I was sexually harassed by a male colleague about ten years older than me at a farewell drinks for another colleague. He told me that my only value in the workplace was 'someone to fuck' and that the only reason any men ever spoke to me in the workplace was because they wanted to fuck me. Any men who I considered to be my friends were not actually my friends but just wanted to fuck me. Any of them who had partners also only spoke to me because they wanted to fuck me and if they thought they could get away with it would have done so. His barrage was relentless.[332]

The Commission was told about some workplaces where rigid notions about gender roles and 'femininity', including the sexualisation and objectification of women, were so deeply entrenched in workplace culture that they formed part of the 'business model' or business strategy, and also contributed to sexual harassment occurring:

> From 19 [years] old to 32, I worked at [an information technology company]. I was constantly commented on for my appearance. I was put in positions where I was told to be friendly with clients (all male) and to 'make them feel special'. I understood this was about using my appearance and femininity to win contracts.[333]

The way in which this issue affects workers in service industries and in workplaces with a high level of contact with customers is also discussed in Section 3.7(c).

The Commission also heard about sexual harassment and other negative experiences of women who were perceived to have contravened accepted gender stereotypes. One female apprentice in a male-dominated trade described the harassment she endured for failing to conform to expected gender roles:

> Following ten months of at least three times a week comments relating to my gender, my sexuality (I was obviously gay if I wanted to be [working in this trade] … and the fact that I had short hair also meant that I was a lesbian) and my poor abilities stemming from being female, I lodged a sexual harassment complaint against a co-worker who basically tipped me over the edge … The attitude was one of 'boys will be boys' and was personified by the manager asking me 'can't you take a compliment'.[334]

Another woman said that unofficial workplace rules were also shaped by gender and that contravention of these gender roles would likely result in hostility and sexual harassment:

> I remember thinking it was quite challenging as a young woman coming into a business like that because you've got your male peers who are going off to have a beer with one of the senior partners. If I was to go off and have a drink with one of the senior partners, you can imagine what the comments [would be] the next day. So I think there's that kind of culture, but also the social expectations around roles, as well, that play into it.[335]

(iv) Male peer relations that emphasise aggression and disrespect towards women

Male peer relations (including in a work context) that reinforce stereotypical and aggressive forms of masculinity are also associated with higher levels of violence against women, as they can create disrespect for, objectification of, or hostility towards women.[336] Research has suggested that this may occur because:

- Violence and disrespect towards women are normalised through these peer relations.
- Men may more readily excuse their peers' disrespectful behaviour towards women.
- Men may be discouraged from taking a stand against this behaviour because they fear rejection by their peers.[337]

Professors McDonald and Charlesworth told the Commission about the potential for negative male peer relations to drive workplace sexual harassment, noting that in policing, for example, 'male bonding, including codes of mateship and loyalty in tightly knit male groups, may intensify sexism and encourage group loyalties to over-ride personal integrity'.[338]

The Commission heard from workers and employers about male peer relations in workplaces that emphasised disrespect towards women, and the ways in which this contributed to the normalisation of sexual harassment:

> [W]e've probably had more challenges [with sexual harassment] in areas where there are larger groups of males working together and it was almost like … it would be acceptable language and behaviour.[339]

> Because this type of behaviour [unwelcome comments on physical appearance and attempts at kissing] was 'normal' workplace behaviour … it was regularly accepted that women would receive this type of attention from men… very little could be done to avoid it.[340]

Research has found that when men participate in sexist jokes and commentary, this 'forms a type of in-group bonding and reinforces stereotypical or "traditional" masculine identities.'[341] The Commission heard about examples of this kind of behaviour in workplaces:

> [A] prime example of his [CEO's] mentality was for a Christmas party invite one year for the association, he sent a photo of women in bikinis washing cars … And for him, that wasn't offensive, it was just … ha, ha, blokey stuff.[342]

> I noticed that the boys had a typical strong hierarchy or loudest-most-aggressive-guy-is-the-coolest, whereby this guy … would constantly make creepy sex jokes and brag about … how much sex he got the day before, and [put] other people down for not getting enough. The other guys mostly all followed by also trying to act 'cool' and like they were getting a lot of sex to his face, although would laugh about how stupid he was behind his back. It was uncomfortable and embarrassing working there listening to this.[343]

The Commission was told that when attitudes and behaviour that emphasise disrespect towards women, such as sexual harassment, become normalised within a workplace, women as well as men may stop questioning the behaviour. One woman working in the film industry told the Commission:

> I know when I entered the industry I was surprised at how much … comments, touching, and all sorts of things happened every day. When I asked the question to other people, 'What's going on?', [the response was] 'What's wrong with me, why are you thinking this is weird because it's just the norm?' So, eventually … you just kind of join in not even realising.[344]

The Commission also heard that negative male peer relations can contribute to an environment where workers and workplace leaders are unwilling to challenge disrespectful attitudes and behaviours for fear of exclusion or reprisal:

> [M]ales probably feel hesitant to speak up if they see the alpha males behaving in a way that they don't necessarily agree with. But they have to go along because otherwise they're ostracised for that reason.[345]

(v) Men's control of decision-making in public and private life

The way in which power is distributed between men and women in the private and public spheres, including in the workplace, is an important dimension of gender inequality.[346] This is reflected in the workforce and in public life through, for example:

- women's under-representation in Australian parliaments[347]
- women's under-representation in senior leadership positions in the Australian workforce[348]
- a gender pay gap of 20.8%[349]

- higher levels of under-employment for women than men.[350]

Evidence has suggested that men's dominance of decision-making in public and private life, and limits to women's autonomy, may contribute to violence against women for a number of reasons, including:[351]

- Women's lower status may serve a symbolic function that communicates that women have a lower social value and are less worthy of respectful treatment.
- Violence may be used and accepted as a mechanism for maintaining the dynamic of male dominance and female subordination, especially when male dominance is under threat.
- If women's participation in formal decision-making and civic action is circumscribed, there is less opportunity for women to act collectively in the interests of preventing violence against women.[352]

These views were reflected in a number of submissions and consultations. For example, Our Watch told the Commission that power relationships are strongly gendered within the Australian workforce, and that this creates an enabling environment for sexual harassment.[353]

In a consultation with men working in male-dominated industries, the Commission was told that sexual harassment can occur as a form of backlash against quotas to increase the representation of women in male-dominated workplaces.[354]

Professor Lisa Heap submitted that key drivers of violence against women (including sexual harassment) in a workplace context are '[m]en's control of positions of power in workplace[s]', and '[w]omen's position of vulnerability in the labour market'.[355] Professor Heap said that this vulnerability was caused by a range of factors including that women comprise the majority of insecure and low-paid workers, and are more likely to have interrupted patterns of work as they are responsible for most 'unpaid care giving' in households and communities.[356]

Women's Heath Victoria also told the Commission that sexual harassment is enabled by 'the broader context of gender inequality', including that women:

> typically receive less pay and superannuation than men, experience high rates of pregnancy and sex discrimination and have more care responsibilities requiring them to take time out of the workforce.[357]

At its academic roundtable, the Commission was told that many of the elements of gender inequality that drive sexual harassment in a workplace context relate to men's control of decision-making and power:

> ...decreased opportunities for women's career progression, a concentration of men in senior, more powerful positions, the gender pay gap, penalties for using flexible work, the minimising of women's contributions, and then a whole range of different ... sexist behaviours like assumptions about what women will do when they become pregnant in terms of their return to work [and] assumptions about, or equating leadership with men and masculinities ...[358]

The Commission also heard about the ways in which men's control of decision-making and women's relative lack of autonomy in a workplace context may be associated with sexual harassment:

> [Y]ou've got some men that think it's their entitlement. They can treat women the way they want to treat women, especially women [or] young girls that are below them. A lot of men are in positions of power so that's a problem.[359]

A related issue—the over-representation of men in senior leadership positions, and how this may contribute to sexual harassment—is discussed in Section 3.7 in the context of male-dominated workplaces.

(vi) Condoning workplace sexual harassment

When societies, institutions, communities or individuals support or condone violence against women, levels of such violence are higher.[360] *Change the Story* notes that violence against women is condoned through social norms and structures that justify, excuse or trivialise the behaviour, or shift the blame from the harasser to the victim.[361] *Change the Story* points out that this should be understood as the direct consequence of other expressions of gender inequality.[362]

The Commission heard about examples of workplace sexual harassment being justified or excused on the basis that it was acceptable for men to behave in this way, or that the harassers were 'from a different generation', and so 'don't know any better'.[363] For example, one worker said that after she reported the harasser to a female staff member at the 'temp agency': 'I was told not to make a big deal of it because that's how they are in high finance'.[364] Another worker said:

> Two other female staff also in their 20s said something along the lines of 'Oh, he's just a perv, but he's a nice guy. Don't take it so seriously' ... I refused, then complained to the other female staff and was subsequently bullied out of my job because that's just how he is and I didn't have to if I didn't want to, and I took myself too seriously.[365]

People also told the Commission that sexual harassment was frequently trivialised, by denying the behaviour was sexual harassment or that it had occurred, or by downplaying its seriousness. For example, one worker told the Commission about sexual harassment by her male co-workers, who:

> had no idea they were routinely sexist … and if you accused them of it, they would certainly deny it and tell you that you are insane or a feminist bitch.[366]

Another worker said she complained to her employer about a colleague 'being very sexual in his conversation' in the staff lunchroom, but was told by her manager 'you don't have to be in the lunchroom with him if you don't like it and you probably need to toughen up a bit because he doesn't mean any harm.'[367] The Commission also heard about examples where victims who reported sexual harassment were told they were 'making it all up'.[368]

The Commission heard that it was common for blame to be shifted to the victim of the workplace sexual harassment, which sent a clear message that the workplace condoned the behaviour.[369] One worker told the Commission that when she reported sexual harassment to her manager, she was blamed for being 'too friendly' and was told to 'wear a garbage bag over my head' as she was 'too pretty'.[370]

The Commission was also told about an incident where a female worker reported that she was groped on the dance floor at a work event, in full view of her co-workers. The worker said the CEO refused to take action, claiming that the victim 'had encouraged it' as the harasser had visited her home to get changed before the event and this indicated she 'want[ed] something to happen.'[371]

(c) Intersecting forms of discrimination and harassment

As noted above, the Commission heard consistently that alongside gender inequality, other inequalities experienced by groups with less power in society also contribute to the sexual harassment of people from these groups, and that addressing sexual harassment requires an intersectional approach.[372]

An intersectional approach to sexual harassment sees gender as intersecting with other forms of discrimination and systems of power. UN Women has advocated that approaches to sexual harassment must understand sexual harassment as 'a matter of sex and gender inequalities of power that intersect with other dimensions of inequality.'[373]

An intersectional approach looks at the ways discrimination and risk factors intersect to both increase the risk of sexual harassment for some groups of workers and affect how they experience sexual harassment. For example, Our Watch has noted that gender is not experienced in the same way by everyone:

> While gender inequality is always influential as a driver of violence against women, it cannot be considered in isolation, nor is it experienced in the same way by every woman.[374]

Moreover, an intersectional understanding of sexual harassment acknowledges that while gender inequality underpins sexual harassment, it is not the only factor in every context. It may intersect with other relevant factors, such as race, age, disability, sexual orientation or class, for example.[375] As the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) explained, sexual harassment can be bound up in multiple, interwoven forms of discrimination:

> Often the sexual harassment that is reported to us is experienced together with discrimination—sometimes as intersectional discrimination—and/or together with victimisation.[376]

The 2018 International Labour Conference highlighted that harassment is 'highly contextual' and results from 'a convergence of drivers … such as discrimination, conditions and risk factors'. It noted the importance of understanding 'the intersection, or combination, of factors, such as gender, race, age or disability, that makes violence and harassment more possible.'[377]

A 2016 Meeting of Experts on Violence against Women and Men in the World of Work observed that:

> Violence and harassment can potentially affect everyone, but it affects specific groups disproportionately … Workplaces where the workforce is dominated by one gender or ethnicity might be more hostile to people not conforming to established gender norms or individuals coming from under-represented groups. Where grounds of discrimination intersect, such as gender and race or disability, the risk of violence and harassment is exacerbated.[378]

Section 3.5 looks at a range of experiences of people vulnerable to sexual harassment in different situations. It discusses how various factors — demographic characteristics, identity and circumstances—combine to affect their exposure to, experiences of and responses to sexual harassment.

(d) Other cultural and systemic factors

As noted above, a range of other cultural and systemic factors that contribute to the prevalence of workplace sexual harassment were frequently raised in consultations and submissions. These included:

- the culture or 'climate' of a workplace, including the role of leadership in setting workplace culture, workplaces where high-value workers are 'protected' and where there is a culture of general incivility
- lack of understanding of what constitutes sexual harassment
- use of alcohol in a work context.

(i) Workplace culture or 'climate'

Organisational climate and sexual harassment

There is a strong body of research on sexual harassment in a workplace context which considers the effect of 'organisational climate' or the 'organisational characteristics that communicate tolerance of sexual harassment'.[379]

The organisational climate is 'informed by the social norms that exist in a particular workplace ("the way we do things around here").'[380] Studies have found that the climate of an organisation is an important 'antecedent' (or cause) of sexual harassment.[381] In other words, in workplaces that are perceived to be more tolerant or permissive of sexual harassment, people are more likely to experience sexual harassment.[382]

The research has found that aspects of 'organisational climate' that are important in influencing a workplace's tolerance of sexual harassment include a perception that it is risky to complain, that complaints are not taken seriously and that there is a lack of consequences or sanctions for harassers.[383] These factors align with those identified in *Change the Story* as contributing to the condoning of sexual harassment in workplaces, such as excusing or trivialising the behaviour, and shifting blame away from the harasser.

Other factors identified as influencing workplace climate are perceptions relating to workplace policies and procedures (such as formal guidelines for behaviour, procedures for reporting and investigating grievances, and training programs), and workplace practices for implementing and enforcing policies and procedures.[384]

A 2016 US Equal Employment Opportunity Commission (US EEOC) Select Taskforce on the study of harassment in the workplace reinforced the importance of workplace climate (which it referred to as 'workplace culture') in driving sexual harassment:

> Over and over again, during the course of our study, we heard that workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment.[385]

The Commission heard similarly in submissions and consultations about workplace cultures where it was perceived to be risky to complain. These included examples of workplaces described as having a culture where 'loose behaviour is tolerated and treated jokingly',[386] where the victim said they feared they might lose their job,[387] where the victim said the harasser was a senior leader in the workplace,[388] or where bystanders who said they had witnessed or heard about incidents of workplace sexual harassment were unwilling, or felt unsafe, to call out the behaviour.[389] It also included workplaces in which there was a culture of general incivility where respect was not prioritised. This is discussed below in 'General workplace incivility'.

Examples were also provided of workplace cultures in which complaints were not taken seriously, including complaints made to direct managers,[390] to human resources personnel,[391] or to the owner of the business.[392] Other examples included instances where victims said that sexually harassing behaviour was denied, trivialised or excused, as discussed above.

The Commission also heard about examples of workplaces where it was perceived that harassers were not held accountable. One worker told the Commission her employer said they would 'pay the victim out' to avoid taking action against a harasser.[393] Another worker told the Commission she reported being sexually assaulted by a colleague at a work function to her Human Resources manager and 'was offered money to keep quiet and not go to the police.'[394]

Section 6, 'Preventing and responding to sexual harassment in the workplace', sets out in more detail what the Commission heard about victims' experiences of reporting sexual harassment in their workplaces. It also discusses what the Commission heard about workplaces without formal policies around expectations of behaviour, reporting procedures or training, or where policies were not effectively implemented.

Workplace leaders

The impact of leaders in the workplace has been shown to be significant in terms of enabling or, conversely, inhibiting workplace sexual harassment. Studies have found that sexually harassing behaviours are more likely to occur if people are exposed to such behaviour by authority figures, and less likely to occur when those behaviours are not accepted by authority figures.[395]

The Commission was told about many examples of the decisive effect of leaders' behaviour on the climate of a workplace, including where leaders 'turned a blind eye' to sexual harassment[396] or engaged in sexual harassment as a way of 'exerting and evidencing their power',[397] or where middle managers took the cue from senior leaders to sexually harass workers.[398] The critical role of leadership in creating a workplace culture immune to sexual harassment is discussed in detail in Section 6.2(a), 'Leadership'.

Protection of 'high value' workers

Workplaces in which 'high value' workers were 'protected' was another factor raised with the Commission as contributing to a workplace culture that tolerated sexual harassment.[399] The Commission heard that harassers who 'make a lot of money' for an employer, or hold critical or senior roles, may be considered by their employer to be of higher value to the organisation than their victims.[400] The Commission was told that in some workplaces, these harassers were considered 'untouchable' and were protected by their employers:

> [A] a lot of the harassers are high performers, and people want to protect their high performers, which is natural, so they don't address the harassing behaviour.[401]

The US EEOC noted in its report on harassment in the workplace that the protection of 'high value' workers may occur because:

- The high value worker believes they are 'above the rules' of the workplace.
- Their behaviour takes place outside the view of anyone with the authority to stop it.
- Senior management is reluctant to challenge their behaviour.[402]

A submission from a former senior manager for an organisation in the health sector described systematic sexual harassment by 'high value' practitioners employed by the organisation:

> On a weekly basis, we were dealing with [practitioners] who were either abusing their staff in a physical manner or taking advantage of them sexually … In 100% of cases, the women would be dismissed and the [practitioner] would continue practising his predatory ways with the next unsuspecting nurse to be employed into his practice … [The] organisation would do everything to cover the situation up … so that [the practitioner] could continue to generate revenue for the company.[403]

Another worker told the Commission that when she reported workplace sexual harassment, she was removed from her position and 'effectively demoted' but was told the harasser 'was too valuable in his current position to move'. She said that, as far as she knew, there was 'no impact' on the harasser.[404] In another example, the Commission was told about a CEO who resigned after multiple complaints of sexual harassment were made against him. However, the board rejected his resignation because he did a 'good job' for the organisation.[405]

General workplace incivility

There is evidence that general incivility in a workplace is associated with higher rates of workplace sexual harassment.[406] Workplace incivility is defined in academic studies as rude or discourteous behaviour that conveys disrespect towards others, but lacks clear intent to harm.[407]

A 2005 study found that 'almost all women' who had been subjected to sexual harassment in their workplace also reported experiencing general incivility at work. The study noted that 'sexual harassment often took place against a backdrop of generalized disrespect in the workplace.'[408]

Research has suggested that it is likely that a workplace climate that is tolerant of sexual harassment 'would also be conducive to non-sexual forms of mistreatment, such as general incivility.'[409] This is because 'incivility arises from patterns of social interaction that are implicitly sanctioned by the management environment'.[410] If sexual harassment is not seen as behaviour that should be addressed, then incidents of general incivility 'should be even less likely to receive attention from management.'[411]

The issue of general workplace incivility, and its relationship to sexual harassment, was raised with the Commission in consultations.

For example, the Commission heard how a respectful workplace culture provides an important foundation for respectful professional relationships between workers more generally:

> [I]f you do have a workplace that does have a respectful, safe culture, then a whole lot of things flow from that, and yes, all the [workplace] behaviours start reflecting that, hopefully.[412]

Section 6.2(c), 'Culture', further considers how workplace culture can contribute to effectively preventing and addressing sexual harassment in the workplace.

(ii) Lack of awareness of behaviours that constitute sexual harassment and of its prevalence

While recent worldwide movements such as #MeToo have spurred greater interest in and focus on sexual harassment, the Commission has heard that there continues to be a lack of awareness of what constitutes workplace sexual harassment and its prevalence. As noted in Section 3.2, this was illustrated by the 2018 National Survey findings[413] and was also raised regularly in consultations:[414]

> I hear a lot that we can't do anything about sexual harassment because no one's telling us that it's happening … and a lot of that is around people [who] don't understand what sexual harassment is, technically. 'That's just boys being boys' and 'that's just a joke' … That type of attitude I think is pervasive.[415]

> [I was] working in this area 25 years and there were still people that didn't know what sexual harassment is. So perhaps there's an element of people just not understanding that their behaviour is inappropriate at some level.[416]

> [I]t is really important to give people greater opportunity to talk about what actually is sexual harassment because I think for a lot of women and men that's not well-understood.[417]

These concerns were echoed in submissions from organisations.[418] For example, the Diversity Council of Australia told the Commission that almost three quarters (72%) of their members said that the most common misconception they encountered in their organisations was a 'lack of understanding among other employees about "knowing the line"'—that is, understanding what does and what does not constitute sexual harassment.[419]

The Law Council of Australia also expressed concern about a lack of public knowledge around the laws relating to sexual harassment, as well as complaints processes and support.[420] WEstjustice (a Victorian community legal centre) noted that, for many of their clients, lack of understanding of what constitutes sexual harassment and 'low awareness of rights' means that 'sexual harassment is often not reported, unless other employment issues cause clients to seek legal assistance.'[421]

Other sections of this report address what the Commission heard throughout the Inquiry about the lack of understanding of workplace practices and legal processes for addressing workplace sexual harassment, including through the use of workplace confidentiality policies, confidentiality agreements in settlements of sexual harassment cases, and the operation of defamation laws.[422] The Commission heard that these factors contributed to a lack of awareness of workplace sexual harassment and understanding of its prevalence and nature. By limiting public and workplace discussion about sexual harassment, a lack of transparency can undermine attempts to recognise and tackle the drivers of sexual harassment and respond appropriately when it occurs.

(iii) Use of alcohol

Throughout this Inquiry, concerns were raised with the Commission about the way in which alcohol misuse may contribute to the occurrence of sexual harassment.[423]

The Law Council of Australia told the Commission that there is anecdotal evidence that 'incidents of sexual harassment within the legal profession, and particularly within corporate law firms, are exacerbated by social events centred around the availability and high consumption of alcohol.'[424]

Victorian Women Lawyers told the Commission that courts have identified that some workplace practices, including after-work social events such as Friday night drinks, or 'after parties' following end-of-financial-year or Christmas functions, paid for and sponsored by employers, may increase the risk of sexual harassment.[425]

Alcohol can disinhibit social controls on behaviour. *Change the Story* has identified the 'harmful use of alcohol' as a factor that can interact with the gendered drivers of violence against women (discussed above) to increase the probability and severity of such violence.[426]

Research has suggested that alcohol does not, in and of itself, cause violence against women.[427] Rather, the significance of alcohol use and violence against women lies in the interaction between social norms relating to alcohol and social norms relating to gender (especially norms concerning masculinity and masculine peer-group behaviour).[428] The research has found that this interaction 'can increase the likelihood, frequency or severity of violence against women', rather than the consumption of alcohol itself.[429]

While excessive consumption of alcohol is a potential risk factor for sexual assault, research has indicated the increased risk is primarily among men who are already predisposed to sexual aggression.[430] Similarly, while the use of alcohol may be a factor in some cases of workplace sexual harassment, not all people who use alcohol engage in sexual harassment at work, while other people who do not use alcohol can be harassers.[431]

Many workers said that alcohol was a factor associated with the sexual harassment which they (or others) experienced.[432] One worker told the Commission about an incident at a work-related conference event:

> There was a lot of alcohol being consumed and he started talking to me and making me uncomfortable. We were staying at the conference complex. He asked me what room I was staying in. When everyone was leaving, he jumped up to kiss me. I tried to push my face away so he could get my cheek, but he got my mouth and stuck his tongue in my mouth. It triggered my childhood sexual abuse memories.[433]

> My mentor was aware of me being bipolar … The office (including my supervisor) knew he was 'sleazy' yet did nothing to stop the influence he had over me. He would regularly take me out drinking and ply me with enough alcohol to the point where I would be incoherent and could barely move … he continued to take advantage of me sexually, knowing that I was extremely unwell.[434]

The Commission was told that alcohol was frequently used to excuse sexually harassing behaviour:

> [T]he majority of those [incidents of sexual harassment] seem to occur at social events when there was alcohol, and I think sometimes that can almost be an excuse—oh, we're all just having fun.[435]

> [T]he women I've worked with over time would say, 'Well, I'll never go to a workplace function again where there's alcohol because I just had a bad experience and it's been taken off the table on the assumption that, well, you were there. You knew there was going to be alcohol there. You had a drink. This is what happens, people get handsy'.[436]

The Commission also heard that the use of alcohol could act as a barrier to victims reporting sexual harassment. One worker told the Commission she was groped and sexually assaulted by a co-worker at the office Christmas party:

> When I arrived at work the following Monday, we both pretended like nothing happened and he had no consequences for his actions. I felt that I had no power in the workplace … due to the stigma of 'well, she had been drinking'.[437]

Reviews of cultural and systemic issues in specific organisations have identified alcohol as a factor contributing to sexual harassment, sexual assault or other inappropriate behaviour.[438] For example in 2018, an independent review into a New Zealand law firm examined allegations of sexual harassment by male partners of the firm at work-related social events, who were described as being intoxicated or as putting pressure on younger female colleagues to drink.[439]

The review recommended that the firm engage expert advice to develop 'policies, standards, and systems' on 'alcohol use', 'host responsibility' and 'expected behaviours at social functions',[440] and that 'tight control be maintained over the availability of alcohol'.[441] For example, the firm's recruitment process had involved expensive functions where alcohol was readily available; however, this was shifted to 'lunches and other activities that are not centred on alcohol'.[442]

The Commission was also told that NSW Young Lawyers, in response to a recent survey on young lawyers' experiences of sexual harassment in the workplace, recommended reducing alcohol consumption at work-related events.[443]

The Commission's view

Sexual harassment in the workplace cannot be addressed effectively unless its fundamental causes are identified. The Commission recognises the large weight of evidence, both Australian and international, which has concluded that gender inequality is a 'root cause' of violence against women, of which sexual harassment is one form.

As the Commission explores further in Section 4, 'Prevention outside the workplace', sexual harassment cannot be addressed until the norms, practices and attitudes that underlie it (and other forms of violence against women) are acknowledged and transformed. It is essential that governments, employers and the community understand the gendered drivers that underpin sexual harassment, along with other inequalities that may intersect to increase the risk of sexual harassment for some people, and consider how to shift these attitudes and practices across society as well as in their own workplaces.

Effective prevention of sexual harassment will also require workplaces to consider and address a range of cultural and systemic factors, including the significant influence of workplace 'climate' or culture, the level of understanding of sexual harassment among workers and managers at all levels, and how access to alcohol, especially at work social events, may increase the risk of workplace sexual harassment.

3.5 People who experience sexual harassment in the workplace

> For a long time I thought that what happened to me was normal—it's just what happens to young women in the workplace. You learn to ignore it as best you can and move on … But nowadays I think that, even if that [is] the case, it shouldn't be.[444]

This section examines who experiences sexual harassment in the workplace. As discussed below, women experience higher rates of workplace sexual harassment than men. Beyond this, research on the experiences of different groups of people is limited.

However, there is increasing evidence that sexual harassment affects some groups of people disproportionately. Overwhelmingly, the Commission heard that for at-risk populations sexual harassment is often experienced together with other forms of discrimination and inequality in the workplace.

This section draws on personal accounts and case studies of workers in a range of sectors and employment situations to examine characteristics, circumstances and conditions that combine to increase the risk of workplace sexual harassment for some people. This includes risk factors based on:

- sex
- age
- sexual orientation, gender identity or intersex status
- Aboriginal or Torres Strait Islander status
- disability
- culturally or linguistically diverse background
- insecure work status.

The Commission heard about power structures, as well as social and cultural norms, that create conditions that can both expose these groups to sexual harassment and create barriers to reporting it. As the 2018 International Labour Conference observed:

> Because exposure to violence and harassment is highly contextual and results from a convergence of drivers of violence and harassment, such as discrimination, conditions and risk factors, it is important not to reduce the analysis to a list of who is 'most vulnerable' to violence and harassment. Doing so could mistakenly imply that *who* people are or *what* they do makes them victims.[445]

Rather, it is the 'intersection' (or combination) of factors such as gender, race, age or disability that 'makes violence and harassment more possible, and, in fact, makes this experience of violence and harassment unique'.[446] 'Intersectionality' is discussed further in Section 3.4(c).

(a) Sex

(i) Sexual harassment of women

Women in Australia are more likely than men to have experienced sexual harassment at work. However, rates of sexual harassment are also high among men. The 2018 National Survey found that almost two in five women (39%) and just over one in four men (26%) said they experienced sexual harassment in the workplace in the last five years.[447]

Unpublished data from the 2018 National Survey found that, across every age group, women experienced higher rates of sexual harassment than men. The difference was highest among young workers aged 15–17, where the rate of workplace sexual harassment for girls (31%) was three times higher than for boys (10%). The difference was lowest among workers aged 40–49, where the rate for women was 37%, compared to 28% for men.[448]

International studies show women are the overwhelming majority of sexual harassment victims.[449]

The 2018 National Survey revealed other differences in the nature of sexual harassment experienced by women and men. For example, women were more likely than men to say that:

- the most recent incident of sexual harassment was not a one-off but had happened to them previously at the same workplace (54% of women compared to 43% of men)[450]
- the behaviour they experienced was common in their workplace (21% of women compared to 17% of men)[451]
- others had experienced this type of sexual harassment in their workplace (44% of women compared to 37% of men).[452]

The 2018 National Survey found the majority of people who were sexually harassed did not make a formal report or complaint. There was no significant difference between men and women in this regard.[453]

The 2018 National Survey found that women felt a higher level of offence and intimidation about the most recent incident of workplace sexual harassment they experienced in the last five years than men.[454] Women were also more likely than men to suffer negative impacts on their mental health, self-esteem, self-confidence and career progression as a result of workplace sexual harassment.[455] The gendered impacts of workplace sexual harassment are discussed in Section 3.8.

Most of the accounts of workplace sexual harassment that the Commission heard about in consultations and submissions were from women, and their experiences are reflected throughout this section and the rest of this report.

(ii) Sexual harassment of men

As noted above, the 2018 National Survey found that 26% of men who had been in the workforce in the last five years said they had been sexually harassed in the workplace in that period—a rate which is unacceptably high.[456]

Studies have consistently found that men who experience sexual harassment are more likely to be targeted by other men than by women.[457] In line with this, the 2018 National Survey found that, for both men and women, the harasser was more likely to be a man.[458] Section 3.6 discusses people who sexually harass in the workplace.

Research has suggested that societal norms relating to both masculinity and heterosexuality underpin the sexual harassment of men who deviate from prescribed heterosexual norms and gender roles.[459] This sexually harassing conduct occurs regardless of the actual sexual orientation of the victim.[460]

Studies have also found that male-to-male sexual harassment is often characterised by behaviour that enforces 'the traditional heterosexual male gender role.'[461] Men considered to have violated these norms are ridiculed for being 'feminized, non-traditional, weak, gay, effeminate or in some other way "not man enough".'[462]

The Commission heard at its roundtable with academics:

> … stereotypically feminine behaviours or types are kind of denigrated and so when a man is gay, or perceived to be gay, or doesn't behave in a traditionally or stereotypically masculine way, then they may well be targeted in a similar kind of way to women … there's similar drivers.[463]

In this context, the sexual harassment of men, like that of women, functions as a tool to enforce traditional gender roles in the workplace.[464] Sexual harassment perpetuates 'gender stereotypes in which maleness and masculinity are associated with dominance whereas femaleness and femininity are associated with weakness and subservience.'[465]

The Commission heard about the experiences of sexual harassment of men who may not conform to traditional male stereotypes, as the following case study illustrates.

Prabh's story[466]

In a consultation, the Commission was told about the experience of Prabh, an international student who identifies as gay. Prabh's precarious financial position meant he needed to maintain regular employment in order to support himself to finish his studies.

Prabh told the Commission that at his job at a warehouse, he was harassed by his manager for carrying himself in a more feminine manner. Prabh said his manager teased him by telling him he walked like a woman and humiliating him in front of his colleagues.

Prabh put up with this behaviour until he found a new job working as a cleaner at a retail complex. Prabh said that at his new job he was repeatedly harassed by another cleaner at the complex who would wolf whistle Prabh. Prabh told the Commission these experiences made him fearful and upset.

Professors McDonald and Charlesworth highlighted that rigid adherence to gender stereotypes could extend to negative perceptions of men reporting sexual harassment:

> Men who do complain may be believed less, liked less and punished more than women who complain, arguably because the expectations of observers lead to negative evaluations of men who do not conform to expected gender roles.[467]

The Commission also heard from male victims who felt they could not report sexual harassment by female harassers for fear it would not be taken seriously or more readily dismissed. One man working in a female-dominated workplace said he had been sexually harassed by a female co-worker, but told the Commission, 'My boss is female, my HR head is female and I can't do anything!'[468]

Some research has considered how gendered norms may also operate when men are sexually harassed by women, suggesting women may engage in such behaviour as 'honorary men' to 'fit in' with the dominant culture.[469] Other research has suggested that women's and men's perceptions of sexual harassment by the opposite sex tend to differ, with men typically finding sexual harassment by women 'to be amusing or at least not serious'.[470]

An Australian study on workplace sexual harassment complaints lodged with human rights and anti-discrimination agencies also found that:

> Male complainants alleging sexual harassment by women were far less likely to report serious impacts on their non-work relationships, suggesting sexual harassment by women was perceived as less personally damaging.[471]

(b) Age

(i) Sexual harassment of young workers

In this section, unless otherwise specified, young workers are considered to be those aged under 30 years, using the age groups from the 2018 National Survey.

The 2018 National Survey asked people who had been in the workforce at any time in the last five years whether they had experienced sexual harassment at work in that period. It found that, when compared to the average prevalence rate of 33%, people aged 18–29 experienced the highest rates of workplace sexual harassment of all age groups (45%).[472]

People aged 15–17 years experienced workplace sexual harassment at a rate of 20%.[473] While this rate is lower than that for other age groups, it should be noted that workers aged 15–17 were unlikely to have been in the workforce for as long as workers in older age groups.

Similar findings have emerged from other Australian and international studies, which also show that young workers are more likely to be sexually harassed at work than older workers.[474]

For young workers, as with workers of all ages, the rate of sexual harassment was higher for women. Unpublished data from the 2018 National Survey found that for people who had been in the workforce in the last five years:

- the rate of workplace sexual harassment for women aged 18–29 years was 53%, compared to 36% for men in the same age group.
- the rate of workplace sexual harassment for girls aged 15–17 years was 31%, compared to 10% for boys in the same age group.

Unpublished data from the 2018 National Survey also found that, when people were asked about the type of workplace sexual harassment they experienced most recently, young workers (aged under 30 years) were more likely to have experienced certain types of harassment than older workers (aged 30–39 or 40+). These were:

- repeated or inappropriate invitations to go out on dates (62% of workers who said they experienced this were aged under 30, 21% were aged 30–39 and 15% were aged 40 or older)

- being followed, watched or someone loitering nearby (59% of workers who said they experienced this were aged under 30, 15% were aged 30–39 and 20% were aged 40 or older)
- inappropriate staring or leering that made them feel intimidated (53% of workers who said they experienced this were aged under 30, 15% were aged 30–39 and 23% were aged 40 or older)
- Sexual gestures, indecent exposure or inappropriate display of the body (51% of workers who said they experienced this were aged under 30, 17% were aged 30–39 and 21% were aged 40 or older).[475]

The SDA shared the following experience of a young worker who described sexual harassment by a customer:

> My harasser sits outside my work in the food court and watches me as I work. If I notice him, he averts his eyes but not for long … he has also started parking his vehicle closer to mine.[476]

Suman's story[477]

Suman, a young worker, told the Commission in a consultation that she worked at a large department store. Over the Christmas period, a security guard was assigned to Suman's section to prevent shoplifting. Suman told us that she began to notice the guard leering at her and following her around the section as she worked. One of her co-workers also noticed the guard's behaviour, telling Suman: 'He's been looking at you like he wants [to] eat you up'. Suman said the guard's behaviour made her feel uncomfortable and intimidated.

(ii) Workplace power imbalances and the vulnerability of young people

Professors McDonald and Charlesworth told the Commission that 'children and young adults are inherently vulnerable to adverse experiences including sexual harassment due to their age, sex and unequal power in employment relationships'.[478] The Commission heard that in the retail and hospitality sector, for example, young workers were vulnerable because 'people see themselves as being able to dominate them or intimidate them more easily'.[479]

Consistent with this, the 2018 National Survey found that young workers felt more intimidated by sexual harassment in the workplace than older workers, with workers aged under 18 experiencing the highest level of intimidation of all age groups.[480]

A number of accounts from victims reflected the lack of power and vulnerability of young workers, and particularly young women, as they entered the workforce:

> One senior [staff member] would come into my office adjoining his and stand behind me, then press up against my back and slide his arms around my sides to use my computer! I was young and embarrassed and didn't know how to handle it, and my stunned silence was taken as approval.[481]

> I have been asked to do a twirl in a tight short skirt as my 'job interview' as a 19-year-old cinema usher.[482]

> My first experience with sexual harassment happened when I was at [a supermarket] as a young student working there as a casual. There was a much older man who had worked there for many years. He would rub himself up against me in the aisles when I was stacking shelves or would make lurid comments to the other male staff like 'I bet she bangs like a dunny door'. I reported his behaviour to my supervisor and I was called into a meeting with this fellow and was made to feel I was making things up and was told never to talk about him like that again. I was devastated. My first taste of how women were made to feel when they reported incidents of sexual harassment in the workforce: I was only 17.[483]

The SDA told the Commission that young people's vulnerability in the workforce could leave them open to a greater risk of being 'groomed' or being manipulated 'with the intention that it will lead to sexual behaviour.'[484] It observed:

> Young workers are vulnerable to grooming by adult supervisors because there is already a power imbalance which creates a greater risk of young workers complying with the requests or behaviours of the person grooming them, particularly if they have control over their employment, including hours allocation and promotional opportunities.[485]

(iii) Employment status of young people

The Commission heard that factors relating to young people's employment status could make them more vulnerable to sexual harassment.[486] Young workers aged 15 to 24 years are much more likely than other workers to be contracted on a casual basis.[487] The 2018 Senate Select Committee on the Future of Work and Workers noted that 'the rise of non-standard work has been rapid, and for younger workers it may now even represent the norm'.[488]

Many young people work in sectors (such as retail and hospitality) where there are higher rates of sexual harassment.[489] Employment in these sectors is often characterised by casual, short term or irregular work, with high staff turnover.[490] These industries are discussed in more detail in Section 3.7.

The Commission heard that the casual nature of their employment was a key factor in whether a young person made a sexual harassment complaint. A former legal officer at a youth legal service told the Commission:

> I think unless people are permanent it's really hard for them to come forward and make a complaint … Younger workers are almost never permanent employees, and so when it came to making the decision whether to push forward with a complaint, the status of their employment was always the number one thing on their minds.[491]

Similarly, the Commission was told that young people in casual work in hospitality and retail were less likely to speak up about sexual harassment or seek remedies when it occurred:

> We have a lot of young workers who don't necessarily understand their rights and that is compounded by the fact that they are often casual [which] means that they are very unwilling to make complaints about sexual harassment when it occurs. So, you often have people working in retail and fast food, and sexual harassment for them is a regular every day or every week occurrence and they just don't feel they're in an environment where they can make a complaint about that—whether it's fear of losing their job and also the cultural aspect of the workplaces they're in.[492]

The ease with which employers can remove young casual employees from the workplace was highlighted in consultations with young retail workers who said that after they reported sexual harassment to their employers, they stopped getting shifts at work: 'they're just trying to get rid of me by cutting my shifts and everything. Because I'm a casual, it's just easy to do'.[493]

The Commission was also told that the underemployment and high rates of unemployment of young people can factor in their decisions to remain or to leave situations where they have experienced sexual harassment. The National Union of Students told the Commission that low average earnings and youth unemployment rates also affect graduates.[494] As with other young workers, these factors increase their vulnerability to sexual harassment in the workplace, as they fear jeopardising their employment by making a complaint.[495]

The Diversity Council of Australia highlighted that young people in the beginning of their careers were usually in positions where they had little power in the workplace and were less confident to speak out against sexual harassment. This included 'younger women or new starters in the company who don't want to jeopardise their career'.[496]

The Commission heard that, particularly for young workers in occupations or industries that relied on referrals, concerns about protecting their career prospects could outweigh speaking out against workplace sexual harassment. One victim told the Commission:

> I didn't think it would be good for me [to make a formal complaint]. I am a law student and do not want to muddy the waters in my town if and when I want more work. [The harasser] has been in the industry a long time and it is very tight-knit.[497]

(iv) Lower awareness of workplace rights and access to support

The Commission heard that young people were less likely to be educated about their rights at work.[498] As noted above, there is a high rate of casual employment among young workers, and casual workers are much less likely to have induction and training.[499] Smaller businesses are also more likely to hire casual workers,[500] but less likely to have formal workplace policies or training (see Section 3.7(f)). The Commission heard from young workers and their advocates in the retail industry that: '[g]enerally, the extent of the training is when they've commenced … they're often just usually given a document to sign off on as they're working.'[501]

As employment models and contractual arrangements evolve, workplaces have changed their recruitment, appointment and staff management practices. The Commission heard that young people have low awareness of unions or support services to resolve workplace issues,[502] as well as low understanding of behaviour that is not acceptable in a workplace. These factors could heighten their risk of experiencing sexual harassment:

> [Young] people don't know those channels that they need to go down when they are facing those issues [workplace sexual harassment] and again, they don't know what the definition of it is and was it just … 'am I being sensitive, maybe they didn't mean it like that, maybe I'm reading into it.'[503]

The 2018 National Survey found that young people aged 15-17 had substantially lower awareness of what constitutes sexual harassment than older age groups.[504] Similarly, the SDA told the Commission that 'young workers sometimes don't have a good understanding of their rights and obligations regarding sexual harassment, and even if they do, are not likely to report'.[505] The Commission was told that complaints mechanisms for reporting sexual harassment are 'onerous and confusing' for people of all ages across the workforce and, for young people, 'can be particularly difficult to navigate, especially if you are unaccustomed to the process'.[506]

The Commission heard that, particularly for young people, seeking information and feedback from co-workers was common in small business settings, especially where formal policies and procedures may not be in place. For example, one young worker said that she and her colleagues dealt with frequent sexual harassment from customers by 'sticking together and speaking about it afterwards'.[507]

Section 4, 'Prevention outside the workplace', makes recommendations to improve understanding of sexual harassment and workplace rights more broadly among young people.

(c) Aboriginal and Torres Strait Islander peoples

(i) Sexual harassment of Aboriginal and Torres Strait Islander workers

There is significant diversity among Aboriginal and Torres Strait Islander peoples and communities based on geographic location, language and cultural identification, social and economic conditions, and historical experiences.[508]

Research concerning workplace sexual harassment experienced by Aboriginal and Torres Strait Islander workers is extremely limited, and the only source of data appears to be the Commission's national surveys.

The 2018 National Survey found that more than half of Aboriginal and Torres Strait Islander workers said they had experienced workplace sexual harassment in the last five years (53%).[509] This was substantially higher than the rate for the general population (33%).[510] Broken down by gender, 55% of Aboriginal and Torres Strait Islander women and 50% of Aboriginal and Torres Strait Islander men, said they had experienced workplace sexual harassment in the last five years.[511]

In their lifetime, Aboriginal and Torres Strait Islander men were more likely than other men to have experienced sexual harassment (66% of Aboriginal and Torres Strait Islander men compared to 56% of non-Indigenous men).[512] There was no significant difference between rates of lifetime sexual harassment experienced by Aboriginal and Torres Strait Islander women and women who did not identify as Aboriginal and Torres Strait Islander.[513]

According to 2016 Census data, most Aboriginal and Torres Strait Islander workers were in the healthcare and social assistance industries (14%), and the most prevalent occupation was community and personal service worker (17%).[514] These industries have higher rates of sexual harassment and often involve work with clients or patients in isolated working situations, which can increase their exposure to sexual harassment (see Section 3.7).

(ii) Discrimination and sexual harassment experienced by Aboriginal and Torres Strait Islander workers

The Commission heard that Aboriginal and Torres Strait Islander workers experienced sexual harassment together with other discrimination and harassment in the workplace. International research has suggested that particular groups of women may experience harassment at greater rates than other women on the basis of their gender and race.[515] Discrimination against Indigenous Australians is considered one of the most prevalent forms of discrimination in Australia.[516]

Aboriginal and Torres Strait Islander peoples experience entrenched disadvantage compared to the general population across a wide range of indicators, including in employment.[517] The Diversity Council of Australia's Inclusion@Work Index found that 38% of Aboriginal and/or Torres Strait Islander workers had personally experienced harassment and/or discrimination in the past 12 months—the highest rate of workplace discrimination and harassment of any demographic group.[518]

The United Nations Special Rapporteur on Violence against Women has acknowledged the different dimensions of discrimination experienced by Aboriginal and Torres Strait Islander women:

> Aboriginal and Torres Strait Islander women face institutional, systemic, multiple, intersecting forms of discrimination. In addition to sexism and racism, many women also face class-based discrimination due to their low socio-economic status, as well as social exclusion arising from their regional or remote geographical location.[519]

This view was reinforced by Aboriginal and Torres Strait Islander women who told the Commission that both sex and race were intersecting factors in their experiences of workplace sexual harassment:

> I think it's different [for Aboriginal and Torres Strait Islander women] because there's a level of racism attached to everything that happens with Aboriginal and Torres Strait Islander people. And sexual harassment is no different.[520]

A study on stereotypes, racism and bullying of Aboriginal and Torres Strait Islander workers in the public service identified common experiences of racism and racialised hierarchies in workplaces.[521] The study found:

> The issue of racism was frequently raised by interviewees whether experienced personally or observed. Some spoke of racism as a form of bullying and/or harassment, while for others the two issues were viewed as separate … interviewees often communicated a sense that encountering racism was not wholly unexpected, given similar problems existing in Australian society more widely.[522]

Research on violence against Aboriginal and Torres Strait Islander women has suggested that oppression and discrimination can 'lead to people lowering their expectations of themselves and the ways they will be treated by others, in turn increasing their vulnerability to violence.'[523] The Law Council of Australia's submission recognised that the historical legacy endured by Aboriginal and Torres Strait Islander peoples means that disadvantage has been normalised, and as a consequence there may be 'a higher threshold for tolerance of harmful behaviours, including sexual harassment'.[524]

(iii) Cultural barriers to reporting

The Commission heard that Aboriginal and Torres Strait Islander women have to contend with 'myths, around their sexual and racial identities when addressing sexual harassment,'[525] and that these factors could discourage reporting.[526] The Law Council of Australia noted:

> Indigenous women carry with them the knowledge that, should they make a sexual harassment complaint, they may be less likely to be defended or supported due to these discriminatory attitudes.[527]

Aboriginal and Torres Strait Islander workers also raised a lack of awareness of the behaviours that constitute sexual harassment and pathways for resolving sexual harassment in consultations:

> ... for us Indigenous people I think we lack the knowledge of what is sexual harassment. For example we just put on twenty new people, if you asked them what sexual harassment is they would say no.[528]

Culture, race and gender can intersect in other ways for Aboriginal and Torres Strait Islander women who experience workplace sexual harassment. In workplaces where there are closer links to the community, or where a large proportion of workers are Aboriginal and Torres Strait Islander, it can be even more difficult for women to report sexual harassment because of family and community connections or obligations.

The Law Council of Australia told the Commission that Indigenous women must 'confront the very real possibility that any complaints they make regarding Indigenous men may be seized upon as a "cultural failing"'.[529] Such stigma and interpretations of violence as inherent to Indigenous culture can deter people from reporting.

In community-based settings, boundaries between family and work may be less clear. As discussed in Section 3.7(e), in small communities, privacy and anonymity are difficult to maintain. These issues are relevant to understanding experiences of employment for Aboriginal and Torres Strait Islander workers. One worker observed, 'the people you have to tell are people you know are connected to the person you're making a complaint about'.[530]

(iv) Workplace barriers to reporting

The Commission was told about particular barriers to reporting sexual harassment in the workplace for Aboriginal and Torres Strait Islander workers. The Commission heard that speaking up about a harasser's behaviour required a level of visibility which could be very uncomfortable. People entering a workplace through initiatives to support the recruitment of Aboriginal and Torres Strait Islander workers said that questioning workplace behaviour could be particularly difficult in circumstances where they were already a 'minority', and 'already under the spotlight'.[531]

The Commission also heard that experiences of discrimination and marginalisation can create reluctance to engage with organisational or external agency processes. New research on the experiences of Aboriginal and Torres Strait Islander people with disability has considered how frequent exposure to discrimination can have cumulative impact and lead to 'apprehended discrimination'.[532]

This is when fear of discriminatory treatment transforms into an expectation that this will occur, and can lead to people avoiding situations where they could experience discrimination.[533]

Research on Aboriginal and Torres Strait Islander peoples' experiences of working in the public service found similar responses to instances of racism:

> A majority view was that it was generally better not to respond, and certainly not to make a formal complaint of any kind, as a means of avoiding negative reactions from others. For a number of interviewees, part of the reality of being an Indigenous public servant involved a sense of being under scrutiny by non-Indigenous colleagues and, consequently, a desire not to appear 'thin-skinned' or 'angry'. As one participant put it, a real risk in reacting to racism is that 'you come off looking worse'.[534]

The issue of non-disclosure or under-reporting of violence in Aboriginal and Torres Strait Islander communities has been well-documented.[535] Research has considered systemic and personal factors that influence reporting choices, including: evaluation of the seriousness of the act; the extent of physical or psychological harm experienced; perceptions of justice processes and system responses; fear and distrust of government agencies; estimations of not being believed; and an individual's relationship to the perpetrator.[536]

Lack of trust in reporting structures also involves factors such as power differences and lack of representative structures or of Aboriginal and Torres Strait Islanders in decision-making positions.[537]

Awareness of such issues is necessary to work more effectively with Aboriginal and Torres Strait Islander workers to address barriers to reporting and better prevent workplace sexual harassment. The Commission was also told about the need to ensure that complaints processes and support systems are accessible:

> I think it will be easier for Aboriginal women or men … to approach somebody that is Aboriginal or Torres Strait Islander within the department [to make a report of sexual harassment].[538]

> Simplified terms is what we need. Unless you're in a senior role you won't understand what it is, what the process is and what it entails. That's our challenge, the understanding.[539]

(d) People who are lesbian, gay, bisexual, transgender, queer/questioning and/or have intersex variations

(i) Sexual harassment of LGBTQI workers

This report uses the term 'LGBTQI' to refer collectively to people who are lesbian, gay, bisexual, transgender, queer/questioning and/or intersex.[540]

However, the Commission recognises the complexity of LGBTQI communities and that a person may have more than one LGBTQI attribute (for example, transgender and gay) and that for some people, sexual orientation and gender identity may not be fixed.[541]

The 2018 National Survey found that people who identify as gay or lesbian (47%), bisexual (57%) or with another sexual orientation (55%) were significantly more likely than people who identify as straight or heterosexual (31%) to be sexually harassed in the workplace in the last five years.[542] People with an intersex variation were also more likely than those without such a variation to have been sexually harassed in their workplace in the last five years, (77% compared to 32%).[543]

These results are consistent with findings from Australian and international research.[544] A number of submissions to the Commission also provided data from recent surveys indicating that LGBTQI people experience higher rates of sexual harassment at work.[545]

(ii) Discrimination and sexual harassment experienced by LGBTQI workers

To date, most research on workplace sexual harassment has focused on the sexual harassment of women.

Recent research has found that gender identity and sexual identity also affect sexual harassment, and that specific prejudices are involved in the sexual harassment of gay and lesbian people, including bystander responses.[546]

A 2011 Commission issues paper highlighted that violence, harassment and bullying experienced by LGBTQI people is often hidden and under-reported, which makes it difficult to assess the extent of the problem.[547] The report noted that people, especially young people, are frequently harassed on the basis of their sexual orientation or sex and/or gender identity.[548]

Discrimination and harassment against LGBTQI people at work continues to be a significant issue. The Australian Workplace Equality Index measures LGBTQI inclusion in the workplace.[549] Its 2018 survey of workers in organisations 'active in LGBTI inclusion' found:

- 25% (regardless of identity) had witnessed negative jokes/ commentary targeting LGBTQI people (36.5% said they did nothing in response)
- 13% felt their managers or team leaders would not address harassment of LGBTQI people
- 14% did not feel that LGBTQI employees could comfortably be themselves at work without fear of constant innuendo, jokes or commentary.[550]

Submissions to the Commission recounted experiences of intersecting forms of discrimination and the way in which people who do not conform to heterosexual norms are at increased risk of sexual harassment. Victorian Legal Aid's submission shared the account of a worker known as Chloe, who said she was subjected to sexualised and derogatory comments from co-workers about her sexuality:

Chloe's story[551]

I was employed at a large international company as a Business Development Manager for 10 years. During that time, I was coming to terms with my sexual identity and was steadily sharing this with my friends. I didn't feel able to do this at work after a manager, referring to another gay colleague, told me 'senior staff need to understand they're managers first and gay second'. A colleague started spreading derogatory rumours about me, making sexual innuendos about lesbians, referring to me to newcomers as the 'carpet muncher' and telling workmates they shouldn't eat food I brought in to share. Colleagues changed their behaviour towards me. I felt progressively ostracised.

Heterosexism refers to beliefs and behaviours that privilege heterosexuality and heterosexual relationships. Studies show an underlying link between heterosexist harassment and sexual harassment, as both serve to 'punish deviation from traditional patriarchal gender norms', which mandate heterosexuality.[552]

The Commission heard that heterosexism and homophobia frequently intersected with sexual harassment of LGBTQI people in the workplace:

> I think homophobia has a really big impact on sexual harassment … [A] good friend is openly out at work and … would just get the kind of offhand sexuality-related questions or comments thrown at them with, you know, a regularity that you wouldn't see for someone who was kind of visibly straight … And it was almost that sense of … well, you're openly out, therefore you are, you know, flaunting your sexuality, therefore it's fair game.[553]

The Commission was told that LGBTQI people experienced additional forms of sexual harassment related to the LGBTQI status:

> We've had clients who, where they come out in the workplace, their colleagues presume … that they really want to talk about their sexual exploits and want to engage in that kind of banter around sexual experiences on the weekend. So I think there's some stereotyping that plays into it.[554]

The Commission also heard that the intersection between gender and sexuality was particularly complicated for women.[555] A recent study on the experiences at work of same-sex attracted women found that 'the dual impact of gender and sexuality makes it even more challenging for same-sex attracted women to thrive and develop in their working environment.'[556] The Commission heard from women for whom sexual harassment was directed at both their sexuality and gender:

> When I was read as a lesbian I got extremely harassing remarks from male colleagues working in a male dominated workplace to the point where, at one point, a male colleague suggested that I personally needed a good raping.[557]
>
> I was sexually assaulted by a senior management colleague at a staff function … He said he needed to show me what a real man was so he could 'unlesbian' me.[558]
>
> After a colleague found out I had a female partner I was called out and outed in my workplace … After months, I spoke about my experience as a bisexual, and was asked why I wouldn't just be straight or lesbian. That I needed a good man and that was why I wasn't happy every day. That being with my partner was making me miserable. Then came the [lewd] comments of 'I love watching lesbians.'[559]

(iii) Fear of disclosing LGBTQI identity

The Commission heard that experiences of discrimination affected LGBTQI people's willingness to speak up about workplace sexual harassment.[560] Research has found that many LGBTQI people hide their sexuality or gender identity at work in anticipation of discrimination.[561] Submissions and consultations noted that LGTBQI workers were reluctant to speak up for fear of being 'outed' (having their sexuality or gender diversity revealed) to managers, colleagues, friends or family; fear of dismissal or retaliation from their employer if their LGBTQI identity were revealed; and having fewer support networks to turn to for support and advice.[562]

The Commission was told about a culture of invisibility of LGBTQI people or 'don't ask, don't tell' in some workplaces, in which LGBTQI people did not feel comfortable disclosing for fear of the consequences, and as a result sexual harassment between people of the same sex was not acknowledged.[563] In a consultation with LGBTQI people, one person observed, 'the LGBTQI workforce is not necessarily visible. So, when an incident happens, they require someone outing themselves in the workplace.'[564]

St Kilda Legal Service also described the 'emotional barrier of wanting to protect one's own community' for some LGBTQI workers, including one worker who said 'it seemed inappropriate to report another lesbian for harassment in a heterosexual-dominant workplace'.[565]

Recent research with same-sex attracted women found they valued LGBTQI networks within their workplace because of the potential for these networks to provide support to LGBTQI co-workers and to promote a more LGBTQI-inclusive workplace.[566] The Commission was told that the level of organisational support for LGBTQI people is an important factor influencing how comfortable and included LGBTQI people feel at work.[567]

(iv) Lack of understanding of LGBTQI identities and experiences

The Commission heard that a lack of mainstream understanding of sexual orientation and gender diversity could contribute to LGBTQI people's experiences of sexual harassment.[568] One worker commented:

> I think that's also being the token queer person in your industry and your workplace and that if you are the queer person, you're expected to answer any questions and be expected to educate them. And it's okay if they make mistakes and if they sexually harass you because they're learning.[569]

The Commission was told that lack of understanding could also contribute to workplace sexual harassment of transgender and gender-diverse people, for example due to intrusive questions about potential surgery, genitalia and sexual activities:

> When it comes to gender identity and intersex status … it's [posing] questions about transitioning and about their bodies which are just obviously inappropriate.[570]

The Commission heard that much of the discussion around workplace sexual harassment is heteronormative (where heterosexual relationships between people who identify with their birth gender are seen as the norm) and assumes a male harasser and female victim, excluding experiences of LGBTQI workers.[571] A recent report on the experiences of LGBTQI people at work noted:

> There is often a misconception in the straight community that ignoring is the same as accepting. But pretending not to see a difference is choosing not to understand difference, and heteronormativity becomes the default.[572]

The St Kilda Legal Service told the Commission that LGBTQI workers who experienced sexual harassment felt 'their concerns would not be taken seriously as their experience did not fit the most commonly discussed pattern of a cisgendered male harassing a cisgendered female'.[573] One worker observed:

> If a male is sexually harassed in the workplace by another male, people either chalk it up to that just being gay culture. They go 'that's just what goes on with you boys'.[574]

St Kilda Legal Service shared the following case study of a worker known as Michelle.

Michelle's story[575]

While working at an LGBTQI health organisation, Michelle was subjected to harassment, in the form of inappropriate comments about her sex life, by her lesbian manager. Michelle said that the perpetrator thought that it was 'okay' because they were both women. Had the harassment been from a male co-worker, Michelle said she would have reported it, but because it was two women, she said she 'thought no one would take it seriously'.

The Commission heard that heteronormative views could sometimes lead to employers refusing to recognise or take appropriate action when a worker was sexually harassed by someone of the same sex:

> In my role at the [union], I organise young workers every day … a young worker in a retail warehouse is queer and … he complained of sexual harassment. The company gave both the men a warning … so companies have no idea what to do in queer situations.[576]

(e) People with disability

Disability is defined differently in different contexts. The definition of disability in the *Disability Discrimination Act 1992* (Cth) is broad:

> **Section 4 Interpretation**
>
> ***disability***, in relation to a person, means:
>
> (a) total or partial loss of the person's bodily or mental functions; or
> (b) total or partial loss of a part of the body; or
> (c) the presence in the body of organisms causing disease or illness; or
> (d) the presence in the body of organisms capable of causing disease or illness; or
> (e) the malfunction, malformation or disfigurement of a part of the person's body; or
> (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
> (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
>
> and includes a disability that:
>
> (h) presently exists; or
> (i) previously existed but no longer exists; or
> (j) may exist in the future (including because of a genetic predisposition to that disability); or
> (k) is imputed to a person.
>
> To avoid doubt, a ***disability*** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

Disability is defined more narrowly by the Australian Bureau of Statistics where it includes any limitation, restriction or impairment which restricts everyday activities and has lasted or is likely to last for at least six months.[577]

The term 'disability' covers a wide range of experiences, from physical and sensory disabilities, to psychosocial disability, head or acquired brain injury, to intellectual disability.[578] The *United Nations Convention on the Rights of Persons with Disabilities* views disability as the result of the interaction between people living with impairments and attitudinal and environmental barriers that hinder their participation in society on an equal basis to others.[579]

Nearly one in five Australians have disability—around 4.3 million people, and about half of all people with disability in Australia are of working age (15–64 years).[580] The prevalence of disability among Aboriginal and Torres Strait Islander people is almost twice that experienced by other Australians.[581]

(i) Sexual harassment of people with disability

The limited data available suggests that people with disability are more likely than those without disability to have experienced workplace sexual harassment. The results of the 2018 National Survey showed that 44% of people with disability said they had been sexually harassed in the workplace in the last five years, compared to 32% of people without disability.[582]

Both women and men with disability were more likely than those without disability to have experienced workplace sexual harassment during this period. In the last five years, 52% of women and 35% of men with disability said they experienced workplace sexual harassment, compared to 39% of all women and 26% of all men.[583] Other Australian research has similarly found that women with disability were twice as likely to say they had experienced sexual harassment at work than those without a disability.[584]

This data and research is consistent with other research which has suggested that women with disability are at greater risk of violence than other people in the community.[585] In April 2019, a Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability was established to examine these issues in all settings.[586]

(ii) Discrimination and sexual harassment experienced by people with disability

The Commission heard that incidents of sexual harassment were often tied to other forms of discrimination for people with disability.[587] The submission from Women with Disabilities Victoria noted:

> … as women with disabilities, we know that our experiences of sexual harassment overlap with our experiences of harassment, abuse, discrimination and workplace bullying, on the basis of our disabilities.[588]

Their submission argued that it was not possible to understand experiences of women with disabilities of workplace sexual harassment 'without looking at the widespread systemic issue of disability employment discrimination'.[589]

The Commission's 2016 *Willing to Work*: *National Inquiry into Employment Discrimination* report confirmed that people with disability experienced discrimination at high levels, and that discrimination on the basis of disability was a significant barrier to employment.[590] The report also noted that labour force participation rates for people with disability in Australia were low.[591]

The Commission was told that sexual harassment against people with disabilities was often connected to persistent discriminatory attitudes, stereotypes and marginalisation in work settings. In consultations, the Commission heard that attitudes of '[p]aternalism' made workers with disability feel 'less equal at work', and could result in inappropriate behaviour:

> '[I]t's not being done in a nasty way but it's done in a, 'Ah, this person needs looking after' and that leads you into maybe touching them inappropriately … putting your arm around them, doing things to make them feel uncomfortable, and definitely not including them in the same manner that you would other workers.'[592]

The Commission also heard that the low employment rate of people with disability could also be a factor in workplace marginalisation:

> [S]o in a workplace, we have very small numbers of people with disability and some people see them as being like a special project or, you know, 'aren't we good for employing somebody with a disability' and treat them in a different way.[593]

The Commission also heard in consultations that women and girls with disability could be subject to people ignoring or stereotyping their sexuality: 'There's also this cultural assumption that women with disabilities are not sexual or they're asexual and that they should be slighted if they're given attention with that.'[594] Women with Disabilities Victoria identified that these factors increased the risk of sexual harassment for people with an intellectual disability, cognitive, communication and/or sensory impairments or high support needs.[595] They argued:

> Internalised expectations and pervasive stereotypes mean that women with disabilities are often perceived to be 'powerless', physically helpless, inherently vulnerable, unreliable witnesses, compliant and either asexual or hypersexual. Men who harass women know how to target women who are more likely to be isolated and who are easier to discredit.[596]

(iii) Workplace risk factors and barriers to reporting

The Commission heard about workplace power dynamics, hierarchies and unequal power relations in workplaces that could increase the risk of sexual harassment and create barriers to reporting for people with disability. For example, Springvale Monash Legal Service noted that some people with disabilities needed to rely on their co-workers to function in the workplace, and that this could 'put them in a position of vulnerability with co-workers and management'.[597]

The Commission heard that these factors were particularly acute for people with disabilities in insecure work (see further Section 3.5(g)):

> The employment rates of people with disability is low, so you're in a workplace and there are very few people with disability around and not everyone but often they will have more junior positions in the organisation, so speaking up is really hard and they're not likely to be either in positions where it's easy for them to speak up.[598]

Some disability sector stakeholders raised concerns about risks for people with disability working in Australian Disability Enterprises workplaces.[599] Australian Disability Enterprises are not-for-profit organisations that provide supported employment, for people with moderate to severe disability who may face barriers to working in the open labour market.[600]

Women's Health Victoria called for more attention to understanding the risk characteristics and practices in Australian Disability Enterprises work environments.[601] Women with Disabilities Victoria noted:

> Sheltered workshops are often male-dominated work environments. The sheltered or 'hidden' nature of these workplaces and a lack of independent oversight means it is difficult for women to speak up about violence, harassment or abuse in their workplace, make a complaint, or seek information or assistance. These women are often invisible in the conversation about sexual harassment in the workplace.[602]

The Commission heard that other reasons why workers with disabilities were reluctant to report sexual harassment included not being taken seriously or having assumptions made about their capacity. [603] For example, people with intellectual disabilities told the Commission they felt less likely than other workers to be believed when they report their experiences of sexual harassment.[604]

People with disability can face particular barriers when engaging with the justice system.[605] In consultations, the Commission was told about the impact of harmful assumptions about the capacity and reliability of people with disability when they have made a complaint, and challenges they faced in effectively exercising their legal capacity:

> What we see with sexual assault with women with disabilities is they're often not believed … It's often assumed that a woman in a wheelchair, because she's in a wheelchair, has an intellectual disability. So, reporting violence to the police: it's often very common that that's just not followed up. Because it's just assumed that they don't have the capacity. So, I think that's very much an issue for women with disabilities in workplaces with experiencing sexual harassment.[606]

(iv) Lack of access to information and advice

The Commission was told about the importance of providing information and communication for workers who have difficulty reading and understanding written English in Easy Read formats.[607] As one worker with a disability who worked in a supermarket explained, 'it [the sexual harassment policy] was in our handbook, but it wasn't clear. It wasn't in easy English.[608]

Research has suggested that people with intellectual disabilities who are victims of sexual violence may need different responses to protect them from victimisation and different services and resources while navigating complaints processes.[609] The NSW Council for Intellectual Disability emphasised that people with intellectual disability may face unique barriers to reporting and need clear information about their rights and making complaints[610] (see Section 4.5(b), 'Strategies and actions that prevent sexual harassment of people at higher risk').

(f) People of culturally and linguistically diverse backgrounds

The term 'culturally and linguistically diverse' (CALD), refers to people from a range of countries and ethnic and cultural groups. It includes people of non–English speaking background as well as people born outside Australia but whose first language is English, and encompasses a wide range of experiences and needs.[611] In 2016, over a quarter of Australia's population was born overseas, and nearly half had a parent who was born overseas.[612] One in five people spoke a language other than English at home,[613] and more than 300 languages were spoken in Australia.[614]

CALD workers include people who are not Australian citizens or do not have permanent resident status. They come to Australia for a range of reasons, for example to seek protection as asylum seekers or refugees, as migrants to reunite with family, or as seasonal workers, international students or backpackers. Some CALD workers may hold a temporary visa with full or partial work rights attached, while others may be unauthorised to work but do so.[615] Workers on temporary visas are estimated to constitute between 6% and 11% of the Australian workforce.[616] Specific issues relating to migrant workers and workers on temporary visas are discussed further below.

(i) Sexual harassment of people of CALD backgrounds

In Australia, data on sexual harassment and CALD workers is very limited. The 2018 National Survey found that overall there was no significant difference in the prevalence of workplace harassment based on main language spoken at home (32% English, 34% language other than English).[617] However, as discussed in Section 3.2, this may have been affected by issues including the accessibility of the survey instrument for people of CALD backgrounds, the lack of a representative sample of the CALD population and the use of main language spoken at home to measure cultural and linguistic diversity.[618]

In contrast to the 2018 National Survey findings, the 2018 University of Sydney *Women and the Future of Work* report found that women born in Asia—and more broadly, women of CALD backgrounds—reported experiencing sexual harassment at twice the rate of the surveyed population.[619]

Findings from international research on race or ethnicity as risk factors for sexual harassment have been mixed. While some studies have found that incidence of sexual harassment was higher among ethnic minority women,[620] other studies have found that prevalence of sexual harassment did not vary because of race or ethnicity.[621]

(ii) Discrimination and sexual harassment of CALD workers

Research by the Australian Institute of Family Studies has indicated that women from CALD backgrounds may be more vulnerable to exploitation—including sexual harassment and assault—and can experience a number of barriers to reporting. These are often complex and intersectional and include, among others: the amount of time spent in Australia; language proficiency; insecure work or visa status; not understanding their rights or where to go for help; in many cases, actively distrusting government or official complaint channels; and concerns about career progression or place in community.[622]

Similarly, the Commission heard in consultations that for CALD workers, especially women, many types of discrimination and harassment can intersect to place them in more vulnerable situations in the workplace:

> I work with women who have just arrived in Australia … and they're working in regional Australia … in meat factories, with 99 percent males in the workforce, and are going to work with minimal, very basic English skills … they're wearing head scarves, they're battling the sexism, the sexual harassment, the racism, and every other form of 'ism' that they can encounter in that.[623]

WEstjustice noted that factors including 'gender, race, recently arrived or refugee status and/or temporary visa status', impact on the ability of women to enforce minimum workplace protections. Specific cultural and community contexts can also increase the risk of sexual violence and sexual harassment for migrant women.[624]

Victoria Legal Aid observed that its clients in a minority group in their workplace, for example due to being from a CALD background, often described being 'easy targets' of sexual harassment.[625] Victoria Legal Aid shared the experience of a worker known as Nomusa in their submission.

Nomusa's story[626]

Nomusa worked as a live-in nanny for a family. She was placed in her role by a service provider. The father of the family made discriminatory comments about Nomusa's skin colour and touched her inappropriately. Despite Nomusa voicing her concerns, the behaviour continued.

His conduct made Nomusa feel uncomfortable, awkward and afraid. She felt particularly uncomfortable when he made racist comments about her in front of the children. She began to dislike her job and became scared of being in certain areas of the house alone because she feared what he may do to her. Nomusa did not report the behaviour as she was the sole income earner for her family at the time and was not confident she would be believed.

(iii) CALD workers in insecure work

In 2018, the Senate Select Committee on the Future of Work and Workers found that people of CALD backgrounds were particularly vulnerable to exploitation in the informal economy, and likely to be overrepresented in insecure employment arrangements—particularly, if they were women, refugees, or very young or older migrants.[627]

Migrant women have historically been employed in lower-paid and lower-status occupations relative to Australian-born women.[628]

WEstjustice's 2016 *Not Just Work* report identified a range of significant barriers to entering the labour market for people who have recently arrived in Australia.[629] In consultations, the Commission heard that reduced opportunities to enter the labour market could impact on a worker's willingness to speak out on sexual harassment:

> [For migrant workers], workplace rights are kind of a secondary issue to being secure in the country, which often means having permanent residency, and they won't do anything to jeopardise that, which means they put up with all the awful things that we know.[630]

The Commission heard that particularly for migrants, refugees or other workers on temporary visas (discussed further below) insecure employment was a barrier to reporting. The Australian Women Against Violence Alliance noted that for women on temporary visas:

> [M]igration status places women in an unequal position where more often women will prioritise financial need over personal safety [and] thus not report their experiences. The situation is similar for women engaged in domestic work.[631]

Jesuit Refugee Service also raised economic insecurity as a key vulnerability factor for women asylum-seekers:

> Asylum-seeking and refugee workers who have managed to secure employment are far less likely to report or speak out against workplace sexual harassment for fear of losing their only form of income.[632]

(iv) Cultural and language barriers

The 2018 National Survey results indicated that people of CALD backgrounds may understand sexual harassment differently from other populations. Among CALD respondents, prevalence rates were heavily influenced by whether a 'legal' or 'behavioural' definition of sexual harassment was used. When provided with a specific list of sexual harassment behaviours, the number of CALD respondents who said they had experienced sexual harassment increased by 120% (compared with a 65% increase among those from mainly English-speaking households).[633]

Research has also shown that sexual harassment may be perceived by CALD women in different ways.[634] Cultural and social attitudes can affect how CALD workers experience and respond to sexual harassment. Cultural norms may reinforce gender inequalities, gendered roles and identities; affect attitudes to authorities or government agencies that inhibit 'speaking out' and guide how people prioritise rights, wellbeing and access to support. These cultural factors can also influence understanding and recognition of sexual harassment.

For example, the Commission heard in consultations about cultural differences in perceptions of sexual harassment, including whether it could be physical and non-physical in nature, and the seriousness and offensiveness of different behaviours:

> What sexual harassment is in Australia is very different from how people conduct themselves like back home. I can only speak for back home. So, leering at someone or saying something sexual to them in a joking way wouldn't be considered sexual harassment … maybe that's why they're not reporting because they don't understand that it is actual sexual harassment.[635]

> For migrants, refugees and asylum seekers, it's usually their first work in Australia. They don't know if this is normal culture … and if you don't know any different here in Australia, you don't know if it's good or whether it's bad, it's just how it is.[636]

The Commission also heard that culture and language could be a barrier to reading work contracts, negotiating work conditions, and understanding workplace rights or where to seek assistance. SafeWork NSW have recognised that cultural and language factors increase risks to the health and safety of CALD and migrant workers in the workplace including:

- language and literacy barriers to understanding work health and safety rights and worker obligations and accessing information
- reluctance to speak up and 'make waves'
- fear of authority due to cultural factors.[637]

One migrant worker told the Commission about when she first started working in Australia:

> I didn't know, I didn't recognize it was sexual harassment. Coming from a culture … where sexual harassment is rife, no anti-sexual harassment policy, and women are usually blamed for the harassment … I used to receive dirty English jokes, which I didn't understand it was dirty and I smiled … There were guys who tried to put arm on my shoulder, who asked me to go on a weekend trip with them and who asked to kiss me. I didn't understand. I didn't know … my rights. I didn't complain at that time.[638]

Language barriers and lack of awareness regarding sexual harassment and workplace rights were also identified as issues for CALD employers.[639] The submission from the Australian Small Business and Family Enterprise Ombudsman observed that 'the large number of micro business owners from other countries which may have a different understanding of appropriate behaviour to our Australian laws' could present a challenge for addressing sexual harassment in those small businesses.[640]

People of CALD backgrounds—particularly migrant workers, refugees or others on temporary visas, as discussed further below—are disproportionately represented among victims of exploitative workplace practices.[641] Project Respect told the Commission that cultural and linguistic diversity is a key driver of workplace sexual harassment within the sex industry, where CALD workers make up a substantial proportion of workers:[642]

> A woman who is from a CALD background is less likely to understand her rights within the booking, due to language barriers, which is likely to increase the risk of sexual harassment and violence within the booking. Language barriers may also prevent a woman from being able to safely negotiate a booking or refuse a client if she does not want to engage in a particular request.[643]

Project Respect also noted that these factors also acted as barriers to reporting sexual harassment:

> Language barriers further isolate a woman from a CALD background as she is less likely to report any acts of sexual harassment and violence due to these barriers and cultural differences, including shame.[644]

The fear of social isolation or stigma attached to disclosing sexual harassment could also be a barrier to reporting for some CALD workers, 'especially if the employer is from the same cultural group, or if they're a prominent person within their cultural group'.[645] The Young Women's Advisory Groups of Equality Rights Alliance and Harmony Alliance told the Commission:

> Women from CALD backgrounds associate sexual harassment and violence with feelings of shame. There is also stigma that can be felt from family and community if experiences are disclosed and these feelings can be very isolating.[646]

In a submission, a CALD worker told the Commission:

> Due to my background as an immigrant coming to Australia, when I was in my mid-20s, growing up in Vietnamese culture that doesn't educate women how to stand up for themselves against sexual harassment or make women aware of their rights … I frequently suffer[ed] from sexual harassment which 9 out of 10 [times], I was numbed and shocked and didn't know what to say or do to the offender. I didn't report all except one case due to my embedded culture belief to swallow and forget.[647]

The Commission was told that language barriers also impact on CALD workers' access to information and advice on complaints systems:

> A majority of farm workers are migrants that come from different communities and have other languages as their first language. There are many cases of sexual harassment that happen at workplaces [that] do not get raised due to workers not being capable to speak to someone who understands their language or even someone who they can trust.[648]

(v) Lack of access to information and advice

The Commission was told about the importance of access to information and advice for vulnerable and low-income CALD workers, noting that many workers may try to solve workplace issues, including sexual harassment, informally.[649]

There is a growing body of work that has sought to understand cultural, structural and service-related barriers to addressing sexual violence for CALD women in Australia.[650] Research has found that migrant workers and temporary visa holders are often not aware of their rights and may come from countries with legal systems which have different standards of protection and enforcement of work rights and entitlements.[651]

Research focused on how best to inform migrant workers about their rights and obligations in regard to workplace laws in Australia found:

- Understanding of workplace conditions and obligations is relatively low.
- Migrant workers' information needs relating to workplace laws and conditions are diverse.
- There are misconceptions about different elements of the system.[652]

(vi) Migrant workers on temporary visas

Australia's migration and visa system is complex and not canvassed in detail in this report. This section focuses on those migrant workers who are not permanent residents or citizens and have a temporary migration status in Australia. This group includes people in Australia on temporary visas, which includes partner-related, work, student, visitor temporary protection and bridging visas, among other categories.

Migrant workers have been identified as at increased risk of workplace exploitation due to their reduced power in the labour market, difficulties in securing alternative employment, social isolation, their lack of language skills and financial resources, and power imbalances that arise from their immigration status and visa conditions.[653] Professors McDonald and Charlesworth, in their submission, highlighted that internationally, there is significant evidence that migrant status is an additional vulnerability in respect to sexual harassment, especially for women.[654]

In recent years, poor working conditions for international students and backpackers, and allegations of sexual exploitation and abuse, have been covered in the media.[655] The pervasive exploitation and vulnerability of low-waged, temporary migrant workers in Australia has emerged as a significant human rights concern and has been examined in a number of reports and government inquiries.[656]

The Commission heard about women working on temporary visas in the cleaning industry, which has a high proportion of migrant workers.[657] The work requires women to be in confined spaces and private homes, and undertake evening and night work, which can increase their risk of exposure to sexual harassment. This is illustrated in the following case study of a worker known as Catalina, shared by JobWatch.

Catalina's story[658]

Catalina was a young international student with limited English who found a job as a cleaner to help her pay for her education and living expenses in Australia. Her boss was an older man who operated as a sole trader franchisee, cleaning various hotels.

[Her boss] underpaid Catalina, did not provide her with pay slips, did not make any superannuation contributions for her and he always paid her late.

When she explained that she desperately needed to be paid on time, he stood up close to her face and asked: 'Are you willing to do anything for money?' Over the following weeks, Catalina was repeatedly told by her boss that she needed to be 'friendly' and hug him more. She felt forced to hug him on several occasions. She told him she didn't like it but he persisted. He also reached out to touch her buttocks when he would see her …

> Eventually, after Catalina's boss told her that if she wanted to keep her job, she would have to 'make [him] happy', she decided to quit even though she badly needed an income. Catalina decided to put her energy into recovering her unpaid wages rather than pursuing a sexual harassment complaint.

In 2016, a Fair Work Ombudsman inquiry examined the impact of conditions attached to the 417 visa (Working Holiday Makers), including specific work requirements such as number of hours worked.[659] The inquiry found that women on 417 visas were reluctant to report unsafe working conditions, including sexual harassment, for fear that employers would report that they had not complied with specified work requirements of their visa.[660]

More recently, in March 2019, the Australian government released the findings of the Migrant Workers' Taskforce into the exploitation of temporary migrants. The report acknowledged:

> There are a number of vulnerabilities to workplace exploitation that are common among migrant workers, including limited English language skills, lack of awareness of Australian workplace laws and fear of visa cancellation, detention and removal from Australia. Peer and community or family expectations, norms within cultural groups, as well as economic settings in visa workers' home countries can also influence their decisions regarding low paid work.[661]

Different groups of temporary workers, such as temporary skilled or seasonal workers, graduates and working holidaymakers, have different visa conditions. The Commission heard that a person's visa type and conditions could create significant power inequalities between visa holders and their employers.[662] Unions NSW noted:

> Employers can effectively deter visa holders from reporting exploitation by threatening to report them to government agencies for being in breach of their visa restrictions. Certain visa restrictions placed on different categories of visa holders are a key driver of the exploitation of temporary migrant workers.[663]

The Commission was told that where a worker's visa conditions were tied to their employer's sign-off, or where a sponsorship arrangement existed, this made them dependent on their employer, 'for money, for visa requirements, for reporting requirements … it's an overwhelming reliance on the employer.'[664]

For example, Unions NSW submitted that the requirement for working holiday makers to undertake 88 days of regional work to receive a second-year visa 'intensifies the vulnerability of temporary migrant workers'.[665] The 2016 Fair Work Ombudsman inquiry found that this raised safety concerns for young travellers, especially females, with limited English and often travelling alone, by encouraging them to go to remote areas to work.[666] Unions NSW pointed to Facebook groups created by backpackers to provide community support to people experiencing abuse which revealed:

> posts by backpackers who had been victims of sexual harassment during their farm work. It was apparent that there was a fear to report such incidences due to the perceived negative impact of their visa if the 88 days requirement was not satisfied.[667]

The Commission heard that the barriers to reporting sexual harassment for workers on temporary visas meant that some harassers were able to act with impunity. The Commission was told about experiences of temporary migrants who were sexually assaulted by their employer and threatened that their visa would be revoked if they did not comply or if they told anyone:

> She was a woman with a precarious visa status which made her extremely vulnerable. She was raped by the farmer [her employer] in broad daylight on a field. She was very scared [but] was told she would be deported if she refused to have sex with him. She has now left the country. This is one out of so many other examples.[668]

Several organisations representing the interests of migrant workers highlighted the common barriers these workers faced in accessing external support services and complaints mechanisms. These included fear of legal repercussions, cancellation of their visa, or deportation, particularly for workers who had overstayed their visa, exceeded right to work conditions attached to their visa or were in informal or undocumented work.[669] Victoria Legal Aid told the Commission it had clients who were unable to continue with a complaint because they were forced to leave Australia after losing their employment.[670]

The Commission also heard about workers on temporary visas who had experienced sexual harassment or assault and felt unable to report to employers, external agencies or police, because they feared they might be reported or their personal data shared with the Department of Home Affairs.[671] Unions NSW told the Commission of 'reports of police in regional and remote areas not dealing with complaints of sexual assault or harassment, and responding to complaints by asking about the person's visa status, or calling immigration.'[672]

The Jesuit Refugee Service told the Commission:

> [Our] client started work as a cleaner and after not being paid was informed that she would need to have sex with her employer in order to be paid for her work. The client felt unable to report the offence due to a fear of her work rights status being disclosed to the Department of Home Affairs and a negative impact on her visa application.[673]

The 2019 Migrant Workers' Taskforce report made recommendations to strengthen the 2017 inter-agency Assurance Protocol, designed to encourage migrant workers to report workplace exploitation. The Assurance Protocol was put in place to provide support to visa holders involved in a Fair Work Ombudsman investigation where they have worked in breach of their visa's work conditions.[674]

Under the Assurance Protocol, the Department of Home Affairs agreed that an individual who has breached the work-related conditions of their temporary visa will generally not have their visa cancelled where they meet the relevant requirements. However, in consultations for this Inquiry, concerns were raised about a lack of understanding in the community of the operation of the Assurance Protocol and how it worked in practice, and that it may not apply to all victims of exploitation.[675]

The Migrant Worker's Taskforce recommended review of the Assurance Protocol to 'assess its effectiveness and whether further changes are needed to encourage migrant workers to come forward with workplace complaints.'[676]

It is important to ensure that all workers, including temporary visa holders have confidence in bringing forward complaints to relevant agencies and regulators in relation to workplace sexual harassment, and that agencies that come into contact with victims of workplace sexual harassment provide appropriate and sensitive responses.

In Section 4, 'Prevention outside the workplace', the Commission discusses the need for improving information and awareness of sexual harassment, workplace rights and avenues for support and assistance for at-risk groups, including people of CALD backgrounds and migrant workers.

In Section 5, 'The legal and regulatory framework', the Commission discusses the need for education and training for regulatory bodies, and for police and judicial responses to victims of workplace sexual harassment to be trauma-informed and recognise the nature, drivers and impacts of these behaviours.

(g) People in insecure work

(i) Understanding insecure work

The Commission heard about sexual harassment in work arrangements described as 'precarious' or 'insecure'—that is, work 'characterised by instability, lack of protections, insecurity and social and economic vulnerability'.[677]

Precarious or insecure work is most often associated with contractual arrangements of non-permanent or non-regular work such as casual work, seasonal work, fixed-term contracts, independent contracting and labour hire.[678] The duration of the contract and the nature of the employment relationship are generally used to distinguish insecure work.

Not all non-permanent or non-regular forms of employment are insecure.[679] The 2015 Victorian Inquiry into the Labour Hire Industry and Insecure Work (2015 Victorian Inquiry) highlighted the difficulty of generalising across employment arrangements.[680] For example, work which may have lower levels of employment protections can be secure due to demand for a worker's skills.[681]

The Commission heard that insecure work was commonly characterised by conditions such as low wages, lack of control over working conditions or hours, reduced bargaining power between workers and employers, lack of employment protections and power to exercise them, and lack of entitlements, such as leave.[682] A range of factors related to a worker's social context and resources also impact on whether an insecure work arrangement exists. These include a worker's access to alternative sources of income and alternative career paths, employment needs and choices.[683]

Insecure workers have been identified as a key group of workers most at risk of harm in the workplace. The Australian Council of Trade Unions (ACTU) stressed that insecure workers are more likely to be injured at work for a range of reasons, including 'inadequate training and induction, fear of reprisals for speaking out about safety concerns, lack of regulatory oversight, poor supervision and inadequate access to effective safety systems.'[684]

The 2015 Victorian inquiry found that workers in labour hire and other precarious forms of employment missed out on protections, were subject to exploitation in certain sectors and differential treatment related to conditions, health and safety, dismissal and rostering.[685]

All of these factors can also contribute to greater risk of sexual harassment of insecure workers.

(ii) The changing nature of work

As discussed in Section 2, 'The current context for this Inquiry', the Commission was also told about the changing nature of work, such as the way work is organised across digital platforms and types of work people do with technological advancements. For example, the Commission was told that the gig economy or on-demand economy, where workers are matched with work through online platforms across a range of industries, was 'Precarious in terms of casualisation of … employment and … one hour or no hour contracts.'[686]

A 2019 national survey on *Digital Platform Work in Australia* found:

- Over 7% of survey respondents were currently working through a digital platform or had done so in the last 12 months.
- Respondents who identified as living with a disability, temporary residents, and those who spoke a language other than English at home, were more likely to participate in digital platform work.
- Types of digital platform work included transport and food delivery, professional services work, odd jobs or maintenance, clerical and data entry, creative and multimedia work, software development and care services.[687]

The Commission learned about the emergence of new disability workforce models, such as online platforms that provide National Disability Insurance Scheme (NDIS) participants with access to support workers through direct employment arrangements. The Commission heard about concerns that workplace rights and protections could be unclear for both NDIS participants (exercising the authority of an employer) and casual support workers in the disability sector working in private homes with limited supervision or training.[688]

The Commission also heard that insecure and mobile work arrangements could leave workers with fewer protections against sexual harassment. Professors Bertone and Colley said in their submission, 'In the gig economy, it is often difficult to identify an employer, a workplace, or somebody responsible for the range of HR [human resources] and WHS [work health and safety] issues that occur.'[689] JobWatch provided the following case study of a worker known as Yolanda in its submission.

Yolanda's story[690]

Yolanda was a young international student with limited English. She found a job as a cleaner. She was told to get an Australian Business Number and was sent to clean private residential properties on her own, without any training about occupational health and safety matters. Shortly after she arrived at one residential property, the owner of the house sexually harassed her by exposing himself to her. She fled the house in fear and disgust and was unable to return to work for three months due to feeling traumatised by that event.

The ACTU argued that 'our legal framework has not kept up with these developments, leaving many workers without basic statutory protections which are essential to preventing sexual harassment at work.'[691] As one union representative explained:

> When you are a casual worker or you don't have security of employment, when you are low paid, then you don't have a lot of options in terms of taking action against sexual harassment. And that makes it easier for sexual harassment to flourish in those workplaces.[692]

These evolving employment arrangements present challenges to addressing sexual harassment that go beyond the traditional workplace and employment protections. Women's Health Victoria argued that laws protecting people from sexual harassment would need to adapt to the changing nature of work.[693]

Section 5 discusses the legal and regulatory framework with respect to workplace sexual harassment and makes recommendations to address gaps in the protection of workers against sexual harassment. Section 6.2(d), 'Knowledge', considers the benefits of industry-based sexual harassment policies, particularly for insecure and mobile workforces.

(iii) Sexual harassment of people in insecure work

The 2018 National Survey found that the employment status of people who said they were sexually harassed at work in the last five years broadly reflected the make-up of the Australian workforce:

- **Employment status:** Three in five (61%) victims were working full-time, while one third (33%) worked part-time.
- **Employment type:** Two thirds (66%) of victims were permanent employees at the time of the most recent incident, while almost one quarter (23%) were employed on a casual basis.
- **Occupation group:** 24% of victims were professional workers, 16% were clerical or office workers, and 12% were service workers.[694]

Some Australian research has found that people were more likely to experience unwanted sexual advances in the context of precarious employment arrangements—compared to people in full-time, permanent employment—and that young women were disproportionately affected.[695] In 2018, the United Kingdom House of Commons Women and Equalities Committee found that people in insecure work were more likely to experience sexual harassment.[696]

(iv) The gendered nature of insecure work

The 2015 Victorian Inquiry found that working arrangements commonly associated with insecure work, especially casual and fixed-term work, disproportionately affected women.[697] Several submissions to the Commission also pointed out the changing nature of employment since the introduction of anti-discrimination laws and highlighted the broader gendered division of labour in Australia and associated vulnerabilities, such as low paid or insecure work.[698]

A 2018 Curtin University *Future of Work in Australia* report found that precariousness in work is increasing over time for both genders and remains consistently higher for women.[699]

Women and men work differently, with a majority of women in part-time and casual jobs, and women concentrated in industries such as health care and social assistance, education and training, retail trade, and accommodation and food services.[700] Submissions from unions emphasised that women are over-represented in industries and occupations that are award reliant, low paid and casualised.[701]

Noting that women made up 60% of all underemployed Australians, Our Watch's submission argued:

> The precarious nature of both underemployment and casual employment compounds their already relatively poor levels of power in the workplace, by reducing or compromising their ability to raise complaints about their working conditions, including any harassment that they experience, for fear of losing their job.[702]

(v) Discrimination and sexual harassment experienced by people in insecure work

Some groups of workers are more likely to be employed in precarious work. The Australian Council of Trade Unions (ACTU) has observed:

> Precarious work is often experienced by sectors of the workforce with the least bargaining power including those with lower skills, women, migrant workers, young workers, Indigenous workers and persons with disabilities.[703]

Women's Health Victoria highlighted that insecure work was a risk factor for sexual harassment that, when 'combined with other factors, such as geographic isolation and language barriers', could 'compound risks and impacts of intersecting forms of inequality and discrimination'.[704] Similarly, Women's Electoral Lobby Australia pointed out that women in insecure work are 'more likely to be women who are subject to multiple disadvantages and prejudices.'[705]

As discussed in Section 3.5(b), the Commission heard that young people were more likely than other workers to be employed on a casual basis, increasing their vulnerability to workplace sexual harassment and reducing the likelihood that they formally report harassment. The Commission also heard that people with disabilities are concentrated in insecure work arrangements and therefore may be at a higher risk of sexual harassment (see Section 3.5(e)).[706]

Several submissions drew attention to the number of CALD and temporary migrant workers in insecure work, and associated barriers to reporting which increased the risk of sexual harassment occurring (as discussed in Section 3.5(f)).[707]

(vi) Barriers to reporting

Insecure work status may also affect reporting behaviours. Research by Professors McDonald and Charlesworth suggested that casual workers were less likely to complain externally when they experienced sexual harassment than those employed in more secure forms of work.[708] The Commission heard about casual and labour hire workers who had been sexually harassed and were reluctant to complain because of fear of retribution, victimisation or job loss:

> They feel that if they report it or if they create a problem that they won't get another shift. And many of them are casual and they're absolutely dependent on their shifts to pay their rent, pay their mortgage, feed their kids. So they just shut up, they put up with it.[709]

> In retail and fast food, our members are often victimised as a result of making a complaint. They're the ones who are demoted or transferred or made to work on the other side of the city they live in just to get away from the perpetrator who is still employed.[710]

The Commission was told that some women who were sexually harassed in casual jobs 'wouldn't come forward because they had been directly threatened with losing their jobs'.[711] Another worker told the Commission, 'I was afraid to report the sexual harassment because I thought it would hurt my chances of a contract extension'.[712]

The NSW Young Lawyers Human Rights Committee observed:

> It is apparent that people in insecure work tend to be less likely to assert their workplace rights, and that fear of victimisation plays a significant role in this trend. Casual employees often fear that they will not be offered further shifts, whilst temporary employees often fear that their contracts will not be renewed. Although such retaliation may be unlawful in certain circumstances, the casual or temporary nature of the employment relationship can make it more difficult to prove that an employment relationship has ended for retaliatory or discriminatory reasons.[713]

Section 3.5(f) above discussed the difficulty for migrant workers in finding work, and how economic insecurity could lead to them prioritising financial need over reporting sexual harassment.

The Commission was told in consultations that labour hire workers may face difficulties knowing where to report or seek support when they do not have a specific worksite, or are unsure if the labour hire employer or host organisation is responsible for health and safety issues in a workplace.[714]

The National Union of Workers said:

> 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.[715]

The Commission's view

Throughout submissions and consultation, the Commission heard about the importance of research in developing an evidence base to understand the extent, nature and drivers of sexual harassment.

The Commission also heard that existing research on the factors that make an individual or groups vulnerable to sexual harassment is very limited. The evidence and research that does exist indicates that particular individuals and groups are more at risk of workplace sexual harassment than others. This includes women, younger workers, Aboriginal and Torres Strait Islander workers, LGBTQI workers, workers with disability, workers from CALD backgrounds, migrant workers and temporary visa holders and other people in insecure work.

It is important to understand the ways in which experiences of discrimination and inequality can intersect with experiences of sexual harassment for workers in these groups, its impacts and how this may affect their willingness to report it.

As Women's Heath Victoria argued in their submission:

> An intersectional approach to preventing sexual harassment would include consideration of which industries, workplaces or forms of work may be particularly likely to enable the perpetration of sexual harassment, and which population groups may be at higher risk.
>
> For example, workers on migrant/tourist/student visas (with work restrictions or obligations) and refugees without formal working rights are highly vulnerable to abuse because they may feel unable to report to authorities or may be working in rural or otherwise isolated areas or conditions (e.g. farms).[716]

The Commission recognises the need for additional research that explicitly examines the overlapping vulnerabilities between at-risk populations, work arrangements and risks associated with specific industries or occupational groups. Building an evidence base on sexual harassment is necessary to advance policy and develop initiatives tailored to sectors, contexts and workers most at-risk of sexual harassment.

3.6 People who sexually harass in the workplace

> There is not one position I have held where I have not been sexually harassed. I have been sexually harassed by colleagues, by superiors, by customers … and by junior men in my own workforce.[717]

In contrast to the information available about experiences of victims of sexual harassment, there is limited data or research on harassers.[718] Much of the available statistical data is drawn from the 2018 National Survey.

Existing research has shown that in most incidents of workplace sexual harassment the harasser is male.[719] However, there is very little research in relation to other traits of harassers such as profession, marital status, education level or other socio-demographic characteristics.

There are no typical characteristics of a person who sexually harasses in the workplace—harassers have diverse behaviours and motivations, and exist across all age groups, industries and social strata. This section sets out some of the characteristics that the Commission more commonly heard about in submissions and consultations and what is known from the limited research and data available, including:

- the number of harassers involved in incidents
- the gender of harassers
- the age of harassers
- the harasser's position in the workplace
- repeat harassers.

(a) Number of harassers involved in incidents

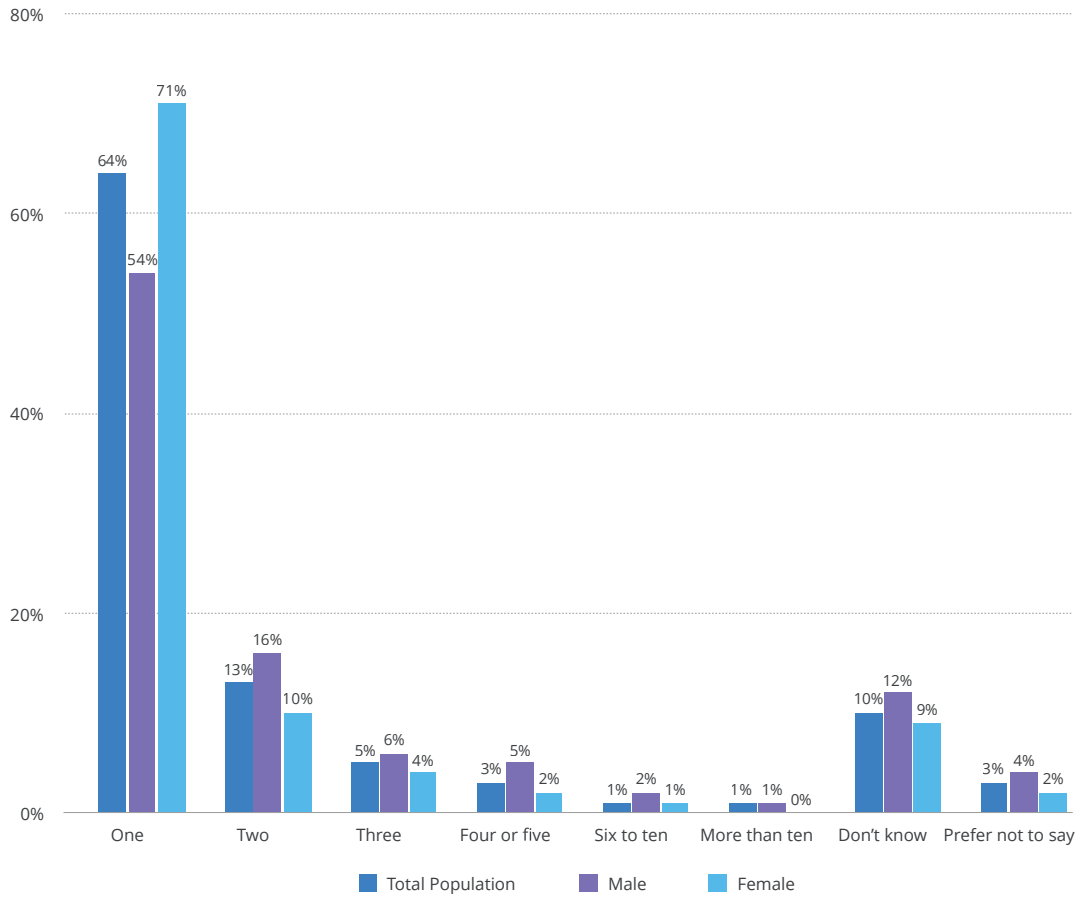
The 2018 National Survey indicated that the majority (64%) of people who said they had been sexually harassed in the workplace in the last five years said the most recent incident involved a single harasser.[720] Similarly, a 2016 survey of federal government employees in the United States found that 74% of workplace sexual harassment incidents reported by victims involved a single harasser and 26% involved two or more harassers.[721]

The 2018 National Survey indicated that while women were more likely than men to have been sexually harassed by a single harasser (71% of women compared to 54% of men), men were more likely than women to have been sexually harassed by more than one harasser.[722]

Average number of harassers

The 2018 National Survey found that the mean number of harassers involved in the most recent incident of workplace sexual harassment experienced by men was 2.1, compared with a mean of 1.4 harassers involved in the most recent incident experienced by women.[723]

Figure 3.2: Number of perpetrators involved in most recent sexual harassment (by gender of victim)



Base: Respondents who had been sexually harassed in the workplace in the last 5 years (n=2,585); Men (n=1,042); Women (n=1,522).

Source: Australian Human Rights Commission, 'Everyone's business: Fourth national survey'.

People aged under 15 years at the time of the most recent incident were more likely than those in other age groups to have been sexually harassed by larger numbers of harassers (mean of 3.5 harassers involved in the most recent incident).[724] In some industries, which tended to be male-dominated, the likelihood of sexual harassment by more than one harasser was higher.

The existing research on workplace sexual harassment by multiple harassers is very limited.[725] Some research has suggested that sexually harassing behaviour by groups of men in the workplace, such as making comments about a woman's body or sexual joking, can be used as a way to establish bonds among themselves and as a 'performance' of heterosexual masculine identity, where the intended audience is other men rather than the victim.[726] Other research has suggested that for incidents involving multiple harassers, often one harasser, or 'leader', encourages or even directs others to engage in sexual harassment or even assault.[727]

The Commission received a number of submissions about incidents of sexual harassment by multiple harassers. For example, a 22-year-old graduate worker told the Commission that, while she was working in a male-dominated public sector workplace, a male co-worker included her on an email distribution list of a group of workers where pornographic images, videos and jokes were regularly shared and sometimes discussed in the office.[728] A male worker said he was subjected to 'group sexual humiliation' by 30–40 of his colleagues who made comments and jokes about his 'small penis'.[729]

Other accounts included circumstances where workplace leaders were perceived to have encouraged others to engage in sexually harassing behaviour—often through their own behaviour:

> This culture was facilitated and led by the top. Some of the most disgusting behaviour was from the managers there. And they were very loud and open about it. So, of course, the rest will see this as 'ok' and follow along.[730]

> ...I have witnessed and experienced ass grabbing, inappropriate touching of the inner thigh and other body parts and attempts to kiss women who are not willing or consenting to do so. It is a disgusting culture that has been created by the male managers within this company and because the two managers mentioned are the top managers in the company it seems as though it's made it ok for other managers below them to act the same way.[731]

The Commission heard that sexual harassment by multiple harassers, particularly if workplace leaders were involved, could reinforce victims' feelings of powerlessness and sense that they would not be supported if they tried to stop the behaviour or made a complaint. One worker who described being 'looked at, laughed at [and] whistled at' by a director and his team told the Commission that she had tried to report the harassment to another male manager but was told 'there was nothing to be done'. She said this made her feel 'like an object, powerless, and an ethnic little girl who was being taken advantage of.'[732]

(b) Gender of harassers

While the available data and research shows that the significant majority of sexual harassers are men, throughout this Inquiry the Commission heard about experiences involving both male harassers and female harassers.

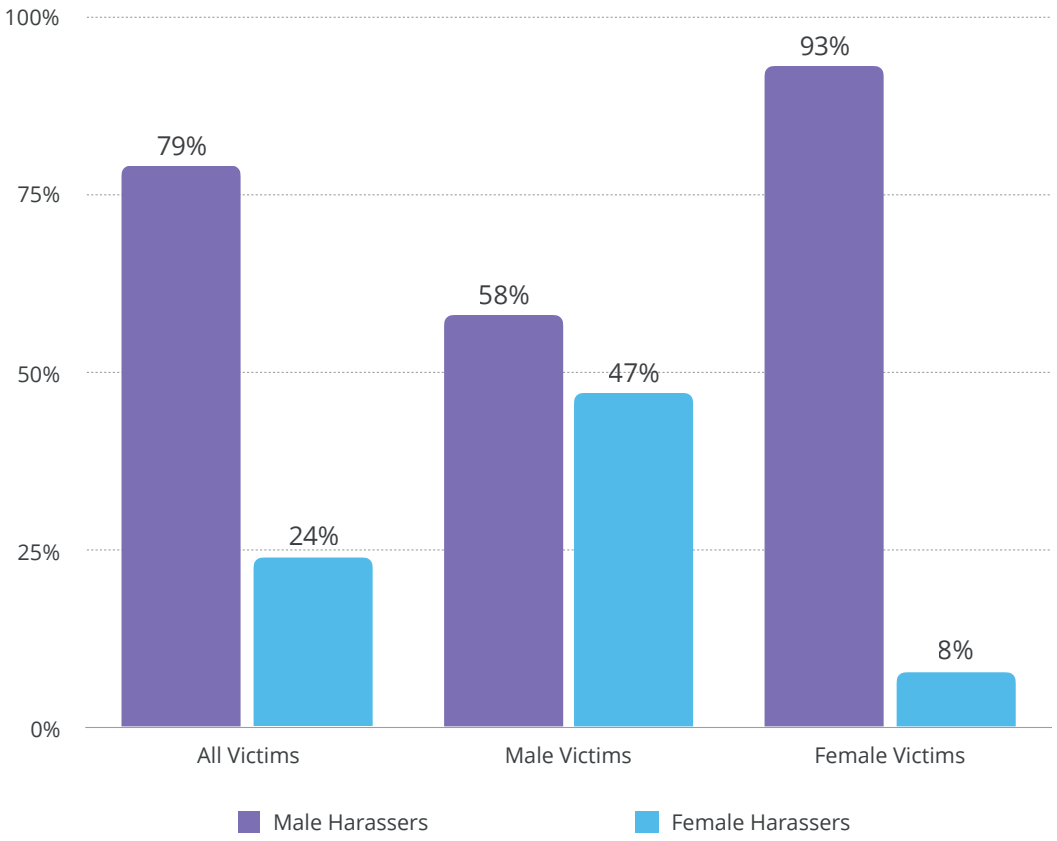
(i) Male harassers

The 2018 National Survey found that in the majority of incidents of workplace sexual harassment the harassers were men—79% of victims who said they had experienced workplace sexual harassment in the last five years said the most recent incident involved one or more male harassers (see Figure 3.3 below).[733] An analysis of this data by gender indicated that:

- 93% of female victims said they were sexually harassed by one or more male harassers
- 58% of male victims said they were sexually harassed by one or more male harassers.[734]

Where the most recent incident involved only a single harasser, four in five victims (80%) said the harasser was male.[735] Similarly, where the most recent incident involved multiple harassers, just under four in five victims (77%) said that one or more of the harassers were male.[736]

Figure 3.3: Gender of all perpetrators of workplace sexual harassment (by gender of victim)



Base: Respondents who had been sexually harassed in the workplace in the last 5 years (n=2,585); Men (n=1,042); Women (n=1,522).

Source: Australian Human Rights Commission, 'Everyone's business: Fourth national survey'.[737]

Existing research overwhelmingly supports the Commission's data that most harassers are male.[738] Along with evidence that workplace sexual harassment disproportionately affects women, this further reinforces that gender inequality is a key driver of these behaviours in the workplace. The cultural and systemic drivers of workplace sexual harassment are discussed above in Section 3.3.

The 2018 National Survey findings are also consistent with recent international studies[739] and with information received by the Commission in submissions.[740] For example, in 2019 the Shop, Distributive and Allied Employees' Association survey of over 3,400 members found that in four out of five cases of workplace sexual harassment in the last five years (82%), the harassers were male.[741]

The VEOHRC noted that men comprised more than nine in ten of the alleged harassers in complaints of workplace sexual harassment made to VEOHRC over the previous three financial years.[742]

Broader Australian workforce demographics indicate that the majority of senior positions are held by men, highlighting the intersecting nature of gender and power. Section 3.7 considers the way in which the distribution of power between men and women in the workplace can perpetuate institutionalised gender inequality that is associated with sexual harassment and other forms of gender-based violence.

Because most of the harassers that the Commission heard about in consultations and submissions were men, many of the experiences reflected throughout this report relate to male harassers. Some of the vast range of examples the Commission heard about included:

- male managers or male co-workers who 'propositioned' female staff for sex,[743] harassed them through texts,[744] phone calls,[745] or social media,[746] or who openly displayed, showed or gave other workers pornographic magazines,[747] emails,[748] images or diagrams, [749] or 'images of bestiality'[750]
- 'male people in positions of authority and seniority' who made 'sexual slurs' or comments 'on clothing and cleavage' in meetings[751]
- workers stalked by male colleagues or customers[752]
- male managers who looked at their female staff 'up and down like … a piece of meat' and touched them inappropriately,[753] or indecently assaulted them.[754]

Other examples included male colleagues who 'groped' female colleagues at work social events;[755] a male worker subjected to 'unwanted physical contact' by a male staff member from another firm at a work function;[756] male patients who groped, threatened, or subjected female nurses to crude remarks;[757] male customers who assaulted hospitality workers;[758] and workers who were sexually assaulted by male colleagues while travelling for work.[759]

(ii) Female harassers

The 2018 National Survey found that 24% of people who said they experienced workplace sexual harassment in the last five years said the most recent incident involved one or more female harassers.[760] An analysis of this data by gender indicated that men were more likely than women to have been sexually harassed by a female harasser:

- 8% of female victims said they were sexually harassed by one or more female harassers
- 47% of male victims said they were sexually harassed by one or more female harassers.[761]

Given the proportionally lower rates of sexual harassment experienced by men, there were far fewer female harassers overall when compared to male harassers.[762]

Where sexual harassment involved a female harasser (either a single female harasser or multiple harassers), the harasser was more likely to be a co-worker at the same level as the victim (35% and 40% respectively).[763]

Where the most recent incident involved only a single harasser, one in five victims (19%) said the harasser was female.[764] Where the most recent incident involved multiple harassers, one third of victims (33%) said that one or more of the harassers were female.[765]

While there is very limited information on female harassers, some research has considered how gendered norms may operate when men are sexually harassed by women (see Section 3.5). This research has suggested that some female harassers may be engaging in these behaviours as 'honorary men', where they feel encouraged to engage in sexual harassment to assert their status and authority and conform to the dominant culture.[766]

A submission from a worker in a male-dominated industry described the culture of sexism and sexual harassment in her workplace as having resulted in most women leaving, except for some who were 'very crass and seemed to fit in nicely with the culture'. She gave the example of one woman who:

> would send unwanted sexual messages and pictures of herself reclining to one of my male [colleagues] … I told him to go make a complaint … as this is unwanted behaviour from a senior but he told me that he was worried if he did she would stop paying him.[767]

The Commission was told by another woman who had worked in the scientific research sector that she felt she had to 'play along' with the 'dominant culture' in order to stay in her chosen field:

> I … did so for many, many years, believing that if the male scientists could see me as 'one of the boys' I would have a future working alongside them … The jokes and slurs that seemed harmless fun when we were junior researchers lodged under our skins like barbs and festered, and we were slowly poisoned by them, and by our own participation in a culture that devalued us.[768]

Another worker shared her observations about women in leadership positions in a male-dominated workforce:

> Toxic masculinity rules the roost, even though we have women employed in high ranks … These women have been groomed and rewarded by the sexist culture. They are more interested in maintaining their status by identifying with toxic masculinity than eliminating harmful workplace attitudes and behaviour that reinforce sexual harassment. … Women interested in promotions will quickly adapt these negative attitudes, if they don't already have them. As a result, we work in environments where predatory behaviour and locker room talk are prominent, as is bullying and harassment.[769]

The Commission heard from a male worker about a pattern of sexual harassment by female co-workers and senior personnel in his office, where he was the only man. The worker said this made him feel 'very unwelcome within the workplace', and resulted in him changing jobs:

> The behaviour took the form of dismissive, derogatory or crass comments about men and/or their bodies. On each occasion, none of my colleagues held the person making the comment to account for her comment.[770]

The Commission also heard in submissions that when the harassers were female, victims felt their complaints were not taken seriously or more readily dismissed. One man said that he felt unable to raise a complaint in his workplace after a female co-worker told him, '"Wife or no wife, I would fuck you in an instant", while spreading her legs and showing no panties'.[771]

Another male worker in a female-dominated industry described being regularly asked personal questions about his sex life and genitals by female colleagues and patients, as well as being 'groped, had my trousers pulled down and been interrupted in toileting by female staff looking over cubicles.' He said that when he tried to report these incidents he was 'disbelieved by management, or these predatory staff gang up to allege that as a male I'm the perpetrator'.[772]

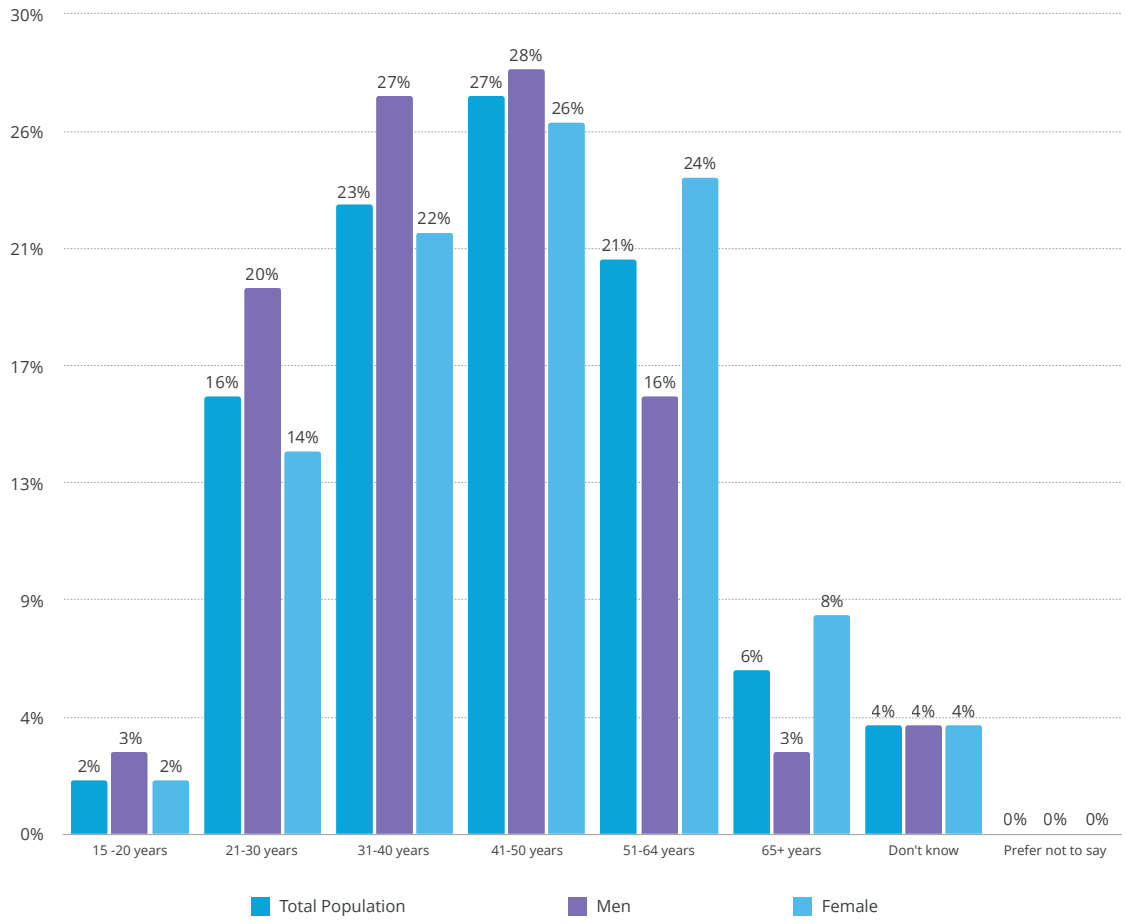
The 2018 National Survey found that men were more likely than women to be sexually harassed in some female-dominated industries—for example, in the health care and social assistance industry, 37% of men said they were sexually harassed in the last five years compared to 31% of women; in the education and training industry, an estimated 46% of men said they had been harassed compared with 35% of women.[773] Other industries in which the rate of sexual harassment was found to be higher for men than women, included: electricity, gas, water and waste services (an estimated 51% of men compared with 41% of women).[774]

(c) Age of harassers

Throughout the Inquiry, the Commission heard from victims about sexual harassment by both older harassers and younger harassers. The 2018 National Survey indicated that of people who said they experienced workplace sexual harassment in the last five years:

- most commonly a single harasser was aged between 41–50 years (27%)
- more than half (54%) said the most recent incident involved a single harasser aged 41 or older.[775]

Figure 3.4: Single perpetrators of workplace sexual harassment (by age of perpetrator and gender of victim)



Base: Respondents who had been sexually harassed by a single harasser in the workplace in the last 5 years (n=1,652); Men (n=565); Women (n=1,077).

Source: Australian Human Rights Commission, 'Everyone's business: Fourth national survey'.[776]

Where the most recent incident of workplace sexual harassment involved multiple harassers, the most common age groups for one or more of the harassers were:

- 31–40 years, in 40% of instances
- 21–30 years, in 35% of instances
- 41–50 years, in 31% of instances.[777]

(i) Older harassers

The 2018 National Survey found that where the most recent incident of workplace sexual harassment involved a single harasser in an older age group,[778] the victim was more likely to be a woman (32% of women who said they were sexually harassed by a single harasser in the workplace in the last five years, compared to 19% of men).[779]

Similarly, the victim was also more likely to be a woman where the most recent incident involved multiple harassers in an older age group (61% of women who said they were sexually harassed by multiple harassers in the last five years, compared to 39% of men).[780]

Existing research has noted that sexual harassment by an older harasser can be perceived by the victim as 'more frightening'.[781] The Commission heard this from a number of individuals in submissions about their experiences of sexual harassment by older co-workers.

For example, an administrative services worker said she was repeatedly 'sent pornography via company email, with the sole purpose to humiliate and intimidate me. I was 19 at the time and the perpetrator was a 40+ year old male.'[782] Another worker said she was 'sexually harassed and assaulted by a much older work colleague' over several months,[783] while yet another provided the following account:

> I was a younger woman (late 20s/early 30s) … The number of older men (40s and 50s) in positions of management in my immediate team far outnumbered the women … During my employment I was sexually harassed on a regular basis … My manager, a man in his late 40s, was the worst offender. He would spend a lot of time in my office talking to me about personal matters and I did not feel that I had the power to ask him to leave. He would regularly comment on my physical appearance such as saying he thought I was beautiful. Eventually this unwanted attention culminated in him trying to kiss and grope me at an after work social event.[784]

One worker also observed in her submission that she felt the age gap between the 40-year-old harasser and herself as an 18-year-old worker 'contributed to his [sexually harassing] behaviour, as I am very young and lack the power to stand up for myself.'[785]

As discussed in Section 3.5(b), research has indicated that younger workers are more likely to be sexually harassed at work than older workers.[786]

Gabrielle's story[787]

Gabrielle worked in the entertainment industry. At the age of 23, she toured around the country, working one-on-one with a man who was in his forties, Nick. Gabrielle told the Commission in her submission that during the long car trips travelling between performances, Nick would ask her invasive questions about her sex life and religious beliefs, asking if Gabrielle and her then-partner would 'touch each other' instead of having sex.

The company would often book Gabrielle and Nick in the same accommodation with a shared communal living room. Gabrielle told the Commission that she was 'shocked and uncomfortable with this, sharing living arrangements with a middle-aged co-worker twice [her] age'; however, she felt she couldn't raise her concerns because Nick and the company producer were the only other staff members and they had been working together for many years. One night, Nick became inebriated and would not let her go to bed. She said she was 'terrified', as there was no way to lock the door to her bedroom.

When the tour finished, Gabrielle did not accept another contract. She told the Commission that she tried to report Nick's behaviour to the company when she left, but was told to leave and to 'stop making up lies'.

The Commission heard in submissions and consultations that older harassers often held more senior positions of power in an organisation compared to victims.[788] For example, one woman who worked for a fast food chain told the Commission that:

> … not only myself but four other women (that I know of) have been sexually harassed by our managers (both men at least 10+ years older than us) with us women all aged between 23 and 28.[789]

Another worker recounted the following incident:

> I was out at a bar with colleagues, including some from another agency who had come from interstate for a training session and meetings. An older male manager then in his early 40s (I was in my mid-20s) who worked for another agency interstate asked me to sit on his lap.[790]

Harassers in positions of authority are discussed further below.

(ii) Younger harassers

The Commission also heard about incidents of sexual harassment involving younger harassers. The 2018 National Survey found that where the most recent incident of workplace sexual harassment involved a single harasser in a younger age group,[791] the victim was more likely to be a man (47% of men who said they had been sexually harassed by a single harasser in the last five years compared to 35% of women).[792]

Similarly, the victim was more likely to be a man where the most recent incident of workplace sexual harassment involved multiple harassers in a younger age group (40% of men who said they had been sexually harassed by multiple harassers in the last five years compared to 28% of women).[793]

Studies of sexual assault perpetrator characteristics have suggested that, on average, where there are multiple perpetrators, they are likely to be younger than lone perpetrators.[794] However, there is limited research on young people who engage in workplace sexual harassment.

The Commission received submissions from victims about incidents of sexual harassment by younger co-workers. For example, the Commission was told by a worker in the public sector that a group of 'younger males' would smirk and leer at her in the workplace, and make comments about her 'big tits' or 'big boobs'.[795] A retail worker described working alongside younger men who would flirt with her and ask if she gave her husband 'blow jobs',[796] while a female journalist told the Commission:

> I have been chronically sexually harassed, victimised and intimidated by one young cameraman because I politely turned him down for a drink after he sent me inappropriate messages over Facebook.[797]

A male worker also recounted an incident involving a younger female co-worker during a staff dinner:

> [T]he staff member I was sitting beside started rubbing/caressing my right leg and gradually worked her way up towards the top of my leg. I didn't react immediately as I hoped if I ignored her she would stop—she didn't, until I took more decisive action, before she reached a more sensitive area.[798]

(d) Harasser's position in the workplace

The 2018 National Survey found that, for people who said they had been sexually harassed in the workplace in the last five years, the most recent incident was most commonly perpetrated by a co-worker employed at the same level.[799] This was the case for incidents involving a single harasser or multiple harassers.[800]

The second most common relationship of a single harasser to the victim was a client/customer relationship; for multiple harassers, the second most common relationship was a co-worker in a more senior position to the victim.[801]

Table 3.2: Relationship of harasser to victim[802]

Single harasser	Multiple harassers
A co-worker on the same level as the victim (27%)	A co-worker on the same level as the victim (35%)
A client or customer (18%)	A co-worker more senior than the victim (26%)
A co-worker more senior than the victim (15%)	A direct manager or supervisor (21%)
A direct manager or supervisor (11%)	A client or customer (17%)

For single harassers, an analysis of this data by gender indicated that:

- men were more likely than women to be sexually harassed at work by a co-worker at the same level (37% of men compared to 21% of women)
- women were more likely than men to be sexually harassed at work by a client or customer (22% of women compared to 11% of men).[803]

Where there were multiple harassers, there were no substantial differences between male and female victims in the harasser/victim relationship categories.

Research on the hierarchical relationship between victims of workplace sexual harassment and harassers is mixed. Some studies have found that harassers are more likely to be at the same organisational and status level as the victim, consistent with the 2018 National Survey findings.[804] Other studies have suggested that harassers are more likely to be in a more senior position in the workplace, for example a direct manager or someone in direct authority over the victim.[805]

Yet another study suggested that women in positions of authority in the workplace were more likely to be sexually harassed, including by co-workers and subordinates, as the harassment served as an 'equalizer against women in power' and was directed towards putting them 'in their place'.[806]

This research demonstrates the complex and gendered nature of power relations in the workplace. As discussed in Section 3.4, gender inequality and other inequalities based on class, race or other forms of discrimination, can create power imbalances between victim and harasser and drive sexual harassment,[807] whether or not the harasser is in a formal position of authority or seniority to the victim, more junior to the victim, a co-worker or even someone external to the organisation.

(i) Harassers in senior positions

Research has suggested that both men and women are more likely to consider behaviour to be sexual harassment if the harasser is a manager, or in a more senior position to the victim, rather than a peer.[808] Other research has indicated that the higher the status or power of the harasser, the greater the victim perceives the impact to be.[809]

The Commission heard from individuals describing sexual harassment by their direct managers. One worker said that her manager invited her to dinner to 'discuss my future', insisted that she drink with him and, '[a]fter a while he insisted I had to sleep with him as company policy'.[810] Another worker told the Commission about being sexually harassed by her manager while working in a 'largely male environment':

> The harassment escalated to the point that I would be called to his office and he would close the door and touch me inappropriately … There was one occasion when I thought he was going to rape me. I just kept saying no and I was eventually able to get away from him … I couldn't complain to more senior management as line management were all male and my boss would have been considered more important to keep rather than me.[811]

The Commission also heard about situations where the harasser was not in a position of direct authority over the victim, but was able to influence another senior person with authority in the workplace.[812] The Commission heard that this could be the case in small businesses where there is a close relationship between the owner and the harasser (see Section 3.7(f)). For example, an office worker told the Commission she felt she could not reject the advances of a much older co-worker because his brother-in-law was the director of the company:

> It's hard when it is small business and family if someone says 'your brother in law is doing this' and I have known him all my life and don't know this person [the victim making the complaint] from a grain of salt.[813]

Another worker told the Commission she tried to report sexually suggestive comments made by her boss to management, but was advised the company 'will never do anything about him'. She said this was because he was a company shareholder and 'best mates with the CEO'.[814]

The Commission also heard about employers protecting their 'star' or highly-valued workers from complaints of sexual harassment. These individuals were often in senior roles, high income earners or high-profile public figures. One individual described a partner in a law firm who regularly sexually harassed junior female lawyers:

> All of the young women he was said to have harassed simply vanished from the firm—they very quickly left and nothing more was said. It was indicated to me that HR and senior partners were aware of this man's conduct, but nothing was ever done about it. He continues to work there and is in fact one of their 'star' performers.[815]

Another worker told the Commission that there were no consequences for a harasser after she reported his inappropriate conduct. She said: 'he held all the cards … He seems to be one of those protected species'.[816]

The Commission also received submissions describing sexual harassment by workplace leaders or people in very senior positions of power, such as CEOs or company directors. One worker told the Commission: 'I felt powerless to report the incident as this man was the head of the [organisation] and I believed he was "untouchable". Who would believe me?'.[817] Another worker said:

> I am a senior member of the executive team and the most senior female in my workplace. I have allowed myself to be sexually harassed and bullied for over three years by the CEO and part owner of the business I work for.[818]

The Commission heard about the distress this could cause and the damaging impacts to victims' wellbeing and careers (see further discussion in Section 3.8 below). One worker described her experience as follows:

> My immediate supervisor, the Executive Director of this company … had been systematically sexually harassing me for many years … Even though I had told [him] many, many times that I did not want to hear his sexual comments and innuendo, and did not want him to touch me, he continued to do so. When I screamed and cried at him to leave me alone, he told me that if I ever told anyone about what he was doing, that he would fire me and make sure that I didn't work in the building and construction industry again.[819]

The worker said that when she reported the harassment to the Deputy Executive Director, she was advised to 'keep [her] mouth shut and not speak about this to anyone', because if she did she would be fired. When she asked why, as she had not done anything wrong, he replied: 'It is easier to get rid of a secretary than it is to get rid of an Executive Director'.[820]

Tamara's story[821]

Tamara told the Commission in her submission that she attended an office party at a public venue to farewell her CEO, who was known to be 'a bit sleazy' to the women in the office. She said that he became very intoxicated and started hugging Tamara and grabbing her breasts, making loud derogatory comments about them. Other co-workers pulled him off her and tried to quieten him down. Tamara describes feeling 'so humiliated [she] couldn't move'. She said she still feels a lot of shame in relation to this incident, and blames herself for being 'too friendly'.

(ii) Harassers who are clients or customers

There has been increasing recognition of sexual harassment by clients, customers or patients, particularly as few workplaces have clear policies for addressing this type of sexual harassment.[822] The prevalence rate of sexual harassment by clients and customers is much higher in certain industries and work environments, for example hospitality and retail (see Section 3.7(c)).[823]

The Commission received a number of submissions describing incidents of workplace sexual harassment by customers, clients or patients.[824] Retail workers frequently told the Commission about sexual harassment by customers:

> I worked retail jobs in clothing/fashion, bedding and bookshops. The bedding job was by far the worst. At least a couple of times a week, men would ask me to 'test drive' the beds with them … Occasionally a man would attempt to push me onto a bed so he could 'see what it looked like with a pretty girl lying on it' … On one afternoon a man followed me out to the storeroom at the back of the shop and attempted to rape me.[825]

Another person who worked in the gaming retail industry described being stalked by one customer, told by another customer that he would put her in his 'dungeon' and that other customers followed her to her car at night.[826]

The Commission also heard that for frontline workers in the health care sector, such as those working in aged and disability care, power dynamics in their relationship with clients could differ from those of relationships between customers and workers in other types of service roles. However, the impacts of sexual harassment by patients or clients could still be extremely distressing.[827] A health and social assistance sector representative told the Commission in a consultation that workers visiting clients in their homes were 'being sexually harassed and feeling that they don't have any rights in that situation'.[828]

The Commission also heard from another person working for a disability service provider, who said they were sexually harassed by a client with a disability:

> One young man I worked with would routinely make inappropriate comments about my body and would talk about me in a sexual context to the other people I worked with. On a number of occasions, he excused himself from my classes because he had an erection. All of this made me feel very uncomfortable.[829]

Some workers provided other examples of sexual harassment by people outside their organisation with whom they were required to come into contact as part of their work. One worker told the Commission:

> I was unexpectedly asked to meet with a stakeholder one morning … I met this man alone in a meeting room that was outside the security area of the floor—no other staff members were likely to pass the room. He spent the meeting leering at my breasts.[830]

Sexual harassment by customers, clients and other third parties can also present challenges for bystanders to know how to act or intervene.

Case study:

Third party sexual harassment and bystander intervention[831]

A New Zealand qualitative study which examined case studies of different workplace contexts, including a retail store and a bank, found evidence that groups of women—targets and bystanders—collectively developed avoidance strategies in relation to particular customers known to engage in harassing behaviour. Strategies included:

- ensuring there was a witness present when dealing with the customers
- taking lunch breaks at strategic times
- leaving the counter or workstation
- asking staff to cover for them while they retreated to the back office
- pre-arranging to be interrupted by phone calls.

The Commission heard about a range of other types of unique working relationships between victims and harassers, including:

- students, tutors and lecturers in university settings[832]
- barristers and solicitors and their clients[833]
- volunteers and other paid or unpaid staff members[834]
- contractors or freelancers and employers who engage their services or other workers.[835]

In Section 5, 'The legal and regulatory framework', the Commission recommends a suite of changes to increase coverage and protections against sexual harassment for workers. These changes are recommended to ensure the law captures evolving forms of workplace sexual harassment and a broad range of categories of harassers.

(e) Repeat harassers

The Commission heard that some individuals (referred to as 'repeat harassers') sexually harassed more than one victim in a workplace, or moved to other workplaces where they continued to sexually harass others.

The 2018 National Survey found that two in five people (41%) who said they had been sexually harassed in the workplace in the last five years were aware that others in their workplace had experienced the same form of sexual harassment as them and that this was most often by the same harasser.[836]

In submissions the Commission heard from victims about repeat harassers who had also sexually harassed other workers:

> I was not this particular man's only victim, and others have recounted worse experiences with him. Because of this, I feel guilt that I didn't do more at the time to take the case further than internal complaints, but my reality is, being so junior, it possibly would have ended my career in the legal profession to do so.[837]

Hallie's story[838]

Hallie told the Commission in her submission that the owner-manager of the branch of a company where she worked repeatedly sexually harassed her by making verbal sexualised comments, contacting her through social media, phone and text messages, and on one occasion inappropriate physical contact.

Hallie made a number of complaints to the company about this, and in doing so was made aware of two previous sexual harassment complaints made against him by another worker and a customer. Hallie told the Commission that the company 'chose to ignore the complaints from multiple women and allowed [the harasser] to continue his predatory behaviour'.

Other victims told the Commission about sexual harassment by individuals who had allegations of inappropriate conduct against them from previous workplaces. For example, one woman working at a university told the Commission:

> I was informally warned by the school [occupational health and safety] representative that [a senior staff member] had had informal complaints made against him for sexually harassing a woman at [another campus] in the past.[839]

Individuals may be able to engage in sexually harassing behaviour over long periods of time where employers are reluctant to make known information about incidents or complaints in their workplace. The Commission heard that this lack of transparency often stemmed from the reputational damage associated with public knowledge of sexual harassment in a workplace or concerns regarding potential legal liability (see Section 3.8(c)).

As discussed in Section 5.8(a), 'Non-disclosure agreements and confidentiality clauses', to resolve complaints many employers, victims and, sometimes, harassers enter into confidential settlement agreements (non-disclosure agreements or NDAs). The Commission heard that some harassers remained employed while victims left the workplace with a settlement payment, while other harassers simply relocated to a new workplace where the new employer was not aware of the allegations.[840]

The Commission also heard that, in some cases, an agreement between the employer and harasser to end the employment relationship may include commitments from the employer to provide a positive reference for the harasser or to make no disparaging remarks, allowing repeat harassers, or 'rolling bad apples', to continue to work in the industry with impunity.[841] In its roundtable with legal experts, the Commission similarly heard that confidential processes and NDAs could facilitate 'serial predatorial conduct' by sexual harassers:[842]

> We all know that the most egregious cases and the repeat offenders are never going to see the light of day, and they're the ones that absolutely should see the light of day … [The victim] is paid to exit the organization, and [the harasser] stays on, presenting a risk to all the other employees, and they don't know, the employer does.[843]

In Section 6, 'Preventing and responding to sexual harassment in the workplace', the Commission discusses measures to address the risks posed by repeat harassers. This includes, for example, sanctions' for harassers designed to achieve behavioural change, with a view to preventing them from sexually harassing others.

The Commission's view

While recognising that workplace sexual harassment is a broader cultural and systemic issue, better research and data to understand behaviours, characteristics and trends in relation to harassers are critical to assist employers to identify risks in their workplace and inform the development of targeted prevention initiatives and improved responses to workplace sexual harassment.

The Commission recommends gathering additional information on people who engage in workplace sexual harassment through the Commission's national survey on the prevalence, nature, reporting, impacts of and responses to sexual harassment (Recommendation 2) and, the National Sexual Harassment Research Agenda, which will contribute to building a national evidence base on sexual harassment to guide policy and practice (Recommendation 4).

3.7 Workplace settings where sexual harassment occurs

> [W]e are a very male-dominated industry and organisation and have been since its inception. It's only recently that women have even been legally allowed in certain mining areas. So it creates a boys' club culture, for lack of a better terminology. And that creates a bravado among men that they wouldn't necessarily have in a different environment.[844]

This section considers the types of workplace settings in which the Commission heard sexual harassment most commonly occurs, and some of the key characteristics, practices and other factors which drive sexual harassment in those settings.

It first examines the prevalence of sexual harassment across different industries, focusing on the two industries that experience the highest rates of workplace sexual harassment according to the 2018 National Survey: information, media and telecommunications, and arts and recreation services.

It then discusses a range of workplace characteristics that may contribute to sexual harassment occurring, and examines examples of particular industries and workplace settings with these characteristics, including:

- male-dominated workplaces, such as in the construction, mining and financial services industries
- work involving high levels of contact with customers, clients or patients, such as in the retail and hospitality industries and the health care and social assistance industry
- hierarchical workplace structures, such as in police and defence organisations and the medical and legal professions.

This section also considers workplace sexual harassment in regional, rural and remote workplace settings, and what the Commission heard about issues driving sexual harassment in small businesses.

(a) Industries

The 2018 National Survey asked survey respondents who had been in the workforce in the last five years, and who had experienced sexual harassment in the workplace during that period, in which industry the most recent incident of sexual harassment took place.[845] The survey used categories from the Australian and New Zealand Standard Industrial Classification (ANZSIC) to classify the industries.[846]

The 2018 National Survey found that the highest proportion of people said the most recent incident occurred in the health care and social assistance industry (13%) and retail trade industry (13%). The next highest share said the most recent incident occurred in the education and training industry (10%), followed by accommodation and food services (9%).

These industries also account for the largest shares of the Australian workforce, so it is not unexpected that the highest proportion of sexual harassment victims said the most recent incident occurred in these industries.[847] For example, 13% of the Australian workforce was employed in health care and social assistance in 2018, the largest proportion of the Australian workforce in any one industry. The table below shows both:

- the proportion of respondents who said they were sexually harassed in the last five years, by industry in which the most recent incident occurred
- the proportion of the Australian workforce employed in each industry.

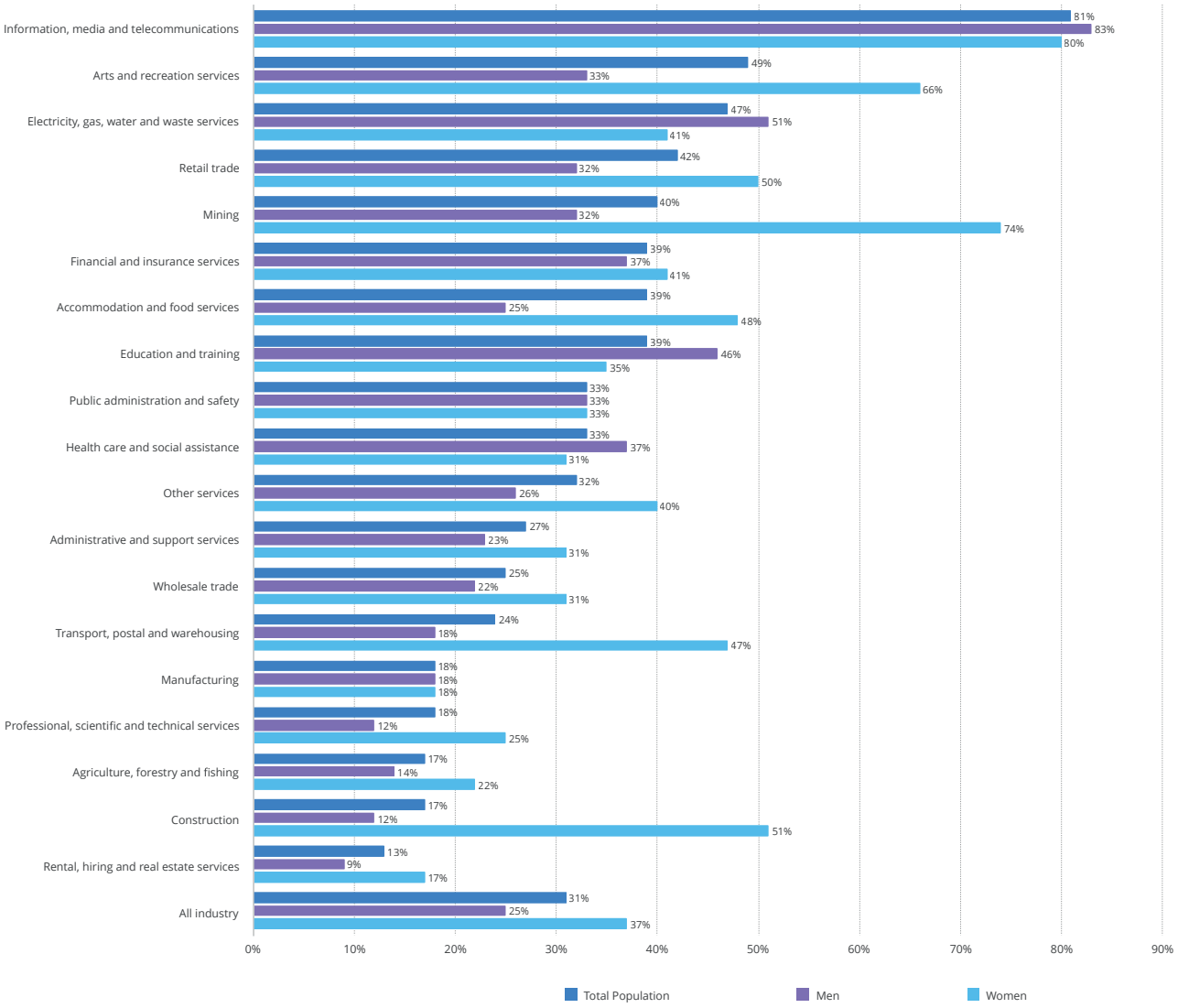
Table 3.3: Industry in which the most recent incident of workplace sexual harassment occurred[848]

Industry	Proportion of victims of sexual harassment	Proportion of the Australian workforce
Health care and social assistance	13%	13%
Retail trade	13%	10%
Education and training	10%	8%
Accommodation and food services	9%	7%
Public administration and safety	6%	6%
Construction	5%	9%
Information, media and telecommunications	5%	2%
Professional, scientific and technical services	5%	8%
Financial and insurance services	4%	4%
Manufacturing	4%	8%
Other services	4%	4%
Transport, postal and warehousing	4%	5%
Administrative and support services	3%	3%
Arts and recreational Services	3%	2%
Electricity, gas, water and waste services	2%	1%
Mining	2%	2%
Wholesale trade	2%	3%
Agriculture, forestry and fishing	1%	3%
Rental, hiring and real estate	1%	2%

Base: Sexually harassed in the workplace at some time in the last 5 years (n=2,585); Industry worked in at the time of the most recent incident of sexual harassment: accommodation and food services (n=225); administrative and support services (n=73); arts and recreation Services (n=77); construction (n=121); education and training (n=246); electricity, gas, water and waste services (n=45); financial and insurance services (n=108); health care and social assistance (n=347); information, media and telecommunications (n=120); manufacturing (n=104); mining (n=57); other services (n=97); professional, scientific and technical services (n=120); public administration and safety (n=166); rental, hiring and real estate services (n=18); retail trade (n=339); transport, postal and warehousing (n=92); wholesale trade (n=56); and agriculture, forestry and fishing (n=35).

The 2018 National Survey data was analysed to allow a comparison of the prevalence of sexual harassment within each industry.[849] The table below shows this data, with industries ranked in order from highest to lowest in terms of the prevalence rate of workplace sexual harassment. The table also shows the prevalence of sexual harassment in each industry for women and men.

Figure 3.5: Prevalence of workplace sexual harassment by industry (by gender)[850]



Base: Sexually harassed in the workplace at some time in the last 5 years (n=2,585); Industry worked in at the time of the most recent incident of sexual harassment: accommodation and food services (n=225); administrative and support services (n=73); arts and recreation services (n=77); construction (n=121); education and training (n=246); electricity, gas, water and waste services (n=45); financial and insurance services (n=108); health care and social assistance (n=347); information, media and telecommunications (n=1201); manufacturing (n=104); mining (n=57); other services (n=97); professional, scientific and technical services (n=120); public administration and safety (n=166); rental, hiring and real estate services (n=18); retail trade (n=339); transport, postal and warehousing (n=92); wholesale trade (n=56); and agriculture, forestry and fishing (n=35).

The 2018 National Survey found that the prevalence of sexual harassment across all industries was 31%.[851] The survey also found that the prevalence of sexual harassment in a number of industries was substantially higher (40% or more) than the rate across all industries of 31%. These industries (and the prevalence of sexual harassment in them) were:

- information, media and telecommunications (81%)
- arts and recreation services (49%)
- electricity, gas, water and waste services (47%)
- retail trade (42%)
- mining (40%).

The discussion below examines sexual harassment in the two industries with the highest prevalence of workplace sexual harassment: information, media and telecommunications, and arts and recreation services. What the Commission heard about factors contributing to sexual harassment in the mining industry and the retail trade industry is set out below in Sections 3.7(b) and (c).

The 2018 National Survey found some industries where victims of workplace sexual harassment were less likely to report the incident. In total, 81% of people who said they were sexually harassed in the last five years did not formally report the most recent incident. In certain industries, people were even less likely to make a report or complaint, including:

- arts and recreation services (89%)
- professional, scientific and technical services (87%)
- information, media and telecommunications (86%)
- administrative and support services (86%).[852]

Barriers to reporting in specific industries and professions are discussed throughout this section, while Section 3.5 discusses factors which affect reporting and increase the risk of sexual harassment for certain groups of workers. Section 6.2(f), 'Reporting', examines the range of reasons why victims across the workforce do not report sexual harassment and their experiences of reporting when they do, and makes recommendations to improve reporting across all workplaces.

(i) Information, media and telecommunications

The information, media and telecommunication industry includes publishing; motion picture and sound recording; radio and television broadcasting; internet publishing and broadcasting; telecommunications services; internet services providers; web search portals and data processing services.[853]

The 2018 National Survey found in relation to the information, media and telecommunications industry:

- It had the highest prevalence rate of workplace sexual harassment of any industry (81% compared to the prevalence across all industries of 31%) (see Figure 3.5 above).
- The rate of sexual harassment for women and men was similar in this industry, at 80% and 83% respectively (see Figure 3.5 above).
- A higher proportion of sexual harassment in this industry took place at a work social event (28% compared to 18% across all industries).[854]
- A higher proportion of sexual harassment in this industry was perpetrated by a co-worker (41% compared to 30% across all industries).[855]
- A higher proportion of sexual harassment in this industry was not formally reported, compared to other industries (the most recent incident was not formally reported by 86% of those working in information, media and telecommunications, compared to 81% across all industries).

In submissions and consultations, the Commission heard about workplace sexual harassment, its drivers and the experiences of workers in different parts of this industry, particularly in media, film and television.[856]

For example, in consultations the Commission heard that gender inequality is reflected in the 'male-dominated' nature of the film and television industries, where 'the culture on set is very macho' and 'women feel they have to fit into that culture'.[857]

The Commission also heard that the structure of the entertainment and screen industries, where most workers are engaged on a freelance basis, made workers 'vulnerable' and fearful that complaining about sexual harassment would jeopardise future work.[858] This was exacerbated by a reliance on personal referrals to get work in the industry, as 'nothing's advertised'.[859]

Workers also told the Commission that the high degree of competition in both the screen industry and journalism—where 'the graduate numbers are about four to five times what the jobs are'—means workers fear the consequences of reporting sexual harassment, as there are fewer jobs available.[860] As employers were often small, independent producers, this led to a 'fear around the impartiality of any complaints investigation procedure.'[861]

The Commission was told that the small size of the industries can also lead to people being 'blacklisted' (not considered for employment) if they complain.[862] A worker in film and television explained that many victims may be reluctant to complain for fear they may have to leave the industry altogether:

> [Y]ou don't choose to be in this industry unless you absolutely love what you do … You give up all of your life to enter this industry. So, the stakes are incredibly high … you can tell yourself that you can step past that behaviour even if something terrible has happened to you, because at the end of the day you want to stay there.[863]

Similarly, the Commission was told about gender inequality in the male-dominated media industry. The Commission heard that although more than 50% of graduates of media courses are women, this 'is not adequately represented at upper senior management levels'.[864] One worker said:

> We have a persistent and systemic pay gap and opportunity gap for women in our industry. It is still run by blokes. There is still a significant culture shift that needs to occur to allow women to participate fully in a career across the entirety of their working lives and work to seniority.[865]

The Commission was told that media organisations 'swept historical incidents of sexual harassment or assault by their employees under the carpet', creating 'workplace cultures that allowed that behaviour to go unchecked' and reinforcing that the 'careers of people reporting this behaviour would go nowhere.'[866]

As discussed in Section 3.3, the Commission heard that women in media face systemic online harassment as part of their job, especially through sexually harassing and sexist posts on social media.[867] The Commission was also told in consultations that in some workplaces in the media industry, employers did not have adequate policies covering sexual harassment or other workplace health and safety issues.[868]

(ii) Arts and recreation services

The arts and recreation services industry covers creative and performing arts activities, sports and recreation activities, heritage activities (such as museum, parks and gardens operations) and casino, lottery and other gambling activities.[869]

The 2018 National Survey found in relation to the arts and recreation services industry:

- The prevalence of workplace sexual harassment (49%) was substantially higher than the prevalence rate across all industries (31%).

- The rate of sexual harassment for women working in this industry (66%) was double that of men (33%).[870]
- It had the highest proportion of harassers who were male out of all industries (90% compared to 79% across all industries).[871]
- It also had a higher proportion of workplace sexual harassment that was witnessed by someone else (53% compared to 40% across all industries).[872]
- A higher proportion of sexual harassment in this industry was not formally reported, compared to other industries (the most recent incident was not formally reported by 89% of those working in arts and recreation services, compared to 81% across all industries).

In submissions and consultations, the Commission heard about experiences of sexual harassment and the drivers of this behaviour in the arts and recreation services industry, particularly in the creative and performing arts. Many factors contributing to the sexual harassment of people working in the arts were similar to those in information, media and telecommunications, and some people worked across both industries (for example, actors working in theatre, film and television).

A survey of sexual harassment in the live performance industry, conducted by the Media, Entertainment & Arts Alliance in 2017, found that at least 40% of participants had experienced sexual harassment, almost all of these on multiple occasions.[873] It also found that:

- The majority of survey respondents (58%) said they were rarely or never made aware of any policies or processes for reporting and resolving allegations of sexual harassment.
- The majority of respondents (53%) had never reported the sexual harassment to their employer.
- The most common reasons for not reporting sexual harassment were worrying about 'professional repercussions' (43%) and worrying that reporting would make the situation worse (40%).[874]

The survey also found that almost four in five respondents (79%) agreed that 'some people use the creative process as an excuse for sexual harassment or misconduct'[875] and 48% agreed that the 'the nature of an actor's work makes it difficult to know what is appropriate and what is not'.[876]

Similarly, the Commission was told in consultations about a 'very real fear' among some in the arts industry that if you 'crack down' on sexual harassment, you 'hinder the creative process itself'.[877] The lack of formal induction processes and policies on sexual harassment within the arts industry was also highlighted:

> [T]he overwhelming message coming out from people [in the arts] is that they've never been inducted. They've never had a policy explained to them. They wouldn't know who to formally report to if there [were] an issue. They wouldn't feel that there was anyone impartial who they could have conversation with. So, the mechanisms have not been in place in our industry.[878]

Workers in the arts and entertainment industry spoke about risks associated with reporting sexual harassment similar to those described by workers in film and television. For example, the small, highly competitive and connected nature of the industry meant actors who reported sexual harassment feared jeopardising further work opportunities.[879]

Others suffered negative impacts on their careers where reports were made public without their consent: 'there are several cases at the moment of people who have been victim shamed in the media. They are young actors who … their career will suffer'.[880]

The Commission also heard about issues related to the small size of the industry and limited job opportunities for professional musicians. One worker's submission noted that musicians employed on a casual basis 'won't speak up' about sexual harassment as there is a 'very small select world of employment opportunities'.[881] The submission observed that sexual harassment can also be driven by the 'dominance' and 'celebrity status' of some senior musicians, and that managers 'ignore the behaviour and culture believing they just want the best players regardless of their actual behaviour.'[882]

The National Association for the Visual Arts (NAVA) told the Commission, 'Sexual harassment in the contemporary arts is a significant and widespread problem.'[883] Its submission referred to factors contributing to sexual harassment in the visual arts, such as a lack of understanding of sexual harassment; treating it as a joke or 'just what it's like working in a creative environment'; and the effect of power disparities which resulted in harassers feeling entitled to behave as they like.[884]

(b) Male-dominated workplaces

(i) Overview

There is an established body of evidence that shows that male-dominated workplaces have a higher prevalence of sexual harassment.[885] Characteristics of male-dominated workplaces that can increase the risk of sexual harassment include:

- an unequal gender ratio (a higher proportion of men than women in the workplace)[886]
- senior leadership that is predominantly male[887]
- performance of jobs by women that are considered 'atypical' for women.[888]

Research has indicated that even where workplaces are not male-dominated in gender ratio or senior leadership, they may still be male-dominated in their work practices, culture, or behavioural expectations.[889] Such workplaces are commonly characterised by 'gendered behavior, cultural symbols of masculinity, male superiority, and sexual bravado'.[890] Workplace environments where these types of cultural norms predominate increase the risk of sexual harassment occurring.[891]

What the Commission heard about the characteristics of male-dominated workplaces, and how these may drive sexual harassment, is discussed below.

(ii) 2018 National Survey data

The findings of the 2018 National Survey also suggest that factors aside from gender ratio alone may contribute to sexual harassment in a workplace. The survey found that sexual harassment occurred more frequently in workplaces with roughly equal numbers of men and women than in workplaces with a higher ratio of either men or women:

- 42% of people said the most recent incident of sexual harassment they experienced occurred in a workplace made up of roughly equal numbers of men and women.
- 29% of people said it occurred in a workplace of mainly men.
- 26% of people said it occurred in a workplace of mainly women.[892]

Of the five industries found by the 2018 National Survey to have the highest rates of workplace sexual harassment, three had a gender ratio where men outnumbered women in 2018–19 (the electricity, gas, water and waste services industry, the mining industry and the information, media and telecommunications industry).[893] The other two industries all had a more evenly mixed workforce of men and women (the arts and recreation industry and retail trade).[894]

When industry data from the 2018 National Survey was disaggregated by gender, the results showed that women were substantially more likely than men to be sexually harassed in some industries where the workforce was predominantly male, such as the construction and mining industries, and the transport, postal and warehousing industry.[895] The 2018 National Survey found that:

- In construction, the rate of sexual harassment overall (for women and men) was 17%, lower than the rate of 31% across all industries. However, women were more than four times as likely as men to be sexually harassed (51% compared to 12%). In 2018–19, women made up 12% of workers in the construction industry, making it the most male-dominated industry in Australia.[896]
- In mining, the rate of sexual harassment overall was 40%, higher than the rate across all industries of 31%. Women were more than twice as likely as men to be sexually harassed (74% compared to 32%). In 2018–19, women made up just 16% of workers in the mining industry.[897]
- In transport, postal and warehousing, the rate of sexual harassment overall was 24% (lower than the rate of 31% across all industries). Women, however, were more than 2.5 times as likely as men to be sexually harassed (47% compared to 18%). In 2018–19, women made up 22% of workers in this industry.[898]

During the Inquiry, the Commission heard about experiences and drivers of sexual harassment in the male-dominated industries of construction and mining, considered in more detail below. The Commission received little information about the transport, postal and warehousing industry.

The 2018 National Survey also found there were some industries where men experienced more sexual harassment than women:

- Information, media and telecommunications, where the rate of sexual harassment for men was 83%, compared to 80% for women. In 2018–19, men made up 59.5% of workers in this industry.
- Electricity, gas, water and waste services, where the rate for men was 51%, compared to 41% for women. In 2018–19, men made up 74.4% of workers in this industry.

- Education and training, where the rate for men was 46%, compared to 35% for women. In 2018–19, men made up 28.2% of workers in this industry.
- Health care and social assistance, where the rate for men was 37%, compared to 31% for women. In 2018–19, men made up 21.8% of workers in this industry.[899]

What the Commission heard during the Inquiry about experiences of sexual harassment of men is discussed in Section 3.5.

(iii) Factors that may increase risk of sexual harassment in male-dominated workplaces

Workplace gender ratio

There is evidence that working in an organisation where women are in the minority is a risk factor for sexual harassment.[900] An 'Open Statement on Sexual Harassment from Employment Discrimination Law Scholars' explained that a skewed gender ratio in a workplace can contribute to sexual harassment because:

> Without the power and safety that comes with equal representation and numbers, women cannot effectively counter stereotypes or deter or resist harassment. Skewed numbers leave women outnumbered and vulnerable at work, left to curry favor with men or compete on an unequal basis.[901]

The Commission heard that a skewed gender ratio could impact on a manager's willingness to take action in response to sexual harassment. At an academic roundtable, the following example was provided by an academic who was researching women working in male-dominated occupations:

> [A] woman said to me: 'I work in a crew of 30 heavy diesel mechanics … a woman reported sexual harassment. The manager wouldn't do anything and it was because he'd then have 30 men turn on him, so he was a supervisor, he had a crew of 30, couldn't do anything'.[902]

The 2017 National Community Attitudes towards Violence against Women Survey (NCAS) analysed how the gender ratio of a person's occupation might influence attitudes towards gender equality and violence against women.[903] The NCAS found that both men and women in occupations where men accounted for more than 60% of workers ('male-dominated' occupations, such as technicians and trades, machinery operators and drivers, and labourers) were 'more likely to hold attitudinal support for violence against women'.[904]

Additionally, men in male-dominated occupations were less likely to support gender equality, while women in male-dominated occupations were more likely to have a low level of understanding of violence against women.[905] As the gendered drivers of sexual harassment are the same as those underpinning other forms of violence against women, these findings are relevant to workplace sexual harassment (see Section 3.4).

Over-representation of men in senior leadership

The Commission heard that male dominance in a workplace is not only related to gender ratio, but to broader issues about male control of decision-making and leadership within the organisation. Some research has also indicated that rates of sexual harassment are higher where senior leadership is predominantly male.[906] One reason for this may be that '[m]ale-dominated management teams have been found to tolerate, sanction, or even expect sexualized treatment of workers, which can lead to a culture of complicity.'[907]

Data from the Workplace Gender Equality Agency (WGEA) indicated that in 2019, although the proportion of males and females in the Australian workforce overall was almost evenly split,[908] men made up more than two-thirds of 'other executives'/general managers[909] (68%) and of key management personnel[910] (69%), and 83% of chief executive officers/heads of business.[911]

Even in industries where women outnumbered men in 2019, men's representation in senior leadership positions was disproportionately high:

- Men made up 20% of the total workforce in health care and social assistance, but 46% of key management personnel and 59% of CEOs.[912]
- Men made up 37% of the total workforce in education and training, but 56% of key management personnel and 64% of CEOs.[913]

The continued over-representation of men in senior leadership positions in a range of sectors was also raised with the Commission in consultations and submissions.[914] For example, Science & Technology Australia told the Commission that even in science and technology disciplines 'where women and men are represented equally, or in those where women outnumber men, men tend to dominate the senior ranks.'[915]

The Diversity Council of Australia told the Commission that in workplaces where men dominate management positions, 'women have less ability to speak up and influence change and men feel pressure to accept other men's sexualized behaviour.'[916] The Commission heard that having more women in senior leadership roles would 'make a difference' to how workplaces deal with sexual harassment and 'help change the culture'.[917]

'Atypical' jobs performed by women

Research has suggested that workplaces where women perform tasks considered 'atypical' for women may present a risk for sexual harassment.[918] Atypical work for women includes work that men have historically performed, for example engineering, mining and trades, and work that is seen to diverge from stereotypes of women's roles relating to caring and motherhood.[919]

Victoria Legal Aid provided the following example from a worker in their submission:

> I'm a woman who is interested in cars and motorbikes. I have worked in male-dominated fields my whole life and have been subjected to sexual harassment and discriminatory behaviour in almost every job. I was 15 when I started my first job as a casual petrol station attendant. I worked with an older full-time male who would regularly slap me on my bottom. It made me feel very uncomfortable, but I was too shy and embarrassed to say anything to anyone. At about age 21, I worked at a truck company. My male co-workers would constantly tell dirty jokes and talk about 'hot chicks' and what they 'do to their missus'. Among the many offensive comments that were made to me, I recall sitting in a truck and my male colleague sitting next to me saying 'shut your legs, it's smiling at me'. I pretended that I didn't hear him.[920]

Experiences of sexual harassment of women performing 'atypical' work in the construction and mining industries are discussed below.

Male-dominated workplace cultures

The Commission heard from many individuals and organisations about how cultures in male-dominated workplaces contributed to sexual harassment.

The Women Work and Leadership Research Group at the University of Sydney, which is conducting research on women's experiences working in the traditionally male areas of investment management, automotive trades and aviation (pilots), told the Commission that 'gender-based disrespect' is a common experience for women working in these male-dominated areas.[921]

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) submission referred to its work in the fire and emergency services sector. This work showed that a dominant masculine workplace culture that 'often value[s] attributes, characteristics and roles traditionally associated with men while simultaneously devaluing those typically associated with women' can 'underpin a broad range of behaviours, ranging from everyday sexism to serious cases of sex discrimination and sexual harassment.'[922]

One woman described the culture working in the finance industry as 'overwhelmingly male dominated', where regular conversation and jokes about sex and 'sexist and degrading comments about women', including from managers, were an almost daily occurrence.[923] In another example, a young female electrical apprentice worked with an older male who 'would not say a word to her for the six months she worked with him.'[924]

The Commission also heard that the 'blokey' culture in some male-dominated workplaces was associated with the normalisation of disrespectful behaviour towards women, including sexual harassment:

> [I]t's almost like you become a bit desensitised. That [sexual harassment is] just the norm, those little comments, those little things. And sometimes if they're directed at you, you just laugh it off with them so you can fit in. And you do—there is this level of desensitization that takes place.[925]

The Commission also heard about barriers to reporting for women working in male-dominated workplaces, including that it was too risky to find another apprenticeship in male-dominated areas, that reporting might result in a company deciding not to employ any more women, or because the only option was to report to a man.[926] In an example provided by the Australian Council of Trade Unions, a worker said she did not complain about sexual harassment to avoid upsetting the status quo:

> A female worker in a male-dominated, blue collar industry told us that she was sexual harassed by a much older colleague and a supervisor while she was an apprentice electrician … The worker told us she did not complain because she 'didn't want to get anyone into trouble'.[927]

(iv) Construction

The 2018 National Survey showed that in the construction industry, the proportion of harassers who were male was slightly higher than for industries overall: 81% compared to 79%. The construction industry also had a higher average number of harassers per incident compared to all industries (2.1 compared to 1.7).[928]

A recent report on women in the construction industry found that the following features of the industry impact on women workers:

- Masculine norms and practices, including the acceptance of swearing and aggressive and combative exchanges, and resistance to flexible work.[929]
- Tolerance for sexism, including sexual harassment, sexist comments, sexist graffiti, presumptions that women will do the administrative work, and other practices that make women feel they are intruding in a male-dominated space.[930]
- The exclusionary nature of the industry (reflected in the characteristics described above) 'remind[s] women of their gender and difference', and workers who 'differ from the norm' in terms of race, gender and sexuality often find it difficult to fit into workplace culture.[931]

- Women routinely have to prove their capabilities. Men's capabilities are taken for granted and assumed to fit with construction roles.[932]
- Long hours and little accommodation for social or caring roles outside of construction.[933]

Women interviewed for the report on women in the construction industry provided examples of workplace cultures where disrespect of women and sexual harassment were commonplace:

> [Y]ou could walk around the site and ... there'd be naked pictures of chicks everywhere. It's disgusting, very unsafe. Like a very unsafe feeling work environment. I don't know if anything would ever happen but it doesn't make you feel very safe.[934]

> I've spoken to an engineer here and she said she's had to get her phone number changed because she's been so harassed by people in the past. Another engineer used to get comments about her boobs all the time.[935]

The Commission heard in submissions and consultations about sexual harassment in the construction industry. One employer observed that it was an industry with a 'blokey culture':

> I work in consulting practices that work within the construction industry, which would be where it's very male dominated, and so you can establish, to use a colloquialism, a blokey culture in that workplace.[936]

The Electrical Trades Union told the Commission of an incident where a female worker in the construction industry who reported sexual harassment received no support from her employer, and was barred from future employment:

> [A senior female apprentice] was often working with younger school-aged female apprentices—aged around 16 and 17. When the supervisor, who was in his 50s, started inappropriately approaching the young girls, she stood up to him and management's lack of action and spoke out about the behaviour. She has since been blacklisted from this major construction company because of this.[937]

(v) Mining

In the 2018 National Survey, the mining industry stood out among male-dominated workplaces in a number of ways:

- A higher proportion of people who were sexually harassed in mining said that the harasser was a co-worker at the same level as them (48%), compared to 30% of people across all industries.[938]
- Mining was also the industry with the highest average number of harassers (with an average of 3.0 harassers involved in the most recent incident compared to an average of 1.7 across all industries).[939]

- Close to half (48%) of sexual harassment in the mining industry occurred in a social area for workers, such as a lunch room, substantially more than the average across all industries (26%).[940]
- Sexual harassment was more likely to be witnessed by someone else in the mining industry (48% compared to 40% across all industries).[941]

AMMA, the Australian Resources and Energy Group (a national employer group), noted that the 2018 National Survey data 'indicates a cultural issue within the resources and energy industry where people (especially women) are more likely to be harassed by groups of co-workers in open, common areas (such as crib rooms or social areas at camp) than other industries.'[942]

A 2018 report on gender diversity in the resources and energy industry, by AMMA and the Australian Women in Resources Alliance, noted that the industry is still not perceived as an area where women would want to work.[943] Reasons included a perceived lack of career advancement and professional development opportunities for women in the industry, and perceptions that the culture is still very much male-dominated.[944]

One woman who worked in mining told the Commission that she was sexually harassed by different harassers working on mine sites and in the corporate office over the years she worked for a particular employer in the industry. She said: 'I should have left years earlier but I felt I was stuck as a single mum to earn all the money for my family, and there were no other jobs in my specialised industry.'[945] She also told the Commission:

> There was no one to turn to for help. I reported all incidents to management as I couldn't go to HR. Nothing was ever done to protect me. I was encouraged to 'find a way around this situation myself'.[946]

Another woman described a male-dominated culture in her workplace, in which sexual harassment and sex discrimination was 'ingrained':

> I work in the mining industry, a male dominated industry. This creates a toxic work environment [full] of aggression and intimidation. Sexual harassment and discrimination are ingrained at my work site. It is residential work so people get a job here [and] they don't leave. As a woman working here, I have and my female colleagues have been exposed to pornography … exclusionary language constantly being used, no [maternity] leave policy … I worked so hard to get this job and now I hate it and just feel like I'll never fit in.[947]

(c) Contact with customers and clients

In recent years, sexual harassment in the workplace by customers and clients has been increasingly recognised. A recent publication by UN Women and the International Labour Organization noted that 'working with third parties—such as clients, customers, patients or users—is a significant risk factor for violence and harassment against women'.[948]

The 2018 National Survey found that, for people who said the most recent incident of workplace sexual harassment they experienced involved a single harasser, 'customer or client' was the second most common category of relationship between harasser and victim, with 18% of cases falling into this category.[949] The survey found that women were twice as likely as men to be sexually harassed at work by a client or customer (22% and 11% respectively).[950]

The Commission recognises that sexual harassment by clients and customers is an issue across a range of industries. For example, the Transport Workers' Union told the Commission that its 2018 survey of more than 400 cabin crew working for major airlines found that 65% of workers had been sexually harassed at work. Of these workers, three in five were sexually harassed by passengers.[951] Women doctors and lawyers also told the Commission about sexual harassment by patients and clients.[952]

(i) Retail and hospitality

The retail trade industry includes retailing related to motor vehicles, fuel, food, pharmaceutical goods, clothing and footwear, recreational goods, homewares and garden supplies and furniture. Hospitality sits within the accommodation and food services industry, including accommodation, cafes, restaurants and takeaway food services, pubs and bars.[953]

The 2018 National Survey found that the prevalence rate of workplace sexual harassment in retail trade (42%) was substantially higher than the rate across all industries (31%).[954] The rate in accommodation and food services (39%) was also higher than the rate across all industries.[955]

For people who said the most recent incident of workplace sexual harassment they experienced occurred in retail trade or accommodation and food services, 30% said the harasser was a customer or client. This figure was substantially higher than for the workforce overall (18%).[956]

In 2019, the Commission conducted a survey on sexual harassment of 3,413 members of the Shop, Distributive and Allied Employees' Association (SDA), which represents retail, fast food and warehousing workers. The survey found that 39% of SDA members in the workforce said they had experienced workplace sexual harassment in the last five years, and that they were most commonly sexually harassed by customers or clients.[957]

The SDA survey analysed the most recent incident of workplace sexual harassment that SDA members said they experienced in the last five years, and found that:

- Overall, more than one third of SDA members (36%) said the incident involved a customer or client.[958]
- 42% of women said the harasser was a customer or client, almost double the proportion of men (22%) who said the same.[959]

The SDA survey also found that:

- SDA members aged 18 to 29 years were more likely to have been sexually harassed by a customer in their current job than other age groups (27% compared to 17% of those aged 30 and over).[960]
- There was no statistically significant difference in the prevalence of sexual harassment perpetrated by a customer in the main customer-facing SDA sectors of retail (22%) and fast food (18%).[961]
- Of SDA members who said they had been sexually harassed by a customer in the past 12 months in their current job, 75% said this happened more than once in this period.[962]
- Of SDA members who indicated that they had experienced workplace sexual harassment in the last five years, only 13% had made a formal complaint or report in relation to the most recent incident, compared to 17% in the working population.[963]

Research has indicated that, especially in the retail and hospitality industries, customer-perpetrated sexual harassment occurs 'almost invisibly as an embedded part of retail culture.'[964] This is due to factors including the gendered nature of service work, a dominant ethos that 'the customer is always right', and working conditions (for example, low pay and insecure work) in customer service industries such as hospitality and retail.

Unions NSW told the Commission that another factor contributing to the prevalence of sexual harassment in the hospitality industry is 'the role of alcohol in fuelling unlawful behaviour'.[965] The issue of alcohol as a factor in workplace sexual harassment is considered in more detail in Section 3.4. Alcohol use by customers is a factor intrinsic and endemic to the workplace for many workers in the hospitality industry.

Gendered nature of service work

The gendered nature of service work stems in part from the greater proportion of women (especially young women) working in retail and hospitality.[966] More significantly, however, 'sexual attractiveness and flirtation are often an institutionalised part of the employee's job description'.[967]

Research has suggested that there are clear norms or expectations about a worker's attitude and appearance, grounded in gender and sexual politics ('a culture marked by male-defined femininity'), which aim to achieve customer satisfaction.[968] Service workers face challenges in dealing with sexual harassment from customers because these norms can 'blur the lines between managing customer behaviour that is expected as part of the job, and dealing with inappropriate behaviour that could be considered sexual harassment.'[969]

These 'blurred lines' are exacerbated for hospitality workers (for example, workers in hotels, clubs and bars), as they work in a space that is already sexualised, which encourages thoughts of possible sexual encounters or opportunities to 'pick up'.[970] The SDA also told the Commission that employers' dress requirements can increase the risk of sexual harassment for workers in the retail and fast food sectors:

> Over the years there have been several cases where companies in retail and fast food have required employees to wear revealing clothing or clothing with indecent slogans. Wearing this clothing has resulted in employees being sexually harassed by customers.[971]

The Commission's 2019 survey on the sexual harassment of SDA members found that 4% of members said their employer had required them to wear an inappropriate uniform or clothing, and 4% said their employer had conducted an inappropriate marketing or advertising campaign, which made them feel uncomfortable. One in five of these members (19%) said this resulted in them being sexually harassed.[972]

The gendered nature of service roles is also a feature in other service industries, such as sex work. Some submissions highlighted that women working in the sex industry are at higher risk of sexual harassment from customers and clients.[973] The Commission heard that there is a 'high emphasis on physical appearance' in the sex industry[974] and that 'workplaces where women's sexual appeal is the core of the business model' are likely to have an increased risk of sexual harassment.[975]

Project Respect told the Commission that '[g]ender inequality creates a sense of entitlement and false expectations where men seemingly believe they have the power to do whatever they like within the booking, as they have paid for it.' The Commission heard it can be difficult 'for victims, bystanders and even perpetrators to identify the line between acceptable sexual discussions and comments that would be considered sexually harassing'.[976] The stigma of working in the sex industry can also be a barrier to reporting sexual harassment.[977]

'Customer is always right' mentality

A work environment dominated by the 'customer is always right' ethos means that customers are in a more powerful position relative to service employees.[978] Research has suggested that:

> The power that customers exert over employees in service transactions makes employees feel intimidated, humiliated and hesitant to complain about unwanted sexual attention to their managers.[979]

The 'customer is always right' culture can also delegitimise workers' experiences of sexual harassment through 'victim-blaming',[980] or due to fear of retribution from employers if they do complain.[981]

The Commission heard about the effect of the 'customer is always right' mentality in the retail and hospitality industries.[982] The SDA submission included numerous examples of this from workers in the retail and fast food sectors:

> all the times I have been inappropriately touched or commented on, it has been by customers. I feel as if I can't tell them to stop because I don 't want to be rude to a customer.[983]

> I have experienced this issue [sexual harassment] mostly from male customers. It is difficult to be assertive at work because I am supposed to be friendly and amenable to customers. … It unfortunately would be easier for me if someone else such as a manager were to step in and say 'this is not okay' because I feel very awkward saying it.[984]

Unsafe working conditions

Work in the hospitality and retail industries is often low paid, with high rates of casual or contingent work and low union membership.[985] These working conditions discourage workers from formally complaining about sexual harassment by customers.[986]

The SDA told the Commission that '[i]nappropriate customer behaviour has become normalised in sectors such as retail and fast food'.[987] It said that workers often expected poor treatment from customers, including sexual harassment, which meant they 'don't report incidents or make complaints.'[988] The SDA also reinforced that hospitality and retail have 'very high concentrations of casual workers', which could contribute to sexual harassment in these sectors, as workers fear they will jeopardise their employment if they complain.[989] These issues are discussed above in Section 3.5.

Despite the frequency of sexual harassment by customers, the Commission heard it was uncommon to find a sexual harassment policy in the retail or fast food industries that addressed sexual harassment by customers, or included mechanisms for workers to report such harassment.[990]

The Commission was told that many employers did not attempt to prevent the harassment or address it effectively, creating unsafe conditions for workers:[991]

> [C]ustomers were repeat offenders that had been identified to management and nothing had been done to stop behavior allowing the perpetrator to continue the harassment, and in some cases the nature of the harassment escalated.[992]

> There was an employee who was sexually assaulted in the fitting rooms of our workplace 2–3 years ago. The management didn't discuss it with other workers, nor implement any safety measures to protect other staff members from the same thing occurring.[993]

One worker who said she was stalked by a customer while working in a video games store was told by her boss, when she reported the harassment, to 'hide in the store-room'.[994] Another worker who reported sexual harassment by a customer to management was told 'to not make it look obvious that we were avoiding him even though he tries to sexually harass us.'[995]

(ii) Health care and social assistance workers

The health care and social assistance industry covers hospitals, medical and other health care services, residential care services and social assistance services.[996]

The 2018 National Survey found that the rate of sexual harassment in health care and social assistance was 33%, similar to the rate across all industries (31%).[997] The rate of sexual harassment for men in this industry was slightly higher than for women (37% and 31% respectively),[998] although in 2018–19 women accounted for 78% of workers in the industry.[999] A 2019 UN Women and International Labour Organization (ILO) Handbook on addressing violence and harassment in the world of work noted that rates of sexual harassment and violence against health care workers is high:

> In the health sector, rates of verbal aggression, physical violence and sexual harassment from patients and visitors has reportedly grown in recent years, particularly in the public sector ... Health care workers report some of the highest levels of violence in comparison to other industries and sectors.[1000]

A 2018 study on the exposure of nurses and midwives in New South Wales to patient-related violence and aggression found that 47% reported experiencing an episode of violence, including verbal or non-physical violence and sexually inappropriate behaviour, in the previous week and 80% in the six months prior to completing the survey.[1001]

The study also found that 33% of respondents said they reported all episodes of violence; 45% reported selectively and 22% said they did not report at all. Reasons for not reporting included that victims believed nothing would change in the long-term, that it was an accepted or expected part of the job, and there was a lack of follow-up.[1002]

The Commission heard that workers in some sectors of the health care and social assistance industry, such as nurses, midwives and workers providing social assistance services, experienced high levels of sexual harassment from customers and clients. For example, a nurse in a public hospital told the Commission:

> I have been groped, threatened, and had crude remarks made about me. These are not isolated incidents. Crude comments about your appearance are weekly, if not daily. I have had my breasts squeezed, my private parts groped, a patient attempt to insert a finger into my vagina through my uniform, told to wear tighter clothes and told that I would be a good fuck.[1003]

The Australian Nursing and Midwifery Federation (ANMF) told the Commission that 'a significant cultural challenge in health is to change the perception that experiencing violence at work "is part of the job".'[1004]

The ANMF also noted that the perception that some patients are not responsible for their actions due to their clinical or personal circumstances could also be used to excuse sexually harassing behaviour, which posed a 'significant barrier' to reporting sexual harassment and managing potential risks.[1005]

The Commission heard that for disability support workers, the person with disability who they are caring for may also be the sexual harasser. For example, the Commission heard the following about disability support workers under the NDIS:

> [W]hat we're certainly finding with workers in the NDIS [National Disability Insurance Scheme] sector now is that often it can be the NDIS participant who actually is the harasser, yes, or because they're going in unsupervised, they're often alone.[1006]

The Commission was told about a range of complex factors that may contribute to sexual harassment by clients of disability support workers, including the high rate of casual work, and employers who have historically been small organisations with few paid staff and a number of volunteers.[1007] The Commission heard that these organisations sometimes lacked 'structures in place that … regulated behaviour or gave people guidelines on how they should behave, or set standards,'[1008] and that 'workers in our sector don't tend to be the people with [the] most power in their workplace.'[1009]

As a result, workers may feel they are unable to take action regarding sexual harassment by a person for whom they are caring, either because they feel responsible for the situation or because they perceive they have 'no rights':

> [Where the NDIS participant's] behaviour's highly sexualised or someone's feeling harassed, often workers feel that it's their obligation to avoid those things happening. Because if those circumstances arise, then it's really the worker's fault that they didn't prevent it happening … [T]his is one of the things they [workers] have talked about, going into the homes of participants and being sexually harassed and feeling that they don't have any rights in that situation.[1010]

(d) Hierarchical structures in workplaces

Research has found that a hierarchical workplace structure can increase the risk of sexual harassment.[1011] One study found that 'highly structured organisations with large power differentials between organisational levels … are probably more sexual harassment prone than other organizations.'[1012]

For example, in workplaces with significant power disparities, supervisors may feel 'emboldened to exploit low-ranking workers' who may have less understanding about how to make a complaint, or there may be groups of workers who are particularly vulnerable to exploitation or fear of retaliation (such as workplaces with high numbers of migrant workers).[1013]

Professors McDonald and Charlesworth told the Commission that hierarchical factors may be at play in environments, such as in the medical profession, where there is a 'patronage system of training where trainees depend on powerful senior (usually male) colleagues for training and job opportunities.'[1014]

During this Inquiry, the Commission heard about a range of industries and sectors where hierarchical organisational structures contributed to the risk of sexual harassment and barriers to reporting it. As set out below, this included in police organisations, the Australian Defence Force (ADF), and the medical and legal professions.

(i) Police organisations and the ADF

Independent reviews have examined sexual harassment in police forces in several states as well as the ADF.[1015] A 2015 review into Victoria Police, conducted by VEOHRC, found sex discrimination and sexual harassment were 'widespread and normalised'.[1016] The review noted that 'respect for rank' and reliance on 'command and control management structures' detrimentally affected the 'capability of managers to … address workplace issues, including sexual harassment'.[1017] One interviewee told the review: 'The Sergeants are like gods to the probationary constables … the young girls are eager to please, and they are looking up to the Sergeants, so it is like Christmas to a predator.'[1018]

In its 2019 audit of the implementation of the review's recommendations, VEOHRC observed Victoria Police is making progress in 'disrupting its … high tolerance for gendered harm',[1019] but noted that 'sexual harassment, including predatory behaviour, is a persistent issue in some Victoria Police workplaces.'[1020]

In a 2019 Review into the NSW Police Force Promotions System, female police officers noted a link between sexual harassment and issues regarding promotion and career progression. For example, one woman said she had had 'requests of sexual favours from senior Officers in an effort to be assisted with promotions'.[1021]

The Independent Review into Sex Discrimination, Sexual Harassment and Predatory Behaviour in South Australia Police (SAPOL) noted that the hierarchical nature of workplaces like those in police forces can instil in workers 'an obedience to authority that can erode autonomy and ethical decision-making'.[1022] It connected the 'cultural problems at the heart of sex discrimination and sexual harassment' with the 'long-established, male-dominated, hierarchical' nature of an organisation like SAPOL.[1023]

The Commission's 2012 Review into the Treatment of Women in the ADF highlighted the role of hierarchical dynamics in sex discrimination, sexual harassment and the inappropriate treatment of women.[1024]

The Review found that more women than men in the ADF, 60% compared with 41%, believed that experiencing sexual harassment or discrimination would have a negative impact on their career progress.[1025] The Review also highlighted examples of inappropriate responses by senior officers to reports of sexual harassment, including a victim receiving a negative performance appraisal report after calling out sexual harassment.[1026]

Submissions to this Inquiry similarly connected the hierarchical nature of police and defence workplaces with incidents of sexual harassment.[1027]

(ii) Medical profession

The Commission heard that a key characteristic of the medical profession is its hierarchical structure[1028] and that gender inequality and sex discrimination are widespread.[1029] The Commission was told that these factors have contributed to sexual harassment within the medical profession,[1030] and was informed of surveys indicating that sexual harassment is prevalent in the profession and is experienced by women at higher rates than men.[1031]

Level Medicine told the Commission that, under a 'patronage' system of training, medical trainees depend on a small group of powerful senior colleagues for entry into training, assessment of performance, job opportunities and career progression.[1032]

One medical professional spoke about 'the hierarchical issues and control issues' which permeate medical training, registration processes and referrals, such that, 'for your entire duration of your medical work, you're dependent on the hierarchy for your reputation'.[1033]

The Commission was told that this hierarchical structure leads to power imbalances which make some doctors—especially doctors-in-training and female doctors—more vulnerable to bullying and harassment. The Commission heard in particular about the practice of employing doctors (especially doctors-in-training) on fixed-term contracts, where contract renewal is dependent on the favour of a supervisor, and the high competition within the profession where junior staff compete for a limited number of positions.[1034]

The Commission heard these factors can create barriers to reporting sexual harassment,[1035] for example in the case of trainee doctors:

> I can't do anything about it, because the person who's done it [the sexual harassment] is always going to be signing off my tests at the end of this year.
>
> They're the one who is going to be responsible for me progressing in my career. And therefore my hands are tied. It's wrong, I accept it's wrong, but I can't do anything about it, because it's my career.[1036]

The Commission also heard that senior leaders commonly failed to address sexual harassment, with one victim explaining: 'I ended up being less angry with the sexual harasser … and really angry with the people who enabled him, protected him'.[1037]

(iii) Legal profession

The Commission heard that the legal profession, like medicine, is characterised by entrenched hierarchies and marked power imbalances in the relationships between colleagues.[1038] The Law Council of Australia told the Commission that this hierarchical structure, together with a male-dominated and highly competitive culture, has contributed to sexual harassment in the profession.[1039] In consultations with women working in the legal profession, the Commission was told that for women working in the law:

> [There is] a greater awareness of what women should expect and their rights in the workplace. But [it is] the power structures and the organisation of the way we do our work—which … in law firms [is] reporting to partners—that hasn't changed.[1040]

The Commission was informed of surveys of the legal profession in Australia which have found high rates of sexual harassment in the profession.[1041] A recent global survey by the International Bar Association found that 47% of women working in the law in Australia experienced workplace sexual harassment, compared to 13% of men.[1042] This was higher than global rates which found that 37% of women and 7% of men working in the law worldwide were found to have experienced workplace sexual harassment.[1043]

The Commission was told that men continue to dominate senior leadership positions in the legal profession, and that women still make up less than 25% of law firm partners in Australia.[1044] The Women Lawyers' Association of NSW observed that the hierarchical environment of the profession has influenced the lack of action by senior leaders in addressing workplace sexual harassment:

> [I]n an environment where the junior roles are dominated by women and the most senior roles are dominated by men there are unequal power relations between women and men. There is a concern that men, particularly men at more junior levels will be unlikely to intervene [to call out sexual harassment] because it calls into question their masculinity.[1045]

The Commission also heard about examples of sexual harassment used to intimidate or bully women in the legal profession:

> [I]t is not uncommon for women appearing in court to be, what the boys call 'sledged', but I call verbally sexually abused, both in terms of how we're referred to and various comments made about us. And that's done … as a way of intimidation and bullying.[1046]

The Commission was told that the hierarchical nature of the legal profession, consequent power imbalances and sex discrimination could lead to higher rates of sexual harassment and deter victims from reporting. For example, young lawyers raised concerns about the risks of reporting, including that: 'I was worried of what people would think of me/if they would believe me. He was senior and I was junior';[1047] and that:

> It is impossible to make a complaint against a partner in a law firm for whom you work. [Human Resources] has no power as the partners are the owners of the company. I feared retaliation.[1048]

(e) Rural, regional and remote workplaces

This report uses the term 'rural, regional and remote' to refer to workplaces outside Australia's capital cities. While there is significant diversity within rural, regional and remote workplaces across Australia, the Commission heard that factors such as geographic isolation, lower population density, and cultural and social dimensions can increase the risk of sexual harassment in these settings and create barriers to reporting or challenging these behaviours.

(i) Data on rural, regional and remote workplaces

Previously unpublished data from the 2018 National Survey showed that the prevalence of workplace sexual harassment in regional areas was similar to that in metropolitan areas: 30% of people who lived outside metropolitan areas in Australia (and who had been in the workforce in the last five years) experienced workplace sexual harassment in that period, compared to 34% of people in metropolitan areas.[1049] The prevalence rate by gender was also similar, both outside and inside metropolitan areas.[1050]

However, other research on the prevalence and nature of workplace sexual harassment in rural Australia has found that 73% of participants said they had experienced sexual harassment in their working life, with those working in agricultural or horticultural occupations significantly more likely to have been the target of sexual harassment.[1051]

Submissions to the Commission shared survey data on sexual harassment in regional workplaces and primary industries.[1052] For example, a survey by the Rural, Regional and Remote Women's Network of Western Australia (RRR Network WA) provided insights into women's attitudes and behaviours to sexual harassment in rural communities in Western Australia. It found that 47% of respondents received insults and taunts of a sexual nature at the workplace, but nearly half of the women surveyed 'neither agreed nor disagreed' that suggestive sexual commentary and joking constituted sexual harassment.[1053]

(ii) Cultural and social attitudes

Dr Skye Saunders and Ms Franca Sala Tenna drew attention in their submission to the cultural norms and values that may act to drive, silence and minimise the experience of sexual harassment at work in rural, regional and remote communities, arguing that: 'sexual harassment is entrenched in rural Australian workplaces to the point of acceptance as a cultural norm behaviour'.[1054]

The Commission heard that many rural, regional and remote work environments are male dominated in their work culture, where sexism can be seen as normal and part of the job: 'There is a very strong "Fit in or F#@* off" attitude in rural and remote Australia'.[1055] The RRR Network WA suggested that, 'many women feel an obligation, or an unconscious bias, or are forced to accept inappropriate sexual language as a facet of daily work-life.' [1056]

In consultations, the Commission was told about men conforming to masculine gender stereotypes and expectations of masculinity in rural Australia, and that this was often expressed through humour and was used to excuse sexually demeaning comments and innuendo. One worker shared the following experience of working at a lobster factory: 'You had the manager standing there going, "Well, we hire the guys for their muscles, not their brains and we hire the girls to perve on".'[1057]

Another worker said:

> In rural Australia, live and well there is still a sense of larrikinism for men … and so that if I was offended by a calendar, a poor touch, a poor joke: Have I lost my sense of humour, is there something wrong with me as a woman, why am I taking it so seriously?[1058]

Dr Saunders' research found that 60% of women respondents believed that a woman contributed to her own experience.[1059] Their research also found that harassment was 'unopposed' by 68% of employers, who instead preferred to 'focus on workplace "priorities".'

As an example, one employer justified this approach by saying 'it's a bit different out 'ere', while another said that while he had received complaints from female workers, 'it is just not easy for me to change the workplace behaviour itself. That is a whole other thing and you just can't change the behaviour like that.'[1060]

Tasmanian Women in Agriculture also pointed to a 'huge culture of silence around sexual harassment in rural workplaces' based on a number of factors, including women's attitudes to self-reliance and self-resilience.[1061] RRR Network WA noted that the 'unfamiliar and legalistic' language around sexual harassment, complaint pathways and reporting mechanisms could be alienating for women in rural contexts:

> Women find it difficult to connect issues of harassment with discrimination without further explanation, and then more so to agencies that are labelled with 'human rights' and 'equal opportunity'.[1062]

Others recognised that in rural Australia, some workers may prefer to call out sexually harassing behaviour more informally, as this worker explained:

> 'Not on, mate. You've got to cool that down'. Whereas if I was in Sydney and it was an executive who was harassing me … I would be really scared of what he could do to my career. Whereas with these guys, it didn't matter. They're just doing it because they're stupid. They're not doing it because they're nasty or vindictive.[1063]

(iii) Geographic and social isolation

Some research has indicated that the remoteness of the workplace does not affect the likelihood of experiencing or witnessing sexual harassment.[1064] However, the Commission heard that women in rural, regional and remote workplaces experiencing sexual harassment may be both geographically and socially isolated—for example, on remote properties where workers have nowhere to go, limited phone access and few others to ask for help.

RRR Network WA's submission shared an example from an agricultural industry worker in a remote location:

> The first serious incident I experienced was when my manager told the contractors that the first one to have sexual intercourse with me got $1000 … There was no mobile signal and like many stations there is only a joint landline that is shared between everyone. On other large pastoral companies while out at stock camp there's not even a landline available … And we are sometimes hundreds of KM's from the nearest town … I went out there wanting to learn about the basics of stockmanship and instead I was made to feel like a sex toy.[1065]

The National Women's Working Centres' submission noted the risks for women who had to continue working in regional or remote places with a person who had sexually harassed them:

> For such women an experience of sexual harassment or assault can be compounded by the inability to remove themselves from the perpetrator.
>
> For example, where they are travelling together in a remote location and/or where their accommodation is shared or closely located.[1066]

The Commission also heard that the workplace culture in some remote worksites with transient workers, such as mining camps, could contribute to sexual harassment occurring:

> Mining camps aren't very nice places for women … we'd literally just be walking down to the kitchen to get tucker for dinner and you and some drunk just comes up and say things like, 'Are you married or fucking anyone here or what, love?' And that is the normal way to speak to a woman in a construction camp.[1067]
>
> It's usually a four weeks on, one week off roster … Behaviour will be worse than what it might be in a normal social situation … I've never seen anyone make a complaint in that environment but I do know people who have had some really bad stuff happen to them in those environments.[1068]

Many key sectors in regional and rural Australia such as agriculture heavily rely upon temporary migrant workers.[1069] A 2016 Fair Work Ombudsman inquiry into working holiday makers and exploitative workforce behaviours occurring in remote workplaces concluded that isolation created an additional level of vulnerability for these workers.[1070] One worker who came to Australia on a temporary visa told the Commission about her experiences of workplace sexual harassment:

Natalia's story[1071]

Natalia came to Australia on a temporary visa. She took a job on a farm and was accommodated in the farmhouse with the couple who owned the farm.

From the first day, the farmer was welcoming but Natalia said that he touched her on the arms and hips when his wife was not present. Natalia didn't say anything as she thought 'maybe this is "the Australian way"'.

The next day, Natalia said the farmer touched her legs and bottom while she was weeding and teaching her to drive the truck. He asked if she 'can have sex more than three times a day', made comments about her 'great tits' and lunged at her breasts as he hugged her. Natalia said she forcibly brushed his arm off and asked him to stop this behaviour, but he laughed it off as a joke.

On the third day, the farmer's wife left to travel. Natalia was scared about being alone with the farmer, so when the opportunity arose, she fled the farm and went to the closest hostel.

Experiences of temporary migrant workers are discussed in more detail in Section 3.5.

(iv) Lack of privacy and anonymity

The Commission heard that in small rural, regional and remote communities, there may be concerns about lack of privacy, social loyalties and familiarity, which can present challenges to calling out or reporting sexual harassment:

> Issues of privacy are paramount in small communities where 'everyone knows everyone' and work life often blends into social life. Presenting a complaint of sexual harassment in a small community may threaten a person's employment … and tarnish their reputation.[1072]

> I manage three small sites, they're small towns. So everybody knows everybody's business and, again, if you make a complaint … even though it's confidential, everybody knows anyway because word gets out or you might tell someone.[1073]

The Commission also heard that a lack of anonymity in small communities, combined with limited work opportunities, could further deter victims from reporting:

> I think in rural Australia, it's very hard to be anonymous … we still run very much on the grapevine, it's alive and well. So, for a woman to make a complaint, [she is] putting herself up for public opinion in small towns and that could mean that she … may not get another job in that community or if she does, that original complaint has followed her.[1074]

(v) Small business workplaces

In many regional, rural and remote locations, small businesses are the main employers in key industries. For example, in 2017–18, over 80% of private sector employees in the agriculture, forestry and fishing industry were employed by a small business.[1075]

The Commission heard about a combination of factors that provided barriers to reporting sexual harassment for people working in regional, rural and remote locations in small businesses. For example, internal reporting can be difficult when complaints pathways do not exist, or because of a lack of anonymity and the direct relationships between business owners and workers:

> If you think that there's only several regional towns in Australia over 100,000 and most of them smaller and the majority of people that are employed are employed in small business, your complaint is against someone that you're working very closely to, probably that you know in your community … So, you can't be anonymous and therefore there's an enormous consequence and so even putting that forward is difficult. [1076]

Industry bodies such as Dairy Australia have recognised in their industry-wide guidance that, 'on a farm that only employs a few people it can be difficult to find someone to report a case of harassment to, particularly if it is the owner or manager who is doing the harassing'.[1077]

Similarly, workers told the Commission:

> [I]n agriculture and farming … there aren't policies, and there aren't [human resources staff], especially in farming. That's something that is not commonplace at all. I've also found that nine times out of ten, the owner is the operator and is the HR [manager], and he's also possibly the harasser, and the person you're supposed to report to … so agriculture and rural spaces are really quite isolating for a victim.[1078]

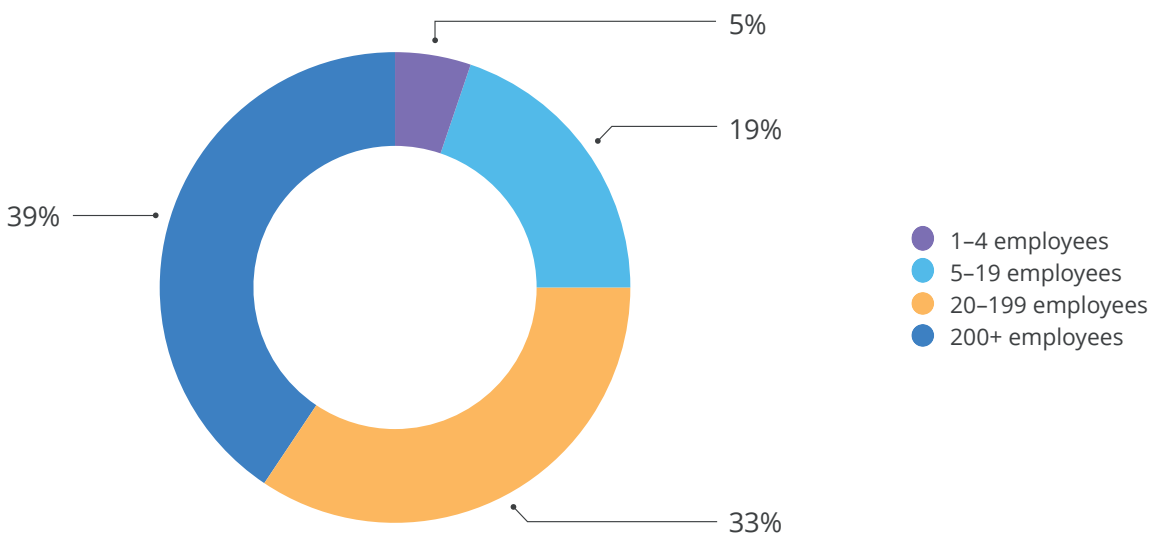
> Many agribusinesses do not have any policies or procedures in place as a preventive measure. They have limited to no information on how to respond to complaints, let alone have a contact person available.[1079]

(f) Small businesses

The 2018 National Survey showed that sexual harassment occurs across a wide range of occupations, industries and in organisations of varying sizes. Nearly three out of five people who said they experienced workplace sexual harassment in the last five years said the most recent incident occurred in a small or medium-sized organisation with less than 200 employees.[1080]

The graph below illustrates the 2018 National Survey findings on the size of the organisation in which people said the most recent incident of workplace sexual harassment they experienced had occurred.[1081]

Figure 3.6: Size of organisation where most recent incident of workplace sexual harassment occurred[1082]

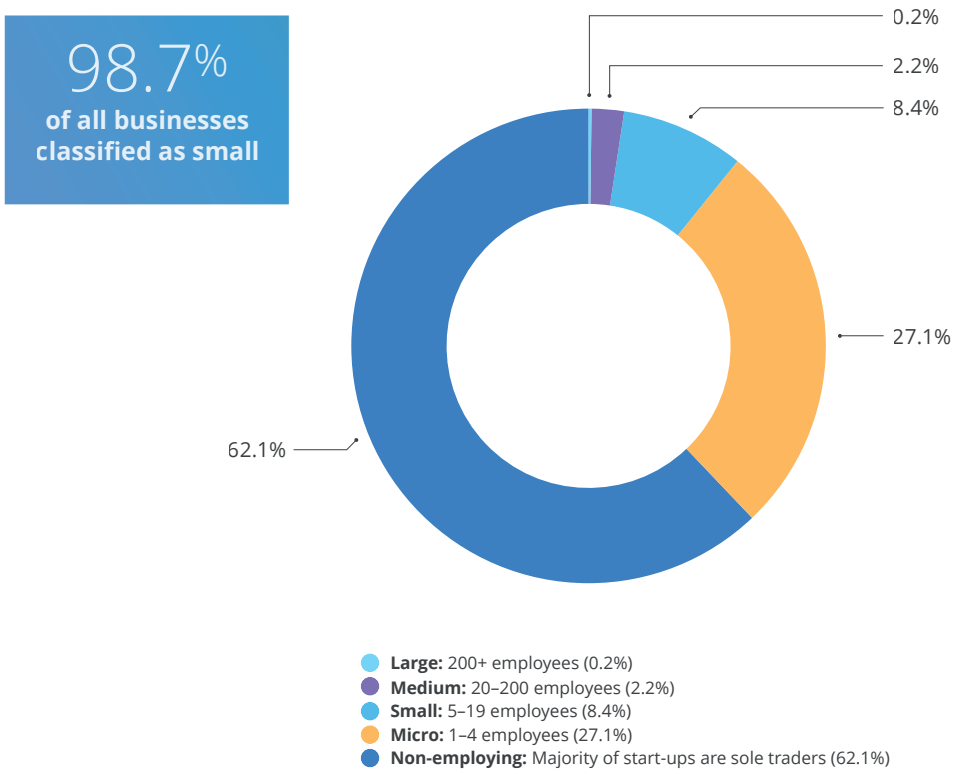


Notes: Respondents who said they had been sexually harassed in the workplace in the last 5 years (n=2,585).

This report uses the ABS categories and employment measures of business. The Commission recognises that small business is defined differently by different regulators and laws, and that many of the issues and challenges relevant to small businesses that employ fewer than 20 people are also of concern to medium-sized businesses.

As the graph below shows, small business is the most numerous type of business in Australia. Small businesses provide employment for around 4.7 million people—about 44% of the workforce.[1083] The vast majority of businesses in Australia employ less than 20 employees, and over 70% of employing small businesses have between one and four employees.[1084] Small businesses are the main employer in some industries, including agriculture, forestry and fishing; the rental, hiring and real estate services industry; and the construction industry.[1085]

Figure 3.7: Australian businesses measured by employment size[1086]



The Commission was told that particular factors in small businesses, such as the small size of the workforce, a small workspace and a high degree of informal and personal interactions, can increase the risk of sexual harassment and create barriers to reporting. Other challenges around reporting and complaint handling were also raised with the Commission, including that many small businesses may not have complaint pathways or staff or the skills to handle complaints.

(i) Business priorities and lack of understanding of sexual harassment

The Commission heard that small businesses may not have the same pressure or priorities as large organisations to address sexual harassment as an organisational issue, and may not see sexual harassment as a key operational concern. The Commission was also told that small businesses may lack understanding of what constitutes sexual harassment.[1087]

In consultations with employers, the Commission heard that for small businesses, it was only when 'a problem comes up, that's when they deal with it'.[1088] An employer representative told the Commission:

> Most of our clients who are small to medium enterprise businesses, they unfortunately see sexual harassment in the workplace as a secondary issue. It's not that they don't think it's important and it's not that they don't deal with it when it arises, but they're just too busy trying to run a business—especially the smaller family businesses. Some of these businesses might be running a business in the backyard or in their garage. It's something that they know is important and you must deal with it, and they know all these liabilities and the media … and they know they have to deal with it, but it's just, for them, running a business, making sure that ends meet—that's their primary focus.[1089]

The Commission heard that many small businesses did not take 'front end' steps to prevent sexual harassment in their workplaces. Because their priority was running their business, they were unsure what appropriate preventative measures they could take, and they felt that they did not have the time, financial resources or human resources expertise to do so.[1090]

While some small business owners did take steps such as explaining to their workers that sexual harassment was not tolerated in their business, introducing a workplace policy that prohibited sexual harassment and educating their workers about that policy,[1091] many only addressed sexual harassment once a complaint was raised or they became aware that an incident had occurred.[1092]

(ii) Small workplaces

ACCI's submission identified some of the challenges for workplaces of small and medium-sized enterprises (SME) including that 'risks created by authority, autonomy and privacy may well play out very damagingly in some SME environments.'[1093] ACCI noted that there is often 'little or no opportunity to avoid someone or create some distance in smaller workplaces, and the harasser and harassed often need to work closely together.'[1094]

The Commission heard examples of sexual harassment in small businesses where workers frequently worked one-on-one with their employers, often in a small or confined space. One young worker described how this made her feel unsafe:

> I was often alone with [the owner] in the store. He would frequently make comments on my physical appearance, particularly about my legs or bottom, which made me very uncomfortable … He would sometimes hand pornographic magazines to me, and when I refused them he would insist that I take them 'for my boyfriend'. He then begun leaving plates of money for me in the back room of the newsagent … at this point I began to feel directly unsafe, and would avoid being alone with him in any confined space. I would try to stay in sight of the public at the front of the store. At the next café I worked at, I was repeatedly groped by male co-workers. They would slap me on the bottom as I was washing dishes or delivering food to tables … My physical space was constantly violated by the men around me.[1095]

(iii) Lack of complaint pathways and conflicts of interests

The Commission heard that the professional and personal can be blurred in small businesses that often employ family and friends, which could create conflicts of interest and affect victims' willingness to speak up:

> If the business owner is the offender … you potentially complain to them? If the other business partners are related to the offender, how do you complain?[1096]

The Small Business and Family Enterprise Ombudsman recognised that direct relationships between owners and their workers can be a challenge for victims reporting incidents, especially where the harasser is the owner.[1097] Professor Anita Mackay's submission also discussed the challenges in small business contexts where the owner may also be the harasser:

> A New South Wales example is *Taylor v Sciberras*. Ms Taylor was sexually harassed by her boss, Mr Sciberras, who was the owner of the fish and chips shop where she was employed. For the majority of the time they were the only people working at the shop (which is when the harassment occurred), except for occasions when Mr Sciberras' wife was assisting with the evening shifts. Thus there were no witnesses to the harassment and no one more senior than her harasser for Ms Taylor to turn to.[1098]

Similarly, the Commission heard from workers who found it difficult to identify to whom or where they could go to make a complaint, or were too intimidated to make a complaint where their employer was the harasser:

> If you're in a small business, and your boss is harassing you, who have you got to talk to? Probably no one. I think that's the major problem, because those businesses are never going to grow to the size where they have [a human resources department].[1099]

The Commission heard about challenges for small businesses in handling sexual harassment by customers or clients. Small business owners (including sole traders) may be reluctant to take action against customers whose business they depend on, where the customer has sexually harassed them or their workers. A union representative from the hospitality industry described concerns that some employers prioritised 'profits over protecting workers' because they 'don't want to push the customer away or kick them out because … they're going to lose the profits from that.'[1100] A worker shared their experience of working at a pub:

> [I] have been sexually harassed by a patron for months on end, and it escalated to the point where he flashed his penis at the bar … I went to management and they refused to do anything about it because he was a regular.[1101]

(iv) Lack of capacity and resources

Submissions emphasised to the Commission that many small businesses do not have human resource staff or staff with specialist skills to handle complaints.[1102] Often, owners or managers perform the functions that are delegated to legal or human resources in large businesses, including keeping current with workplace laws and regulations, and handling complaints. Small businesses rarely have human resource infrastructure to train workers or provide opportunities for people to complain about sexual harassment.[1103]

ACCI emphasised that businesses have differing capacities to manage sexual harassment.[1104] The Chamber of Commerce and Industry Queensland submitted that many small and medium-sized businesses lack the resources and procedures to properly handle sexual harassment complaints.[1105] The Australian Small Business and Family Enterprise Ombudsman also submitted that, unlike many larger employers, 'small and micro businesses do not have separate human resource [departments] or spare cash to engage legal advice to interpret the current sexual harassment laws.'[1106]

Similarly, Ai Group explained that because of their size and limited resources, small businesses generally pushed to resolve problems without relying on internal policies or procedures.[1107] CASA Forum also submitted that many small organisations had no internal systems in place for their clients to raise concerns or report sexual harassment.[1108]

The Commission also heard about difficulties with separating harassers and victims in small business settings. The Australian Small Business and Family Enterprise Ombudsman noted: 'Small businesses will most likely be in one location with no option to provide an alternate working environment while a claim is being investigated.'[1109]

The Commission heard that small business owners could find it difficult to develop systems or processes to respond to workplace sexual harassment to suit their business:

> You're a small [business] person who's employing three people. You haven't got an HR person and there's an accusation of sexual harassment between two of your three employees. We've got to design a system that assists that small business owner to achieve the outcomes we're wanting as a community.[1110]

(v) Strengths of small businesses in addressing sexual harassment

The Commission heard that the size and make-up of small businesses could offer unique opportunities and advantages over larger workplaces in dealing with workplace sexual harassment.[1111] For example, in smaller workplaces, business owners and managers are uniquely positioned to directly set and influence workplace culture and behaviour. The Australian Small Business and Family Enterprise Ombudsman explained, 'good operators can set best practice by direct example and address improper behaviour quickly before it escalates into harassment.'[1112]

As small business owners often work alongside their staff on a daily basis, they are often in a position to continuously monitor conduct in workplaces, lead by example, guide and communicate with workers directly about appropriate and respectful workplace behaviour, and intervene promptly and informally to address sexual harassment when it occurs and support their workers.[1113] As one employer told the Commission:

> My workplace is a really small one. Two others work there, two young females, and we've got a pretty good rapport and they don't know the policies and procedures even though I've shown them to them a number of times. So, if something happens, they're not sure what to follow and don't think to look at the policy and procedures. They'll just tell me. They'll say, 'This has caused me an issue. What do you think?'[1114]

The Commission's view

The Commission has considered a wide range of evidence about sexual harassment in different workplace settings, including data from the 2018 National Survey, information from submissions and consultations, academic research and government reviews, both Australian and international. This has shown a range of characteristics and practices specific to particular industries, professions or workplaces that may increase the risk of sexual harassment.

This information can assist employers, governments and non-government organisations to identify workplace settings in which workers may be at a higher risk of experiencing workplace sexual harassment, and ensure appropriate action is taken in these particular settings to prevent sexual harassment, respond to incidents and support workers who have been sexually harassed.

Based on the evidence available to date, the Commission notes that workplace settings where there is a higher risk of sexual harassment include those that:

- have been found by the 2018 National Survey to have a higher prevalence of sexual harassment than the rate across all industries
- are male-dominated, for example because of the gender ratio, the over-representation of men in senior leadership roles, the atypical nature of the work performed by women, or the workplace culture; and may have disproportionately high rates of sexual harassment of women workers
- involve a high level of contact with third parties, such as customers, clients or patients
- are organised according to a hierarchical structure.

Workplaces located in rural, regional and remote areas, and small businesses, experience particular challenges that affect both workers' willingness to report, and owners' willingness or capacity to address, sexual harassment.

The Commission recognises that further research and data is needed to both identify risk factors in different workplace settings and to support the development of tailored solutions that address these risk factors. Throughout this report, the Commission has made recommendations that will assist in this task, including:

- the development of a National Sexual Harassment Research Agenda (Recommendation 4 – see Section 3.9)
- provision of detailed industry data in the Commission's National Sexual Harassment Survey, which allows analysis across and within industries and helps inform efforts by employers and others to address sexual harassment (Recommendation 2 – see Section 3.2).

In Section 6, 'Preventing and responding to sexual harassment in the workplace', the Commission recommends a new framework that provides a flexible approach to addressing workplace sexual harassment that can be adopted by all workplaces regardless of size, resources or industry. The Commission has ensured that the unique needs and circumstances of small businesses are recognised and catered for within the new framework.

The Commission also recommends the establishment industry-wide and profession-wide initiatives to combat sexual harassment, which may include industry-wide prevalence surveys, awareness-raising campaigns on industry-specific issues and the development of industry-specific policies or accreditation requirements (see Section 6.3, 'Industry-based approaches to addressing workplace sexual harassment').

3.8 Impacts of sexual harassment in the workplace

> The outcome of all of this for me was catastrophic. My health was destroyed; I lost my job and my income and everything I had ever studied and worked for; my family was greatly affected; and my life has never recovered from the betrayal and injustice.[1115]

Throughout this Inquiry, the Commission heard from victims about their personal experiences of workplace sexual harassment and the ways it affected them. Their experiences provided insight into the complex, interconnected and pervasive ways in which experiencing and reporting workplace sexual harassment impacts victims. Recounting an experience of sexual harassment can be distressing and takes enormous courage. The Commission thanks the many individuals who came forward to tell their stories.

The Inquiry has found that, as well as causing personal harm to individuals, sexual harassment also undermines workplace productivity and imposes a significant economic cost to Australian society. These wide-reaching impacts are a compelling justification for investment and action by Australian governments and employers to prevent workplace sexual harassment through implementation of the changes recommended in this report.

This section considers:

- The profound and often devastating impacts on people who have suffered workplace sexual harassment. While the impacts of experiencing and reporting workplace sexual harassment are unique to each individual, the Commission heard that the most common impacts for victims included: impacts on health and wellbeing; impacts on employment (day-to-day work or entire careers); and significant financial consequences (Section 3.8(a)).
- The detrimental impacts of workplace sexual harassment that extend beyond individual victims—to bystanders, families and friends of victims, and harassers (Section 3.8(b)).

- The substantial costs to Australian employers—including financial impacts in terms of lost productivity, staff turnover and a negative impact on workplace culture, as well as the significant costs associated with responding to complaints, litigation and workers' compensation. Sexual harassment can also cause reputational damage to employers that is difficult to quantify but can have a serious impact on their ability to maintain the goodwill and confidence of customers, clients and investors, and to attract talent (Section 3.8(c))
- The broader community, societal and economic impacts of workplace sexual harassment, given the centrality of workplaces in the fabric of communities and broader Australian society (Section 3.8(d) and Section 3.8(e)).

Under its Terms of Reference, the Commission was asked to consider the economic impact of workplace sexual harassment drawing on economic modelling. Deloitte Access Economics was engaged by the Commonwealth Department of the Treasury to conduct this work to inform the Inquiry, and its final report is in Appendix 7 (Deloitte Report). Section 3.8(f) discusses the findings of the Deloitte Report on the costs of workplace sexual harassment and the need for improved data to better understand the full extent of the economic impact in Australia.

(a) Impacts on victims

Just as each individual experience of workplace sexual harassment is unique, so too are the impacts of harassment on each victim. The Commission heard about a range of factors which can influence the severity and type of impacts experienced by victims of workplace sexual harassment, including:

- the nature, duration and frequency of the harassment, the harasser's position in the organisation, and the passage of time since an incident
- experiences of reporting and availability of support
- characteristics and previous experiences of victims.

The Commission heard that these factors could exacerbate the adverse effect of sexual harassment on victims or, conversely, facilitate recovery and resilience.

(i) Factors which influence impacts

Nature, duration and frequency of sexual harassment and impacts over time

As discussed in Section 3.3, sexual harassment occurs across a continuum of behaviours and in different contexts and settings. It may be experienced in a range of locations, as an isolated incident or over a span of time.

Through the course of this Inquiry, a disturbing number of victims told the Commission, in submissions and consultations, about incidents involving sexual assault in connection with their workplace, and the devastating impact this has had on their lives. For example, one worker told the Commission:

> My employer attempted to rape me on one occasion, and then did rape me on another [occasion]. I had just turned 20 years of age. I was terrified. I did not tell anyone [and] locked the memory of the rape away to keep myself safe and subsequently thought it was odd when I started having panic attacks. So began … years of chronic anxiety, depression and [post-traumatic stress disorder].[1116]

Other forms of sexual harassment involving direct physical contact, such as unwelcome touching, hugging, cornering or kissing, can also have significant impacts:

> In my current workplace, I experienced sexual harassment in the form of unwanted kissing by a male colleague after a number of attempts by him to do so and me stating I was uncomfortable with it and physically trying to dodge it … The whole situation significantly impacted my mental health and caused severe anxiety to attend work every day.[1117]

Research has suggested that sexual harassment can be experienced as a threat to a victim's physical boundaries and financial wellbeing,[1118] sometimes with 'similar impacts on a person's health and wellbeing as other traumatic events, including sexual assault'.[1119]

The Commission heard that sexually suggestive comments or jokes, and other forms of workplace sexual harassment which do not involve direct physical contact, could also have damaging impacts on victims, particularly where they were ongoing or repeated.[1120]

Research has found that current exposure to forms of sexual harassment considered less serious can have a similar impact on individuals as a single isolated, more severe incident.[1121] In consultations and submissions, many victims described the serious impact of repeated or ongoing 'low level' sexual harassment.

One worker said there was, 'a perception that it's like a mildly uncomfortable experience, then you continue with your day—but it really weighs you down'.[1122] Others explained:

> People don't think it is serious particularly when it is low-level harassment. I think that people need to better understand that the impacts of low-level sexual harassment [can] have just as much of an impact on people's lives, their mental health and their general wellbeing.[1123]

> My employers—mostly female—took physical harassment seriously, but laughed off the verbal and low-level physical harassment saying it was 'just men'. It was stressful and made me feel angry, frustrated and occasionally frightened.[1124]

> Much of the harassment/discrimination is low-level stuff that nonetheless makes you feel unsafe and devalued. It is the continued presence of it that brings psychological distress.[1125]

Research has suggested that individuals who have previously experienced sexual harassment may feel more deeply affected by a subsequent incident than first-time victims, as their previous experience may diminish their ability to cope.[1126] A worker with 25 years' experience in engineering told the Commission that the cumulative effect of multiple experiences of sexual harassment throughout her career—including being sexually assaulted in a previous workplace—brought her to breaking point:

> I didn't go through the formal aspect of reporting anything until about five years ago. I went to human resources at a consulting company for the first time where something happened as well. I was a sobbing mess. It was the first time in my life I verbalised [my experiences of sexual harassment]. That was a minor issue [of the harasser] talking about my tits. That was nothing. That was water off a duck's back. But I was a sobbing mess … it goes into your soul what goes on.[1127]

Research and submissions showed that the impacts of sexual harassment can be more significant for victims when the harasser is in a more senior position relative to their own.[1128] One worker told the Commission:

> It is very difficult to openly confront anyone about their advances, let alone when [the harasser is] a direct supervisor in which case they have direct power over your income and career … This whole experience is quite traumatising. I spent a lot of time trying to find ways to deal with it. It affected my personal life, and it caused stress and anxiety not only to me but also my close friends and family who supported me during this unfortunate experience.[1129]

The Commission heard that this could be even more distressing for victims when the harassment occurred in the presence of other people, especially when they did not intervene:

> At a company dinner one evening, our Managing Director asked me in front of 12 of my colleagues whether my partner was 'a good fuck' … I was upset, humiliated and fed up with the conditions for women in our workplace.[1130]

According to the 2018 National Survey, around two out of five people (41%) who said they had been sexually harassed in the workplace in the last five years, said they did not suffer long-term consequences following the most recent incident.[1131] The survey did not ask about the long-term impacts for victims who had experienced previous or multiple incidents of sexual harassment.

The Commission heard that impacts for victims could last for long periods and change over time.[1132] For some, effects can be ongoing, as 'the stress response can remain even after the removal of the stimulus (sexual harassment)'.[1133] Others may not feel the impact of an incident immediately after it occurs—mental health and other issues may emerge years later.[1134]

One worker explained in her submission that she only understood the impacts of being sexually harassed by a director in her organisation years later. She told the Commission that she was looked at, whistled at and teased by the director and his team, because of his attraction to her.[1135]

The worker said that this harassment continued for two months, but she did not report it until an incident when the director called her into his office, told her she was 'a hot Latin girl', and asked her out on a date:

> I told my [manager] who said that it was unfortunate but there was nothing to be done. I was shaking and crying because I felt like an object, powerless … It was only years later, in therapy, that I came to understand just how much that had affected me … There were no real consequences for the perpetrator, no admission of fault by the company … and no support given to me by my direct management or by [human resources].[1136]

For some victims, the delayed emergence of mental health symptoms was caused by a triggering event.[1137] The Commission heard from several victims who said they were triggered by the stories that emerged as part of the #MeToo movement:[1138]

> I was assaulted by my [manager]; I haven't thought of that incident in … years, but I got to relive the trauma of that attack and its personal and career ramifications when the #MeToo campaign gained momentum … Sitting on that peak-hour train, I had a physical reaction to [an article] that left me shaking, sobbing and trying not to throw up.[1139]

Disclosing, reporting and seeking support

The impacts of sexual harassment can be contingent on whether victims make a report, their experiences of reporting, whether they seek support, and the response they receive. Complaints may be made within the workplace, to an external agency, to the courts or, in serious cases, to police. As discussed in Section 7, 'Support, advice and advocacy', the Commission heard that victims sought support from friends and family, unions, working women's centres, psychologists and other healthcare professionals, among others.

Many people who experience sexual harassment in the workplace do not report it or seek support. The 2018 National Survey found that fewer than one in five people who said they experienced workplace sexual harassment in the last five years made a formal report or complaint (17%), or sought support or advice (18%), in relation to the most recent incident.[1140]

Among the many reasons that victims gave for choosing not to report sexual harassment, some said they wanted to avoid further negative impacts on their mental health, career and finances.[1141] One individual told the Commission:

> I did not lodge a complaint as I needed a reference and I did not trust the process. I knew at that time that payments were minimal. You would probably end up more traumatised by the process. Settlement and deeds were draconian (enforced silence)—and you would get a 'name' and never work there again.[1142]

Others did not report as they feared losing their jobs. As discussed in Section 3.5(g)(vi), for some workers who lacked job security, reporting was not an option:

> As a casual employee, [reporting the sexual harassment] was no[t] only not an option but terrifying, as I had no other source of income and deteriorating health. I could not afford to take such a risk. I suffered for many years in silence.[1143]

The Commission also heard from victims who said they did not seek support because they felt too ashamed or embarrassed.[1144] One victim said:

> It took me a month or more to tell my partner at the time what had happened. It took me 18 months to tell any family. Still to this day, I feel ashamed of what happened and have not taken the matter any further legally.[1145]

However, not reporting or accessing support can exacerbate the adverse impacts of sexual harassment. The Commission heard that for some it increased their sense of harbouring a shameful secret,[1146] while others felt they were prevented from reaching out for validation.[1147]

Some workers who did make a formal complaint described positive experiences of reporting. One victim said, 'I feel very glad I did report it as it made me feel less like I had a dirty secret and less worried dealing with [the harasser] or being around her'.[1148] Another described in her submission that she felt supported after making a report: 'I am finally feeling safe to come to work'.[1149] The 2018 National Survey found that most people who made reports of sexual harassment in the workplace said they were satisfied with the outcome, and more than one in three people were 'extremely satisfied'.[1150]

Unfortunately, the Commission heard from other victims that existing avenues for reporting and complaint-handling mechanisms contributed to the damage they experienced as a result of sexual harassment. The 2018 National Survey indicated that 43% of people who said they made a formal report about sexual harassment experienced a negative consequence as a result.[1151]

In submissions, one victim likened her experience of reporting to being 'under siege',[1152] while others described the victimisation[1153] or ostracism[1154] they were subjected to after reporting, and complaint processes that were disempowering[1155] or lacked compassion[1156] and impartiality.[1157] Many described the trauma caused by needing to repeat their story many times as they progressed through various stages of their complaint,[1158] and the lengthy delays:

> It has been more than six months since the initial complaint. It has been nearly 12 months since initial allegations. We have no idea still if the person involved will be at our place of work at any time. The mental strain on the victims, witnesses, families and partners who have had to counsel has been immense.[1159]

The Commission heard that for some, overall, their experience of reporting was more damaging than the harassment itself. National Working Women's Centres provided the account of one victim for whom, 'the process had been traumatic and had left her soul destroyed. She said that she regretted making a complaint.'[1160]

Another worker told the Commission that the impact of the sexual harassment was compounded by the poor responses they received at every level as they sought redress:

> The misconduct was reported to senior management who did nothing … Reporting it to [a work health and safety regulator and an anti-discrimination agency] actually made it worse, causing more stress to me, culminating in my being forced out of my job under horrendous circumstances … The outcome of all of this for me was catastrophic. I lost my job and my income and everything I had ever studied and worked for; my family was greatly affected; and my life has never recovered.[1161]

Victims' experiences of reporting are discussed further in Section 5, 'The legal and regulatory framework', and Section 6, 'Preventing and responding to sexual harassment in the workplace'.

Similarly, some victims told the Commission they found support services difficult to identify and navigate,[1162] prohibitively expensive[1163] or lacking understanding about sexual harassment.[1164] The Commission heard that attempts to access financial support, workers' compensation or navigating welfare systems after leaving employment could be complex and taxing.[1165]

Support services play a vital role in minimising the ongoing harm of the harassment, providing an opportunity for victims to feel understood and validated, and decreasing the likelihood and severity of negative psychological outcomes.[1166] Section 7, 'Support, advice and advocacy', explores the need for greater access to support services for victims of workplace sexual harassment.

The Commission heard that the ability to tell their story and receive a positive response promoted healing and assisted victims of workplace sexual harassment to overcome the negative impacts of their experiences. For victims, the most important responses following a disclosure included feeling validated and listened to, and helping to prevent the harassment from happening to others. For some, sharing their experience with the Commission provided this opportunity:

> There are so many of us who have never told these stories that build up over a career… [They are] like a heavy burden and affect all our interactions thereafter. Thanks for listening—you are the first.[1167]

Section 5.4(l), 'Addressing historical complaints', discusses in more detail the benefits of restorative engagement processes and avenues for victims of workplace sexual harassment to have their experience heard with a view to promoting recovery.

Victims' characteristics and experiences

The Commission heard about ways in which the personal characteristics or previous experiences of victims could influence the impact of workplace sexual harassment.

Women are not only more likely than men to experience workplace sexual harassment, they are also more likely to be adversely affected by it, in terms of mental health, self-esteem, self-confidence and career progression.[1168] Negative impacts of sexual harassment can be more significant for female workers for a range of reasons, including:[1169]

- Women often experience sexual harassment in conjunction with other sex-based harassment and discrimination because of broader inequality in the workplace.[1170]
- Sexual harassment reinforces women's traditionally subordinate position in the workforce hierarchy.[1171]
- Women are likely to perceive sexual harassment behaviours as more threatening or upsetting than men.[1172]
- Women are more likely than men to have previously experienced sexual harassment and other gender-based violence.[1173]

The Commission heard from many women about the damaging impacts of experiencing sexual harassment alongside other forms of sex-based harassment and discrimination. For example, one worker said:

> The misogynist, sexist and sexual harassment, bullying and discrimination that I and my female colleagues had suffered throughout our careers had chipped away at me until I broke.[1174]

When sexual harassment occurs in conjunction with other forms of discrimination or unequal treatment—such as discrimination based on age, race or disability, for example—the impacts on victims can be significant.[1175]

For example, Women with Disabilities Australia told the Commission that when sexual harassment overlaps with disability discrimination, bullying and abuse in the workplace, this 'can have the effect of reinforcing dehumanising and infantilising ideas, or excluding and isolating us'.[1176] Negative impacts can be further compounded by other vulnerabilities of workers, such as visa status or casual, temporary or insecure work arrangements.[1177] These factors are discussed in more detail in Section 3.5.

Research has suggested that the trauma and other mental health outcomes for those with prior traumatic experiences are likely to be worse than for other victims.[1178] Some workers told the Commission that sexual harassment triggered memories of family violence[1179] or childhood abuse,[1180] and that it made them feel fearful, betrayed or unvalued.[1181]

(ii) Health and wellbeing impacts

Workplace sexual harassment can have a range of short- and long-term health and wellbeing impacts on victims, including negative effects on their general wellbeing, mental health impacts and impacts on their physical health.

General wellbeing

The 2018 National Survey found that nearly one in five (19%) people who said they had been sexually harassed at work in the last five years experienced negative impacts to their health and general well-being following the most recent incident.[1182]

The Commission was repeatedly told by individuals that they felt uncomfortable, stressed and unhappy after they had been sexually harassed, and that the incident affected their confidence and sense of self-worth.[1183] One worker told the Commission about the impact of being sexually harassed at a client function by a partner at her firm:

> [By the time I] negotiated an exit with HR … my confidence and self-esteem was so diminished it still brings tears to my eyes when I think about it … in the weeks and months that followed [my departure from the firm], I found myself questioning everything I had believed to be true about myself—my capabilities, my personality, my self-worth.[1184]

In some cases, individuals told us they felt denigrated by the harassment. An 'Open letter to perpetrators of gendered harassment', included in the submission of the National Association for the Visual Arts, summarised the sentiments expressed by many victims:

> To realise that, despite all the work I've made and shown, I have been diminished into the object of someone else's momentary sexual gratification—just an object and nothing more … that is an abhorrent feeling. It disconnects you from yourself and everything you've achieved.[1185]

Some individuals blamed themselves for the harassment. One worker told the Commission, 'I thought it was my fault … I got really depressed wondering why it kept happening to me.'[1186] Others told the Commission they altered their appearance or demeanour to protect themselves from future harassment:

> [W]hen I first started working, I would wear suit/tailored skirts and heels to work. I started receiving comments such as 'my ass looks nice in that skirt' or 'those shoes make my legs look sexy'. It got to the point where I had to adjust my dress to loose-fitting pants and tops and flat shoes to avoid these types of statements.[1187]

Victims also spoke about the impact of sexual harassment on their personal relationships, including with co-workers, families and friends. Impacts on these 'secondary victims' of workplace sexual harassment, such as bystanders, families and friends, are discussed in Section 3.8(b).

Research has shown that sexual assault, in particular, can affect people's ability to trust and feel safe in interpersonal relationships.[1188]

Some victims described having difficulties with physical intimacy following the harassment. One worker told the Commission, 'I have not had any interest in an intimate relationship with anyone these last 20 years. I felt so hurt, betrayed and humiliated by [what] my boss [did to me]'.[1189]

Mental health impacts

Research has confirmed that victims of workplace sexual harassment commonly experience a range of mental health conditions including stress, anxiety, depression and post-traumatic stress disorder (PTSD).[1190]

Stress and negative impacts on mental health were the most commonly identified impacts in the 2018 National Survey (36%).[1191] Some research and data have shown this impact to be even greater. For example, the Commission's 2019 survey of members of the Shop, Distributive and Allied Employees' Association (SDA) found that 44% of SDA members who said they were sexually harassed in the last five years said the most recent incident had impacted negatively on their mental health or caused them stress.[1192]

Similarly, in consultations and submissions, many victims said they experienced depression and anxiety after being sexually harassed. One told the Commission, 'I experienced a lot of stress, anger and anxiety. I had very little sleep and was constantly sick';[1193] while another said, 'The working environment quickly became dire. I hated going to work and became more and more depressed.'[1194]

For some, the stress and anxiety was so acute they feared going to work and for their personal safety:

> 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.[1195]

The Commission heard about the emotional and psychological impacts on victims who continued to encounter the harasser at work. A mining industry worker said in her submission that she reported the sexual harassment to human resources but had to continue working in close proximity to the harasser. She described the impact of almost running into the harasser in the kitchen at work one day: 'I said "I can't breathe" and started crying. I was having a panic attack.'[1196]

Another worker told the Commission:

> I was forced to work alongside the offender for the next 14 months with no support. I became more and more withdrawn and less confident every day … my self-esteem plummeted daily and I was struggling emotionally and felt very outcast. I felt subsequently ostracised at work and at work social functions … I essentially had a nervous breakdown.[1197]

For some, their anxiety led to the development of other conditions. One worker told the Commission that after experiencing years of sexual harassment and bullying, 'Within a couple of days of being made redundant, I developed a severe stutter and could hardly speak.'[1198]

Others told the Commission they resorted to using drugs, alcohol or other self-destructive behaviours in an attempt to self-medicate and cope with their experiences.[1199]

Research has also found a correlation between experiences of sexual harassment and incidence of PTSD.[1200] The Commission heard from victims in submissions and consultations who said they suffered PTSD as a consequence of the workplace sexual harassment they experienced.[1201]

> Eventually, I sought medical attention as I felt that I was on the verge of a breakdown. This led to me being diagnosed with post-traumatic stress disorder. What happened to me had and continues to have a detrimental impact on my mental health and everyday life.[1202]

Many victims described the devastating and debilitating impacts of often multiple mental health conditions on their lives:

> Once, I was a confident, competent, ambitious scientist with a bright career ahead of me. Now I have post-traumatic stress, depression and anxiety. I don't have a shred of confidence or ambition left. I am not in regular work and on many days just leaving the house is beyond me. I avoid public spaces and events in fear of encountering one of my persecutors. I am a limited and diminished version of what I once was.[1203]

> I [suffer] from debilitating agoraphobia (along with extreme anxiety, PTSD and clinical depression) and have been unable to leave the house without extraordinary planning and preparation. I do not have the ability to return to work. I have lost contact with my friends.[1204]

> I have continued to require ongoing mental health support for depression and anxiety and my psychiatrist considers I am unlikely to ever return to work of any kind.[1205]

Symptoms of PTSD and depression can include self-harm and suicidal ideation.[1206] Some victims told the Commission that their mental health conditions manifested in suicidal ideation and acts of self-harm.[1207] One worker told the Commission, 'I came very close [to] killing myself. To this day, I don't know why I didn't.'[1208] Section 7, 'Support, advice and advocacy', discusses the need for timely access to specialist counselling for victims of workplace sexual harassment, and makes recommendations to enhance their access to a range of support services, aimed at promoting recovery and resilience.

Physical health impacts

Research has shown that the short- and long-term health effects of sexual harassment discussed above—including psychological distress, stress, depression, anxiety and PTSD—are risk factors for various chronic diseases, blood pressure issues, obesity, hypertension, cardiovascular disease, and some cancers.[1209]

Stress and other mental health impacts of workplace sexual harassment can manifest in physical health conditions including headaches, hair loss, weight fluctuation, sleep deprivation, gastric or respiratory problems, exhaustion, nausea and musculoskeletal pain.[1210] Recognising these significant mental and physical health impacts, Section 5, 'The legal and regulatory framework', and Section 6, 'Preventing and responding to sexual harassment in the workplace', discuss the importance of treating sexual harassment as a serious health and safety risk in the workplace.

The Commission heard about a range of physical health impacts on victims of workplace sexual harassment in submissions and consultations:

> I was clenching my teeth so hard in my sleep that my jaw was inflamed to the extent that I could barely get food into my mouth. I wet the bed—twice.[1211]

> [After the main incident of sexual harassment], I lost a lot of weight very quickly … I was hardly sleeping and when I did get to sleep, it was disrupted.[1212]

> Three weeks after I commenced my stress-related sickness leave, I suffered a severe stroke from which I have never recovered.[1213]

The Commission also heard from some victims about physical injuries resulting from sexual assault or a violent incident following the rejection of a harasser's advances in their workplace.[1214] One worker told the Commission, 'I was seriously assaulted, both sexually and physically to such an extent I was unrecognisable.'[1215]

(iii) Impacts on employment, career or work

The 2018 National Survey indicated that one quarter (25%) of people who said they were sexually harassed in the workplace in the last five years experienced negative impacts to their employment, career or work as a result of the most recent incident.[1216]

Research has indicated that for women, sexual harassment can be one of the most damaging barriers to career success and job satisfaction.[1217] Consistent with these findings, the Commission heard in consultations that sexual harassment negatively impacted on victims' productivity and performance at work.[1218] One worker said:

> [The sexual harassment] really weighs you down and you just have to spend all of that mental energy while you're at work navigating situations and relationships instead of just focusing on your job, [which] is very exhausting.[1219]

Victims of workplace sexual harassment are also likely to psychologically detach from their organisation by missing work, neglecting tasks and decreasing their engagement.[1220] Withdrawal and avoidance are also common responses.[1221] Victims frequently told the Commission they took personal or recreational leave to avoid the harasser:

> The days I took off work as sick days were entirely for the purpose of having a break from the perpetrator of sexual harassment. My work suffered and my enthusiasm for the job and doing it well waned significantly as I got worn down by inappropriate behaviour.[1222]

> I used a significant amount of personal and recreation leave in order to avoid contact with him. I would make sure that I was never in a room with him by myself and that doors were always open in any office space I shared with him … This added tremendous stress to my situation, deepening my depression and exhausting my leave entitlements.[1223]

As noted above, some workers described avoiding situations and areas of their workplace where they would encounter the harasser, or where they might be subjected to further sexual harassment.[1224] For some women, adjusting their behaviour in this way meant they missed out on networking or work opportunities:[1225]

> I had an ex-colleague who actively avoided certain employment/training exercises if they involved being in the same room as a man who she reported for harassing her but who was not appropriately managed.

> This potentially prevented her from obtaining certain professional development skills.[1226]

> I don't put myself in any situation where it's likely to happen. I go to … fewer events, and far fewer off-site meetings because I know that there's the likelihood that that might happen with certain people … I feel my career is kind of limited to emails and sitting in the office … I suppose I [choose] not to put myself in the situation, as it were.[1227]

Another worker told the Commission that following repeated experiences of sexual harassment by male customers while working in retail jobs for over 15 years, she finally left the industry altogether:

> All of this was the main reason I stopped working in customer service. It just kept going, and I ended up with debilitating anxiety and hating my jobs. I shifted professions to work in other industries…[1228]

Sexual harassment is a violation of the trust an individual places in their employer and co-workers to provide a safe work environment.[1229] The Commission heard from a number of women whose experiences affected their ability to trust and work with men:

> I now keep my distance from my subsequent male bosses and colleagues [because I am] anxious if it will happen again to me and I will lose my job again.[1230]

> …[W]hen I sought another job, I was so affected by anxiety that I accepted a very junior, casual administrative role at a significant pay cut, so that I could work with an all-female team.[1231]

One woman told the Commission that repeated experiences of sexual harassment in her industry led to her starting her own company. She said this decision substantially decreased her earning capacity, but put an end to the sexual harassment as she was able to control who she worked for and with.[1232]

Consistent with research,[1233] young workers who were sexually harassed early in their careers told the Commission about the negative effect on their career aspirations and expectations.[1234] For example, a paralegal said that her early experiences discouraged her from pursuing a career in the legal profession.[1235] Another young woman told the Commission that the sexual harassment at her first job 'shaped [her] expectations of what work was like … that sexual harassment is "just part of the job" for girls and women.'[1236]

Some older workers told the Commission that losing their job following an experience of harassment forced them into premature retirement. 'Barry' shared his story at a consultation:

Barry's story[1237]

Barry was an older worker in a rural country town. Barry told the Commission in a consultation that one evening while giving his male boss a lift home, his boss said he was lonely and placed his hand on Barry's upper thigh. Barry respectfully declined the advance. Barry told the Commission that the following day, he was told that his services were no longer required. Barry said he was unable to find another job as his former boss would not provide him with a reference.

Other workers told the Commission that after they reported sexual harassment, they became labelled as a 'problem employee', a reputation that would follow them within their industry and community.[1238] This problem was particularly acute for workers in small communities and industries and those in regional, rural and remote locations as discussed in Section 3.7(e).

Very few victims told the Commission they continued in the same job or workplace following the harassment. One woman who described multiple interruptions to her career in her submission said, 'again and again and again, the same old pattern: you start a job, they harass or menace you, and YOU have to leave.'[1239]

The Commission heard that poor employer responses to sexual harassment in their workplace left some victims feeling they had no choice but to leave. One worker said:

> I didn't want to leave because of the behaviour of one man, I left because the organisation did not handle his behaviour. He was not held accountable at all … I decided I had to go elsewhere and get out of this culture. This was very hard because I loved the work so much. But I had burned up so much energy in getting through the grievance process.[1240]

While some individuals told the Commission they chose to resign following the harassment because they felt it was the 'easy' or 'only option',[1241] others said they were forced out by their employers.[1242]

Consistent with the findings of the 2018 National Survey,[1243] the Commission heard examples from victims who said that after they made a complaint they were subjected to increased scrutiny,[1244] micromanaged or conversely ignored by management,[1245] moved or taken off projects,[1246] denied development or promotion opportunities,[1247] or dismissed for vague reasons during their probation period.[1248]

The Commission also heard from victims in insecure or precarious working arrangements who lost their jobs, stopped receiving shifts or were not offered contract extensions following an incident of sexual harassment.[1249] One worker said: 'When I reported it, my career was over. As I was on a short-term contract, this was not renewed.'[1250]

Victims also described the impact on their careers where the harasser was in a position of power.[1251] One worker told the Commission that when she was 20 years old, her employer raped her and threatened that if she told anyone she would never get another job in her field in her home state. She said: 'I was terrified. I did not tell anyone. Instead, I bought an airline ticket, put my car on a freight train and ran away to a small outback town.'[1252] Another shared an incident at an event for her firm, where one of the partners was intoxicated and asked her in front of other partners and clients:

> '[H]ow 'bout a quick fuck?' … His behaviour was crass, inappropriate and undoubtedly sackable.
>
> While I knew that, I was entirely unprepared to navigate what happened next. Instead of an apology, he questioned my performance … I then resigned without another job to go to.[1253]

The Commission heard that sexual harassment can also affect victims' social and professional networks, with impacts for their careers. The submission from Gender Equity Victoria noted:

> Exiting a harassing work environment may be costly for women's long-term careers, [if they] lose access to social networks, experience gaps in employment, or cannot find comparable work.[1254]

Finally, some victims were so damaged by their experiences, they were unsure if they would ever be able to return to work:

> I have lost everything—my job, a career, the ability to see any and all life as a positive, confident woman. I am now full of self-doubt, scared all the time and labelled forever with nil career prospects as I can't see myself getting back up from this.[1255]

(iv) Financial impacts

The 2018 National Survey indicated that 10% of people who said they were sexually harassed in the workplace in the last five years suffered negative financial consequences as a result of the most recent incident.[1256]

As noted above, research has shown that sexual harassment can have long-term consequences on an individual's career and as a result, their finances.[1257] Repeated voluntary and involuntary career interruptions, and the need to retrain following a change in industry or sector, can impact on long-term earning capacity and superannuation accrual.[1258]

Some research has indicated that the financial impacts of workplace sexual harassment are felt more acutely by women, as they are more likely than men to make lateral moves or take pay cuts.[1259]

As discussed above, victims' responses to sexual harassment, such as withdrawing from work or adjusting their behaviour to avoid further harassment, can have an immediate impact on their income. One young hospitality worker told the Commission:

> ...I would go out of my way to avoid interactions with this individual. He would make sexually suggestive comments to me when we were both rostered on for night shift ... This made me incredibly uncomfortable to the point I stopped requesting those shifts, which ended up having a financial impact on me as I lost the penalty rates that came with these shifts.[1260]

Another worker said:

> All of these incidents have had an impact on my mental health ... They have also contributed to my refusal to accept further employment at those workplaces, which has had a negative impact on my finances.[1261]

The Commission heard that victims also lost income from taking extended periods of personal leave (usually unpaid) and periods of unemployment. One victim said in their submission, 'For a whole year I was not myself ... it was nearly 10 years before I could find permanent work again.'[1262] For victims of sexual harassment who are self-employed, these costs can be even greater, as they do not have access to personal leave entitlements.[1263]

Sima's story[1264]

Sima told the Commission in a consultation that she was sexually harassed by a female colleague, over a period of about nine months. Sima said that this escalated when she was approached by this woman from behind and groped in a private area.

Sima told the Commission that she reported it but it was played down as a joke, and she felt that management were dismissive because it was a woman, not a man, that had groped her. When it came time for contract renewal, Sima's contract was not extended unlike her colleagues. Sima said she was also unable to find another job as her previous workplace would not provide a reference.

Sima described the whole experience as paralysing. She is suffering from PTSD and is in a precarious financial position. When the Commission spoke to her she was about to have her car repossessed and said that she may have to sell her house.

The financial burden of accessing ongoing support is nearly always carried by the victim. As discussed further in Section 7, 'Support, advice and advocacy', support for victims is rarely provided by the employer, government-funded assistance is insufficient and adequate workers' compensation can be difficult to access. The Commission was told that the ongoing cost of effective support was prohibitive for most. One worker said, 'I had to stop counselling for months because I just could no longer afford it.'[1265]

The Commission also heard about the significant financial cost to victims of pursuing legal remedies:

> I've been fighting this [since 2010] and I've lost our house, our super. We have nothing left virtually. But I'm still here because something needs to change. People need to be held accountable.[1266]

> I have been living off my mortgage including paying my mortgage with my mortgage … I have been forced to spend $75k in legal fees. I have been forced to discount my pain and suffering at the expense of my future. The impact on my superannuation, quite rightly, worries and frightens me.[1267]

The Deloitte Report estimated that the cost to victims of workplace sexual harassment was $523.6 million in 2018.[1268] Almost half of this amount ($249.6 million or 47%) was attributed to the estimated cost of the impact on the wellbeing of victims who experienced workplace sexual harassment in the form of actual or attempted sexual assault ('lost wellbeing' costs).[1269]

The Deloitte Report recognised that victims of other forms of workplace sexual harassment (that is, other than sexual assault) were also likely to experience reduced wellbeing, but it did not estimate the costs of this.[1270] Overall, the Deloitte Report did not measure the costs associated with the long-term effects of workplace sexual harassment which, as this section shows, can be significant.

The Deloitte Report attributed one third of the costs incurred by victims ($170.5 million or approximately 33%) to lost income in the form of unpaid leave (a component of 'absenteeism' costs), or loss of income caused by a period of unemployment (a component of 'staff turnover' costs).[1271]

The economic modelling based the costs of absenteeism and staff turnover on a number of assumptions and the limited available data, and as noted in the Deloitte Report, these are likely to be conservative estimates.[1272] For example, the economic modelling was unable to account for the impacts of sexual harassment on a victim's long-term career progression and workplace participation.[1273]

The Deloitte Report also estimated that in 2018, victims spent $103.5 million in accessing the health and justice systems. Due to the limited data available, however, the full scope of support services accessed by victims to address mental and physical health issues arising from sexual harassment could not be taken into account.[1274]

Multiple complex factors affect the severity of the impacts experienced by victims of workplace sexual harassment, which range far beyond those factors which were considered in the modelling. As discussed in Section 3.8(f), it is likely that Deloitte's estimate represents only a fraction of the actual cost of workplace sexual harassment shouldered by victims and affecting the economy. The Commission's recommendations in this report for more comprehensive data collection will assist in future estimates of the cost of sexual harassment to victims.

(b) Impacts on other people

(i) Impacts on bystanders

Who are bystanders?[1275]

A bystander is a person who observes sexual harassment firsthand or hears about it subsequently.

In the workplace, bystanders can include co-workers who are informed of workplace sexual harassment through the 'grapevine' or are sought out by victims or harassers for support or advice.

Bystanders also include a range of people formally authorised to receive reports of workplace sexual harassment, such as managers, supervisors, human resource employees or harassment contact officers.

Witnessing or hearing about sexual harassment in the workplace can be physically, psychologically and professionally damaging for a bystander. Some research has suggested that the negative impacts for bystanders are often similar to those of victims who directly experience sexually harassing behaviours.[1276]

This has been referred to as 'ambient sexual harassment'.[1277] Bystanders can be affected by an incident of sexual harassment, by an inadequate response from the employer, or by victimisation and bullying following an incident.

Bystanders can experience significant adverse emotional impacts when they witness or hear firsthand about the sexual harassment of another person. Research on trauma has suggested that this 'vicarious trauma' or 'secondary trauma' can be similar to the symptoms of PTSD.[1278] Dealing with the effects of someone else's suffering can affect a bystander's health. As one worker described in their submission:

> Each time I laughed along with my own humiliation or kept quiet about the humiliation of another woman or marginalised person, I died a little bit more on the inside.[1279]

Negative mental health impacts on bystanders in the workplace through indirect exposure to sexual harassment can also lead to decreased job satisfaction and reduction in work performance, particularly where they perceive there has been a poor response from the employer.

The Commission heard that a normalised workplace culture of sexual harassment and sex discrimination could make co-workers also feel devalued.

A submission from a teacher described the impact on staff in a school environment where the principal bullied and harassed other female staff members, including making 'lewd and sexist' remarks to young female teachers:

> While I was not subjected to sexualised comments or even bullying remarks, I became very conscious of the effect they were having on the staff. There was a highly sexualised atmosphere in the school. There was constant discussion about the principal's behaviour, mistrust among members of staff about existing privileges, a divided staff and discriminatory practices.[1280]

Witnessing or hearing about sexual harassment in an organisation can also create team conflict.[1281] Co-workers may feel compelled to 'take sides', particularly where victims or harassers are actively seeking their support or advice. The following example was provided by one victim in their submission:

> After the [harasser] was spoken with [by management], he … sent a group text message to many co-workers attempting to isolate me. I spoke to management and made them aware I was being isolated by the text message and it wasn't fair that he is still employed.[1282]

The Commission heard that a complaint of sexual harassment could also emphasise gender divides in male-dominated workplaces.

A female electrician told the Commission in a consultation about the polarising effect of a sexual harassment complaint in her workplace:

> [I]f you do have somebody making a complaint or even if it's just discussed amongst the workgroup, it then becomes a very gender thing, boys versus girls, why should we have women in the workplace, we are sparkies [electricians] anyway, all you do is bitch and moan and complain and we can't even have a joke anymore. We can't have any fun.[1283]

The 2018 National Survey indicated that only one in three (35%) bystanders who witnessed or heard about sexual harassment in the workplace in the last five years took any action in response. In less than half (47%) of these cases, the harassment was reported to the employer.[1284]

Some bystanders said they felt powerless to intervene. The Commission heard from a supermarket worker who disclosed to her male co-workers that her manager 'made [her] go to the liquor cupboard where the alcohol and cigarettes were stored', and 'proceeded to touch [her] inappropriately'.[1285]

She said that her colleagues unsuccessfully tried to help her by offering to go instead:

> It didn't always work. It was stressful for all of us and I still remember the looks in their eyes, looks of helplessness when they weren't able to save me from him.[1286]

In submissions and consultations, the Commission heard that many bystanders feared the repercussions of reporting an incident of sexual harassment, including concern about the security of their own jobs. Bystanders may have observed a poor workplace response to a previously reported incident of sexual harassment, or fear they will be the next target, causing an erosion of trust in the workplace reporting system.[1287]

> [Other senior officers in the organisation], well aware of this [senior officer's] predatory behaviour, did not provide witness statements. They buried their heads in the sand for fear of risking their careers.[1288]

> While I nominated many potential witnesses within the agency who could attest to many of the claims I made, it became clear from the investigator that most had refused to be interviewed about the allegations. I subsequently found out that this was generally because they were afraid of what would happen to them and their careers if they did provide their allegations to the investigator.[1289]

The Commission heard that bystanders' fears of victimisation could be exacerbated in small communities:

> I was a bystander and put my hand up to say this is not right because a colleague and friend of mine has been harassed and assaulted. Between us, there's at least 10 women that have come to us … nine of them are not prepared to come forward at all because of retribution: their reputation within a small country town. They're just not prepared because they've seen what's happened to me.[1290]

One worker, who described their own experience of being a witness in a case relating to a workplace incident, said the fear of being drawn into legal proceedings could deter bystanders from taking action.[1291]

The Commission also heard about circumstances where bystanders did take action and experienced negative consequences as a result. The 2018 National Survey indicated that of those bystanders who said they took action in response to witnessing or hearing about workplace sexual harassment said that as a result:

- 10% were ostracised, victimised or ignored by colleagues
- 9% were labelled as a troublemaker
- 6% said they resigned
- 4% had their employment terminated.[1292]

The Commission also received submissions from workers at all levels who said they were victimised themselves because they intervened or spoke up on behalf of a victim of sexual harassment. One worker told the Commission that, 'As a result of my appropriate intervention, I was turned on and not supported; I was bullied by the alleged perpetrator and ostracised by some male colleagues.'[1293]

(ii) Impacts on partners, families and friends

As discussed above, sexual harassment in the workplace can impact a victim's self-esteem, self-confidence and ability to trust others. This can have flow-on effects on an individual's capacity to form and retain interpersonal relationships.[1294] Victims told the Commission about the negative impacts on their partners, family and friends. Partners in particular are often the first person a victim may disclose the sexual harassment to, potentially giving rise to 'vicarious trauma' or 'secondary trauma'.

Not only can partners, family and friends be affected by learning about the sexual harassment, but they often have to cope with the ongoing negative impacts of the harassment on the victim, such as mental health issues, social dislocation and erosion of trust and intimacy.

One worker told the Commission that she was repeatedly sexually harassed by her supervisor, but when she reported this to her manager, no action was taken and she was directed to work alone with the harasser. She said that as a result, she experienced a 'psychological breakdown' which also impacted upon her family:

> My children suffered because of my ordeal at my workplace. My children needed me to be capable and vibrant upon returning (often very late) from work, but I was broken more days than I was well.[1295]

Partners and families may also need to support the victim and assist them to report or address the sexual harassment. One worker told the Commission:

> I was made to feel incredibly uncomfortable and with support from my husband and my direct manager, I reported his behaviour to our [human resources] department.[1296]

As discussed above, the Commission heard that many victims of sexual harassment left the workplace where the incident occurred. Victims told the Commission how this affected their personal lives and their families, for example causing financial insecurity or forcing them to relocate to a new environment. These difficulties were exacerbated for those working in highly competitive workplaces or remote areas with limited opportunities (see Section 3.7(e)).

> Once I leave the organisation, which I'll have to do, we've been looking at moving interstate because the opportunities for me in the area that I'm in … we probably have to relocate.[1297]

> I felt I had no choice but to leave town as I knew I would be run out by the [harasser and his] mates in the town. I had to sell my home and uproot my children…[1298]

The Commission heard that partners and families of victims could experience significant financial difficulties, including supporting a victim who may no longer be able to work, costs associated with accessing health and mental health support services, and pursuing complaints or legal redress. The profound impacts of workplace sexual harassment on victims, such as mental health issues, deterioration of relationships and financial insecurity, can result in dysfunctional family environments that can have long-lasting impacts on families and children.[1299]

For example, one individual attended a consultation and sent in a submission on behalf of his wife who had been sexually harassed in the workplace. He said:

> We are hundreds of thousands of dollars down the path … Everyone's been harmed … [I'm] scarred by it … my wife has been devastated. I've had to get my children to help me in certain circumstances to stop her from taking her life … it really takes its toll.[1300]

(iii) Impacts on harassers

There is limited research on the impacts of workplace sexual harassment, and the associated investigations or complaints, on harassers or people subject to allegations of harassment.[1301] Regardless of whether or not they are found proven or substantiated through a formal process, allegations of sexual harassment can be complex and sensitive, with far-reaching implications for all people involved. Families can also be deeply affected by an allegation of sexual harassment made against a partner or parent, especially if this information becomes public.

The #MeToo movement has triggered a renewed focus on procedural fairness and natural justice for people who have been subject to allegations of sexual harassment. Much of this discussion has focused on allegations made public through the media or social media ('trial by Twitter'), and the potentially significant psychological, reputational and career impacts for an alleged harasser.[1302] Similar concerns were raised in submissions:

> With the way we are playing this game currently, there is no need to be guilty … a false accusation is all that's required for the life of an accused to be destroyed.[1303]

> Vexatious claims of sexual harassment happen and cause pain to those who are targeted and the people around them.[1304]

As discussed in Section 3.4(d), in some workplaces where sexual harassment is perceived as tolerated or accepted, individuals may engage in sexually harassing behaviour to 'fit in' and conform to the broader workplace culture. If disciplinary actions subsequently arise, the harasser may feel unfairly targeted.

In *Torres v Commissioner of Police* [2017],[1305] a former Senior Special Constable made an application for unfair dismissal to the Industrial Relations Commission after he was dismissed by NSW Police for sexual harassment, including discussing anal sex with junior female employees. His argument centred around the normalisation and culture of workplace banter in the police force, and the lack of training regarding sexual harassment.

Commissioner Murphy dismissed these arguments, finding that his dismissal was neither unjust nor unreasonable, stating:

> No senior officer should, or does, need training or policies to realise that inflicting that type of behaviour on work colleagues, in particular, junior employees, in the workplace is unacceptable conduct which should not be tolerated and which cannot be excused.[1306]

Section 6.2(f), 'Reporting', discusses the need for sanctions for harassers to be proportionate to the conduct and complemented by programs aimed at changing their behaviour where applicable.

Workplace guidelines and codes of practice acknowledge that complaint and investigation processes can be distressing for both people making complaints, and people who have had complaints made against them. For example, publicly available guidelines developed by Monash University in relation to staff and students require that an alleged perpetrator of sexual harassment be treated with respect, provided assistance to minimise trauma or distress, and given access to support services.[1307]

Similarly, Western Sydney University guidelines recognise that alleged harassers also need support, and that in responding to instances of sexual harassment, management and supervisors 'must advise all parties of the support mechanisms available to them through the University such as the Employee Assistance Scheme.'

The guidelines also require strict confidentiality to be maintained, meaning that 'only the people who need to know about any allegations or counter allegations should be told what is happening'.[1308]

Implementation of these policies is particularly important where young people are involved, as allegations of sexual harassment can result in significant lifelong consequences. In Section 6, 'Preventing and responding to sexual harassment in the workplace', the Commission discusses the need to balance confidentiality with transparency in addressing workplace sexual harassment.

The Commission acknowledges the importance of supporting all parties involved in an investigation or complaint of workplace sexual harassment. In Section 6.2(e) 'Support', the Commission recommends that employers prioritise support for workers when responding to sexual harassment, including by encouraging victims, harassers and bystanders to seek the support and advice they need, and providing them with information about their options.

(c) Impacts on workplaces

The impacts of sexual harassment on victims and other workers can have flow-on effects in the workplace, including:

- reduced productivity of workers
- absenteeism
- staff turnover
- impacts on workplace culture.[1309]

There are also financial impacts for employers in responding to complaints, including the time and resources spent on handling both informal and formal complaints, workers' compensation and legal costs. The reputational damage associated with incidents of sexual harassment can also impact on an organisation in a broad range of ways.

The Deloitte Report estimated that in 2018, workplace sexual harassment cost the Australian economy $2.6 billion in lost productivity.[1310] The vast majority of the costs associated with lost productivity (approximately $1,840.1 million or 70%) was borne by Australian businesses.[1311]

When productivity costs were broken down by sector, the Deloitte Report found that the private sector shouldered the vast majority of lost productivity costs (approximately $2.2 billion) in comparison to the public sector ($393.7 million).[1312]

On average, the Deloitte Report estimated that one case of workplace sexual harassment costs $1,053 per victim in lost productivity.[1313] For incidents at the most severe end of the scale (actual or attempted sexual assault), this rose to $5,345 on average per victim.[1314] The report characterised 'productivity losses' to include short-term absences from work (including sick leave, annual leave and unpaid leave), reduced productivity while at work, increased job turnover and manager time when a complaint about workplace sexual harassment is made.[1315]

(i) Workplace impacts of sexual harassment

Reduced productivity

Workplace sexual harassment can result in the reduced performance and efficiency of all workers involved in incidents—victims, harassers and bystanders. Decreased work productivity can include behaviours such as neglecting tasks, avoiding co-workers or the harasser, lateness, and decreased performance.[1316]

The Commission heard that the negative impacts of sexual harassment on workers in service provision roles—such as mental health issues, reduced productivity and employment withdrawal—could impact on the services or care provided to clients, customers or patients.

For example, the submission from the Australian Nursing & Midwifery Federation noted that in the health sector, clinically adverse outcomes have been linked to violence (including sexual harassment) experienced by nurses and midwives perpetrated by patients, relatives and visitors to health services.[1317] This included the victim being more likely to experience a lack of empathy for patients. The submission argued that, 'A loss of ability to empathise and interact with patients is detrimental to the overall ability to provide care'.[1318]

The Commission also heard that poor workplace responses to a report of sexual harassment could result in workers becoming less productive and feeling less engaged:

> I went to a senior officer when this was all coming to a head ... When I told him everything that had been going on, he immediately arranged to have me moved out. This meant being shunted around to various spots without really meaningful work.[1319]

The Deloitte Report estimated that, on average, a victim of workplace sexual harassment was estimated to have a reduced productivity while at work of 3.2%, and this reduced productivity lasted for 2.4 weeks. The Deloitte Report referred to reduced productivity at work as 'presenteeism'.[1320] For victims of sexual assault this reduction in productivity increased to almost 13% and lasted just under 13 weeks.[1321]

This resulted in a loss to the Australian economy of $426.4 million in 2018.[1322] The Deloitte Report noted these findings may be conservative as they were based on data which indicated most victims (almost 80%) reported no presenteeism.[1323]

Absenteeism

It is well established that decreased job satisfaction due to sexual harassment in the workplace leads to greater absenteeism and withdrawal from employment by victims and bystanders.[1324] Absenteeism relates to short-term absences from work, including annual leave, sick leave and unpaid leave. Absenteeism may be due to stress, illness or injury, or avoidance strategies.

As discussed in Section 3.8(a), victims of workplace sexual harassment told the Commission about various ways in which they avoided direct interaction with a harasser by refusing shifts or taking time off.[1325]

Harassers may also take time off from work after an incident of sexual harassment, particularly as a result of a complaint being made against them.[1326] Absenteeism has significant financial implications for workplaces. Research has suggested that depending on the amount of time a worker is absent, this may result in lost output, disruption to work productivity, increased sick leave costs, or additional work responsibilities for co-workers.[1327]

Absenteeism was the second-highest component of lost productivity costs, according to the Deloitte Report. It estimated that the total cost of short-term absences from work due to sexual harassment was $741.8 million in 2018.[1328]

Staff turnover

Sexual harassment in the workplace leads to increased staff turnover, with victims, harassers and bystanders leaving the workplace for a variety of reasons.[1329] This includes workers who resign voluntarily, as well as those terminated, made redundant or relocated.

The 2018 National Survey indicated that where people said a formal report or complaint was made about an incident of workplace sexual harassment:

- 17% of victims resigned, and 8% had their employment terminated.[1330]
- 11% of harassers resigned, and 5% had their employment terminated.[1331]

Of those bystanders who said they took action in response to sexual harassment, 6% resigned and 4% had their employment terminated.[1332]

As noted in Section 3.8(a), the Commission heard from victims who said they were dismissed after they made a complaint about workplace sexual harassment, or that they left the organisation because they felt they were not supported or the harasser was not held accountable.[1333]

One worker told the Commission about how several female workers left the workplace 'due to being unable to function any longer in an environment of favouritism, belittling women at meetings, sexist crude jokes etc.'[1334]

Another individual told the Commission that in their former workplace:

> [T]here had been a revolving door of maybe seven or nine people who had been through this team in a relatively short time, who left after not being able to tolerate the boss's [inappropriate] behaviour.[1335]

The Commission also heard about harassers who left their workplace following a complaint of sexual harassment. One individual told the Commission that after a police investigation and subsequent court proceedings relating to sexual harassment: '[The employer] initially asked [the harasser] to take voluntary leave. He ended up resigning.'[1336] Another individual working in the gaming retail industry said that after making a written complaint to a senior boss within the company, she heard that the harassers 'were very secretly fired and replaced'.[1337]

When workers leave the organisation as a result of sexual harassment, this can have negative impacts on staff morale, as well as incurring considerable costs to employers in redistribution of work and training.[1338] Other costs may include recruitment costs, higher wages for replacement short-term labour, and idle assets.[1339]

The Deloitte Report found that the largest component of lost productivity was staff turnover costs—in 2018, more than $830 million was lost due to staff turnover as a result of workplace sexual harassment.[1340]

Workplace culture

The Commission heard in consultations that incidents of sexual harassment could lead to reduced morale within teams and have a negative impact on the overall culture of workplaces. As one worker observed: 'I think the hidden costs must be enormous in terms of productivity and around efficiencies because it does impact on workplace culture, morale.'[1341]

Research has indicated that job satisfaction and commitment to an employer can be affected where management fails to discipline sexual harassers, and workplace culture and morale suffers as a result.[1342]

One worker told the Commission about the impact of sexual harassment on the culture within her industry:

> I also witnessed others around me become hardened and apathetic about 'the industry' and the perpetrators of sexual harassment they were surrounded by were viewed as 'part and parcel' with the industry.[1343]

As noted above, an 'ambient culture' of workplace sexual harassment has been shown to increase levels of interpersonal conflict experienced by workers, creating a range of negative impacts on co-worker relationships, team cohesion, and financial performance.[1344] When team members are no longer working cohesively, it impacts on the overall productivity and performance of the team.[1345]

The Deloitte Report did not estimate these costs on the basis of the limited available evidence.[1346]

#MeToo: Male managers fear interacting with female colleagues

A 2019 study conducted by LeanIn.Org and SurveyMonkey surveyed more than 5,000 workers in the United States, and found that 60% of male managers felt uncomfortable participating in common work activities with women (such as mentoring or socialising), up 14% from the previous year.[1347]

The study also showed:

- Almost half (48%) of male managers said they were uncomfortable socialising with female colleagues outside of work (up from 34% in 2018).
- More than a third (34%) of men say they had avoided mentoring or socialising with a female colleague because they were concerned about how it could be perceived.
- The researchers said that the #MeToo movement may have unintended consequences of excluding women from the workplace, by reducing formal and informal mentorship.[1348]

(ii) Impacts of responding to complaints

The Commission heard about a range of financial and other organisational impacts for employers following complaints of workplace sexual harassment. These impacts included:

- time and organisational resources absorbed by responding to and investigating complaints
- increase in workers' compensation premiums
- reputational damage and consequent impacts on attracting talent, customers and clients, as well as value to shareholders
- legal costs, including legal representation, court costs and financial compensation payments.

Handling complaints of sexual harassment

Employers incur costs responding to sexual harassment complaints made internally or to external bodies, conducting investigations, and hiring external workplace investigators.

Where adequate responses are provided and the complaint can be resolved at an early stage, this can mitigate some of the further negative impacts on individuals and consequently on the broader workplace.

On the other hand, poor organisational responses can lead to additional costs, such as workers taking time off work, being less productive in their jobs or leaving their employment.

Many employers deal with complaints and investigations internally. In small businesses, these may be dealt with by the owner, and for larger employers, through their human resources or legal department. In other cases, employers may appoint external, independent investigators. The Commission heard from employers about the high costs associated with investigations into workplace sexual harassment, particularly when their findings were inconclusive:

> [T]he current process of having to conduct an internal investigation is burdensome. Hugely expensive. A massive resource drain and more often than not can't be substantiated on the balance of probabilities.[1349]

The Commission also heard from employers who raised concerns about the costs associated with responding to complaints, and the particular challenges for small businesses:

> In instances where a complainant's action is financially supported by a union, the resources available to the complainant, including union in-house legal staff, to pursue and prolong a dispute will far outweigh the resources available to most employers.[1350]

The Deloitte Report estimated that the loss of managers' time in responding to formal complaints of workplace sexual harassment cost employers $623.4 million or over $2,000 per complaint in 2018.[1351] However, this estimate did not include:

- managers' time spent on responding to informal (rather than formal) complaints of workplace sexual harassment[1352]
- other costs such as hiring external human resources specialists or legal professionals to assist with responding to complaints.[1353]

Workers' compensation

As discussed in more detail below in Section 5.7, 'Workers' compensation', workers who have suffered psychological injury as a result of sexual harassment may be able to make a claim for workers' compensation. There are costs to employers of holding insurance to cover the costs of claims, including workplace sexual harassment claims.[1354]

There is a lack of consistent data from workers' compensation agencies on claims relating to sexual harassment (see Section 3.2(e)). However, the Commission heard that where workers' compensation claims were made due to the psychological impacts of workplace sexual harassment on victims, this could increase the premiums paid by employers:

> Despite its complexity, an employer's workers' compensation premiums can increase when a worker lodges a workers' compensation claim; in some jurisdictions, this impact occurs even if the claim is ultimately rejected.[1355]

Premium rates for employers vary depending on the size of the employer, their retention rate and whether there is a history of harassment or discrimination in the workplace.[1356] In addition to this, insurers often include a 'retention' for each claim (similar to a deductible) before the insurer will pay the expenses associated with the claim.[1357]

The Deloitte Report did not estimate the costs of workers' compensation claims, nor the impact of increased premiums for employers, due to limitations in the available evidence.[1358]

Reputational damage

The reputational damage associated with publicised incidents and complaints of sexual harassment can have immeasurable impacts on organisations including significant financial costs.

Publicity through media, the court system, or industry 'word of mouth' can result in heightened scrutiny of organisational decisions and loss of shareholder confidence.[1359]

As discussed in Section 2, 'The current context for this Inquiry', the Commission heard that this has resulted in a lack of transparency around sexual harassment in workplaces, as employers may be driven to minimise, or at worst conceal, complaints to avoid exposure to this reputational risk. For example, one worker told the Commission that she was sexually and physically assaulted while working in a hotel, and the 'hotel management sent [her] away for six weeks, and refused to help as they did not want bad publicity'.[1360] Another worker told the Commission that her employer refused to change the workplace culture in response to incidents of workplace harassment, and instead 'enable[d] the harassment of women … covering up or paying off complainants, rather than addressing the problem'.[1361]

The International Center for Research on Women identified that brand perception and reputational costs incurred due to sexual harassment varied by industry, and were difficult to quantify.[1362] However, other research has linked sexual harassment with various impacts, such as loss of customer and investor confidence.[1363]

Research on 'uncivil behaviour' in the workplace has also shown that when customers witness or are made aware of incivility or misconduct directed at a worker within the workplace, they can develop 'rapid, negative generalisations' and may be less likely to purchase products or services from that business.

The same research also found that workers who have experienced an 'unfair' workplace may actively discourage potential customers from purchasing products or services from their employer.[1364]

However, the way an employer responds to sexual harassment may minimise the impact of reputational damage. One study found that when an organisation responded to a sexual harassment claim in a way that was 'timely, informative, and considerate toward the victim', rather than in a way that was minimising or 'slow, dismissive, and discouraging', this could circumvent public backlash—almost to the same level as an organisation that had not had a sexual harassment claim.[1365]

Research has also shown that complaints of sexual harassment made public can negatively impact on the recruitment of new employees and the retention of the existing workforce.[1366] The Commission heard in consultations about the fear that reputational damage from sexual harassment would impact on recruitment and retention of valuable employees:

> [T]here were other investigations going on at the same time, and I was told that the reputation of the firm and its ability to recruit the following year was of paramount concern and they were going to do everything they could to shut down every other complaint.[1367]

The Commission was told that this reputational damage could have industry-wide implications.

The Law Council of Australia's submission described the negative impacts of sexual harassment on the standing of the legal profession as a whole:

> The public must have confidence in the administration of justice, and often this comes down to the conduct of individual legal practitioners. When lawyers behave unethically, including sexually harassing their colleagues or clients, there is a critical impact on the justice system.[1368]

The submission argued that the legal profession is 'losing diverse talent' as a result of sexual harassment, particularly women, and that this 'jeopardises the sustainability of the profession as a whole'.[1369]

Similar impacts may be felt in other industries that rely heavily on the integrity of professionals, such as in medicine, politics or the finance sector. Entire industries, such as advertising, have come under public and media scrutiny due to the prevalence of sexual harassment, or as evidenced by #MeToo, the entertainment industry.[1370]

There is a lack of reliable data on the cost of reputational or brand damage to businesses, and these costs were not considered or quantified in the Deloitte Report.

However, when a project or production has not proceeded, or a leader of a high-profile organisation has resigned or had their employment terminated due to allegations of sexual harassment, it is likely that significant costs would be incurred by an organisation.[1371]

Legal costs

As outlined in Section 5, 'The legal and regulatory framework', a victim may progress a workplace sexual harassment complaint in a number of ways. Some cases may enter the justice system, and employers often incur associated costs, including for legal advice or representation, court costs and payment of compensation.

For some cases of workplace sexual harassment, compensation may be paid to the victim, typically by the employer where they are found vicariously liable for the actions of their employees.[1372] In some cases, the harasser may also compensate the victim.

Employers may pay compensation outside of court to settle a matter, for example through mediation or conciliation, or they may be ordered to pay compensation by a court or tribunal. Compensation may be paid for a variety of reasons, including for pain and suffering, economic loss, medical costs or legal costs.[1373]

The Commission heard vicarious liability was a concern for employers, given large amounts of damages have been awarded for cases alleging ongoing sexual harassment, irrespective of whether employers were aware of the harassment or not.[1374] The Commission also heard this was an incentive for employers to settle matters outside of court:

> I would suspect that mostly private businesses will make an offer and do a payout because they just want to make the problem go away and they also recognise that [in the] longer term, they won't have the legal costs on top of it all.[1375]

Examples of damages awarded against employers in tribunals and courts, or settlement payments

Hill v Hughes[1376]**—$170,000 award:**

The Federal Court awarded a woman $120,000 in general damages and $50,000 in aggravated damages, who had been sexually harassed by a lawyer who had employed her and represented her in mediation with her former partner. The conduct included emails suggesting they begin a personal relationship, hugging her, appearing in her room in his underwear on a work trip, and making 'veiled threats' that her employment depended on her engaging in a sexual or romantic relationship with him. At the time of writing this report, this decision was under appeal.

Fraser-Kirk v David Jones Limited[1377]**—out of court settlement of $850,000:**

A woman alleged the then CEO of David Jones sexually assaulted her, and made various claims against her employer, David Jones, the CEO and senior management in the Federal Court for $37 million. She accepted a settlement of $850,000, made up of a contribution from David Jones and the CEO.[1378]

Collins v Smith[1379]**—$330,000 award:**

The Victorian Civil and Administrative Tribunal awarded a woman more than $330,000 for being repeatedly sexually harassed by her employer, the owner and manager of a post office, over the course of approximately four months. The conduct included: requests for sex, inappropriate touching and an attempt to kiss, sexual comments, and sexualised text messages.

The Deloitte Report estimated the cost of compensation paid to victims of workplace sexual harassment was approximately $18,000 per case in 2018, based on research on complaints to the Commission.[1380] It did not estimate other legal costs for Australian employers (such as costs of legal representation), or consider the significantly higher costs of compensation awarded in courts or tribunals.[1381]

Damages awarded by courts and tribunals in favour of victims have been increasingly rising to reflect the severe psychological damage which sexual harassment can have on individuals, and to align with prevailing community standards. Damages in workplace sexual harassment cases are discussed further in Section 5, 'The legal and regulatory framework'.

(d) Impacts on communities

Given the centrality of workplaces in communities, workplace sexual harassment can cause significant 'ripple' effects within communities that extend far beyond the individual victim.

There is limited research on the consequences of workplace sexual harassment on communities. Some trauma studies suggest that serious events, such as workplace sexual harassment, can lead to 'cultural trauma'; a social disturbance that can impact upon group identity, social cohesion and group safety.[1382] The Commission heard that in the context of sexual harassment these impacts were amplified in small or tightly knit communities, including rural, regional and remote (RRR) communities and Aboriginal and Torres Strait Islander communities.

(i) Small communities

The Commission heard that the unique characteristics of small and RRR communities can act as a disincentive for victims to report sexual harassment, contributing to a community culture of normalisation and acceptance in these communities. In its submission to the National Inquiry, the Rural, Regional and Remote Women's Network of Western Australia describes the rural context as having a 'noticeable imbalance of power which makes for a complicated space for women.'[1383]

A reluctance to report in small communities was a common theme in submissions and consultations. In its submission to the Commission, the Northern Territory (NT) Anti-Discrimination Commission noted that despite the #MeToo movement encouraging many people to speak out about past incidents of sexual harassment, there was 'no change' in the number of sexual harassment complaints it had received:

> We believe the reason for the low level of formal complaints is because of the small population size of the NT and the risks associated with speaking up in a small community … It is not uncommon that formal complaints lodged are made after someone has left their role or after they have left the NT.[1384]

In circumstances where victims feel their only option to report is to someone connected to the harasser, this can lead to even greater consequences within the community. Research suggests that the lack of anonymity and privacy associated with small and RRR communities can lead to elevated scrutiny of community members involved in allegations of sexual harassment or assault.[1385] High levels of 'acquaintance density'—familiarity with people in the community—can lead to both victim and harasser being the subject of community gossip, causing fragmentation and conflict in tight-knit communities or damaging otherwise close community ties.[1386]

Interpersonal relationships are often closely entwined in small communities. Victims and harassers may also be more likely to continue to encounter each other in public places and social events, 'because public space and community relations are likely to be far more localised and intimate'.[1387]

The NT Anti-Discrimination Commission also noted that they heard women in small communities sometimes created their own networks within the community to 'seek to protect other female employees', including 'warning them not to socialise with certain individuals, suggesting other protective behaviour or warning them from working with a particular organisation to avoid an individual.'[1388] The Commission heard that this could create a fragmented community, potentially polarising small towns and creating gender divides.[1389]

(ii) Aboriginal and Torres Strait Islander communities

Aboriginal and Torres Strait Islander communities, like many indigenous colonised populations, are marked by experiences of collective trauma and grief. The intergenerational impacts of dispossession, marginalisation and institutionalisation continue to be felt by Aboriginal and Torres Strait Islander communities today.[1390] This has resulted in significant physical, mental, spiritual and social harm to community members, as individuals and as part of a social and cultural group,[1391] and impacts on a community's capacity to manage and respond to any additional traumatic event.

Research concerning the impacts of workplace sexual harassment on Aboriginal and Torres Strait Islander communities is very limited. However, the 2018 National Survey found that more than half (53%) of Aboriginal and Torres Strait Islander people who have been in the workforce in the last five years said they had experienced workplace sexual harassment in that time, compared with 32% for the general population (see Section 3.5(c)).[1392]

Further experiences of harm to a community member, such as workplace sexual harassment, can add to the cumulative trauma of the community.[1393] As the workplace is an important social institution, any workplace sexual harassment can exacerbate collective community feelings of distrust for institutions more broadly. This can affect the willingness of community members to access services, such as healthcare or support services, to manage any impacts associated with an incident of workplace sexual harassment.[1394]

Aboriginal and Torres Strait Islander communities also have unique extended kinship structures and family and community roles.[1395] Interpersonal relationships between community members are very closely entwined. In consultations, the Commission heard that for some people in these communities, an incident of workplace sexual harassment could significantly affect relationships outside the workplace.

> Working in an [Aboriginal and Torres Strait Islander] workplace, you're with your mob. You don't want to talk to anyone and make a big deal. The likelihood is the people you're telling have relationships outside work and you can't talk about it.[1396]

(e) Broader societal and economic impacts of workplace sexual harassment

Throughout this Inquiry, the Commission heard about the impacts of workplace sexual harassment on broader Australian society. This included economic costs to Australian governments in lost taxes as a result of less productive workers and workplaces, and increased spending on the health and justice system. The Commission also heard about the broader social impact of sexual harassment in the workplace in perpetuating inequality and undermining a harmonious civil society.

(i) Costs to Australian governments

As noted above, the Deloitte Report estimated that in 2018, workplace sexual harassment in Australia cost around $2.6 billion in lost productivity (i.e. the loss of gross domestic product from workplace sexual harassment).[1397] While employers shouldered 70% of these costs,[1398] Australian governments also incurred a significant proportion (23%), losing $611.6 million in taxes through reduced individual and company taxes.[1399]

The Deloitte Report estimated other costs to governments related to workplace sexual harassment of around $275.3 million.[1400] This included:

- the costs of addressing a complaint lodged with the Commission or a state anti-discrimination agency[1401]
- spending on health system costs (including Australian Government Medicare rebates for accessing doctors, psychologists or counsellors, medications prescribed to victims, and injuries in cases of sexual assault)[1402]
- spending on justice system costs (including police and court costs, and incarceration costs for perpetrators in sexual assault cases).[1403] Due to the lack of data available, the Deloitte Report did not consider costs of matters that were investigated or dealt with by other bodies such as the Fair Work Commission, unions or anti-discrimination tribunals.[1404]

The Deloitte Report also estimated that 'deadweight losses' as a result of workplace sexual harassment (where governments increase taxes above the level they would have been in the absence of workplace sexual harassment—for example, to pay for additional health services) cost Australian society more than $423 million. These 'deadweight losses' were associated with government expenditure, lost taxation revenue, and increased welfare payments due to unemployment.[1405]

(ii) Civil society

Although difficult to quantify, sexual harassment has considerable social impacts on Australian civil society.

Social integration and harmonious relations are essential components of a functioning civil society. Research has suggested that workplaces play a crucial role in supporting cooperative social environments that promote public engagement and societal equality, and the workplace is the 'single most important site of cooperative interaction and sociability among adult citizens outside the family'.[1406]

The workplace can be a positive cultural and societal force. If a workplace is collaborative, safe and respectful of diversity, it can have a ripple effect in transforming attitudes beyond the workplace. The ILO and UN Women handbook, *Addressing violence and harassment against women in the world of work,* noted that the workplace is 'an important entry point for the prevention of violence and harassment against women in society more broadly'.[1407]

Work plays an important role in how people understand themselves, and their perceptions of society. The workplace is a unique forum that allows for exposure to, and exchange of views with, people from different groups, with different political beliefs and identities. Research has suggested that the workplace is 'an important tool for exporting progressive values'.[1408]

Conversely, workplaces can be a destructive social force, and can play a key role in maintaining relationships of power that sustain and perpetuate gender inequality.[1409] Workplaces can 'breed civil discord just as easily as they can foster civil harmony'.[1410]

As discussed in Section 3.4, toxic work environments that implicitly or explicitly tolerate and normalise sexual harassment can create a climate of discrimination and violence against women more broadly.[1411] Because the workplace can help serve to establish public discourse on sexual harassment, tolerant attitudes and behaviours towards sexual harassment in the workplace can perpetuate gender inequality and entrench it further in society.[1412]

Further, sexual harassment and economic disempowerment are inextricably linked where the disruption to careers and income can create economic instability for victims and bystanders. The economic empowerment of women is central to realising gender equality.

Lower labour participation rates of women and women's position of vulnerability in the labour market contribute to persistent gender inequalities in economic and social life.[1413] This can have flow-on effects to the broader economy. For example, a 2018 report by KPMG suggested that if the gap between male and female workforce participation rates could be halved, Australia's annual GDP would increase by $60 billion in 20 years.[1414]

This link is increasingly recognised by leaders in the business community. The submission from Chiefs for Gender Equity, a coalition of senior South Australian business leaders representing key industry sectors, noted that workplace power dynamics are driven by gender inequality, which 'in turn contributes to a culture where women are undervalued at work, which intensifies the power imbalance, paving the way for sexual harassment.'[1415]

(f) Economic modelling on the costs of workplace sexual harassment

The Deloitte Report estimated that the cost of workplace sexual harassment in Australia was approximately $3.8 billion in 2018. This cost was shared by individuals, employers, government and society, as set out in Table 3.4 below. Lost productivity made up the greatest proportion, with the largest productivity-related costs falling on Australian employers.

Table 3.4: Economic costs of workplace sexual harassment in 2018, by payer

	Individuals ($m)	Employers ($m)	Government ($m)	Society ($m)	Total ($m)
Productivity	170.5	1,840.1	611.6	–	**2,622.2**
Other costs	103.5	134.3	275.3	423.5	**936.5**
Lost wellbeing*	249.6	–	–	–	**249.6**

Source: Deloitte Access Economics analysis. Note: *lost wellbeing was limited to Category 4 cases as outlined in Chapter 3.

The Deloitte Report is the first attempt in Australia to scope the economic costs of workplace sexual harassment. To the Commission's knowledge, this is the first time in any country that the cost of sexual harassment has been quantified across all sectors of the economy. Critical to this work has been the data drawn from the Commission's nationally representative survey.

However, the Deloitte Report indicated that due to limitations in the available data and research, the results of the modelling were likely to be a 'conservative estimate of the cost of workplace sexual harassment'.[1416]

The economic modelling relied on data from the 2018 National Survey, and also on data from a 1995 Merit Systems Protection Board survey of Federal Government Employees in the United States (MSPB survey). The Deloitte Report set out several limitations to these sources of data, including:[1417]

- The MSPB survey related to US government employees which limited its application to the Australian population and to non-government workers.
- As the MSPB survey was conducted over 20 years ago, it may not reflect current attitudes towards sexual harassment or responses of victims.
- The 2018 National Survey was not designed for the purpose of estimating the costs of workplace sexual harassment.[1418] Some of the data from the survey—used to calculate certain costs including staff turnover, lost manager time, and justice system costs—was not based on all victims of workplace sexual harassment, but on a much smaller proportion of victims who said they made a formal report or complaint. The Deloitte Report noted that this may have underestimated the costs of lost productivity.
- The extent of health system costs may also have been underestimated because of the questions used to collect this data in the 2018 National Survey.[1419]

The economic modelling was based on a framework developed to determine the average cost of an incident of workplace sexual harassment, which may also have produced a conservative estimate of the impacts experienced by victims. This framework took into account:

- the nature of the sexually harassing behaviour (or 'severity' of the behaviour)
- the harasser (for example, whether they were a supervisor)

- the duration of the sexual harassment (including whether the behaviour was once-off, repeated behaviours over a period of less than six months, or repeated behaviours which occurred for longer than months).[1420]

However, this framework did not take into account the range of other complex factors which affect the impacts experienced by victims. As discussed in Section 3.8(a)(i), these included victims' previous experiences of sexual harassment or other trauma over the course of their lifetime, their personal characteristics or attributes, and their experiences of reporting or the availability of support.

A major limitation of the modelling was that it could not take into account the long-term costs of sexual harassment beyond two years. In particular, due to the lack of longitudinal data available, the cost of health, financial and career impacts on victims of sexual harassment over time are unknown.

The Deloitte Report summarises the range of costs that were included in the model, and those that could not be included.[1421] The Deloitte Report recommended that consideration be given to capturing data on some of the costs not included in the model in future surveys on workplace sexual harassment.[1422] The Commission supports this recommendation.

Throughout this Inquiry, the Commission heard about a range of additional costs relating to workplace sexual harassment which also were not included in the modelling, as discussed in this section. Some of these were:

- reduced productivity, absenteeism, career-related impacts or reduced wellbeing of workers other than victims who may be affected or involved in a workplace sexual harassment matter (such as harassers and bystanders)
- court-awarded compensation and legal costs incurred by employers and harassers in workplace sexual harassment cases
- workers' compensation costs
- justice system costs for anti-discrimination tribunals and other bodies that regularly handle workplace sexual harassment matters.

The Commission's view

It is clear that building the evidence base on sexual harassment is imperative to develop an understanding of the full extent of the impact these behaviours on individual victims, workplaces and broader society. This evidence base is critical to assisting governments and employers to understand the scope of the issue and what investment is warranted to reduce the cost and harm of sexual harassment.

The estimate of costs in the Deloitte Report provides an important starting point. This economic modelling is critical pioneering work which can set a global benchmark over time. Broader data collection on the impacts of workplace sexual harassment will enhance the accuracy of future estimates of these costs.

Through this Inquiry, the Commission has been able to examine for the first time the magnitude of the problem of sexual harassment in Australian workplaces, through data from the national survey and economic modelling, research, consultations and submissions from individuals and organisations.

The Inquiry provides a compelling case for investment and action by Australian governments and employers for the prevention of workplace sexual harassment, to contribute to significantly better health and economic outcomes for Australia. Combined with the information gathered by the Commission through its national surveys, future economic modelling will help create a comprehensive understanding of the nature, extent and impacts of sexual harassment in Australia.

In Section 3.2, the Commission recommends that it periodically conduct a nationally representative survey that collects data on the prevalence, nature, responses to and impacts of sexual harassment—including at a detailed industry level—and that identifies trends over time. Relevant agencies and regulatory bodies should collect more consistent data on workplace sexual harassment matters. In addition to this, there is a need for further research to better inform understanding of the impacts of workplace sexual harassment, particularly long-term, to individuals, businesses and society more broadly.

Future research, data collection and survey design should take into account the data gaps identified throughout this section, as well as the recommendations of the Deloitte Report regarding the need for improved data collection on the impacts of workplace sexual harassment.

This will allow for estimates of the economic costs of workplace sexual harassment based on more accurate information. It will also assist Australia to measure its progress in reducing sexual harassment and ensuring safer and more productive workplaces.

3.9 National Sexual Harassment Research Agenda

> One of our key observations [is] the need to support more and rigorous research into the diverse situations facing targets of sexual harassment in employment and ways that it can be addressed. Such research should be focused on specific groups in the workforce such as culturally diverse women and men, young people, older people, indigenous Australians, LGBTQ and people with disability. It should engage business leaders and [human resource management] professionals, drawing on organizational behavior, employment relations, human resource management theory and practices. It should also seek to engage advocacy groups and community groups that are familiar with the diverse challenge[s] and circumstances of women and men of diverse social identities.[1423]

Through this Inquiry, the Commission has for the first time been able to examine in detail the magnitude of the problem of sexual harassment in Australian workplaces, on the basis of data from the 2018 National Survey, economic modelling, existing research, consultations and submissions.

The Commission consistently heard about the importance of research and data in developing an evidence base to understand the extent, nature, causes and impacts of sexual harassment.

In addition to the periodic national surveys conducted by the Commission, which serve as critical monitoring mechanisms and an important source of data on sexual harassment, the Commission considers that an overarching National Sexual Harassment Research Agenda should be developed.

The purpose of a National Sexual Harassment Research Agenda is to provide strategic direction for the development of a national evidence base that can inform policy and practice to address sexual harassment. It will provide a coordinated method for identifying national research priorities.

(a) What we know

There is strong evidence that gender inequality is a 'root cause' of violence against women and that sexual harassment shares the same underlying gendered drivers as other types of violence against women.

The 2018 National Survey and other evidence indicate that certain population groups are more at risk of workplace sexual harassment than others and experience sexual harassment disproportionately—particularly women, young workers, LGBTQI workers, Aboriginal and Torres Strait Islander workers, workers with disability, workers from CALD backgrounds, migrant workers or workers on temporary visas, and other workers in insecure work arrangements.

Emerging research also indicates that online or technology-facilitated sexual and sex-based harassment is experienced by workers in a broad range of industries, sectors and work environments.

Similarly, this Inquiry has considered evidence that has shown that certain workplace characteristics can contribute to sexual harassment, including: male-dominated workplaces; work involving high levels of contact with customers, clients or patients; and hierarchical workplace structures.

Sexual harassment can have wide-reaching impacts (short- and long-term) on victims, bystanders, family, friends and harassers. It also represents an economic cost for businesses, communities and the broader Australian society.

The range of negative impacts of workplace sexual harassment includes: impacts on health and wellbeing; impacts on employment (day-to-day work or entire careers); significant financial consequences; lost productivity and staff turnover; litigation costs; reputational costs; and systems, such as the legal system and government and social services.

(b) Evidence gaps

Through the National Inquiry, the Commission has identified critical gaps in the evidence available on the risk factors that make particular groups of people more likely to experience sexual harassment.

There is also limited data and a need for better research on the behaviours and characteristics of harassers, which is critical to assist employers to identify and address risks in their workplace and inform targeted prevention initiatives and improved responses, across different workplace settings.

The Deloitte Report also recommended the need for improved data collection on the impacts of workplace sexual harassment. Broader data collection on the impacts of workplace sexual harassment will enhance the accuracy of future estimates of these costs, to assist governments and employers understand the scope of the issue and to better target investment to reduce the harm of sexual harassment.

As the Commission explores in Section 4, 'Prevention outside the workplace', evidence relating to the primary prevention of violence against women is a critical source of guidance for efforts to prevent sexual harassment. However, as much of the available evidence is drawn from evaluations of strategies to prevent domestic and family violence and sexual violence, there is a need to first develop the evidence base in relation to the effectiveness of strategies for the primary prevention of sexual harassment.

The Commission's view

The Commission considers that further research is needed to address evidence gaps relating to sexual harassment, including those identified in this report. The research should explicitly examine the overlapping vulnerabilities between at-risk populations, harasser characteristics, specific workplace settings and work arrangements, risks associated with particular industries and occupational groups and the impacts of workplace sexual harassment.

In the Commission's view, the development of a National Sexual Harassment Research Agenda is needed to provide a mechanism that will ensure a coordinated and comprehensive national approach to address gaps in the evidence base on sexual harassment.

The National Sexual Harassment Research Agenda should align with commitments for research in the area of sexual harassment under the *Fourth Action Plan—National Plan to Reduce Violence against Women and their Children 2010–2022* (the Fourth Action Plan). This is especially important now that sexual harassment has been clearly identified as an area for action under the Fourth Action Plan (see Section 4, 'Prevention outside the workplace', for further discussion).

The National Sexual Harassment Research Agenda should be guided by, amongst other things, findings of the Commission's 2018 National Survey, as well as the issues and evidence gaps emerging from the National Inquiry and identified in this section, including:

- the prevalence and nature of sexual harassment, particularly technology-facilitated sexual harassment
- risk factors that lead to greater exposure to sexual harassment for particular population groups, including women, young workers, LGBTQI workers, Aboriginal and Torres Strait Islander workers, workers with disability, workers from CALD backgrounds, migrant workers or workers on temporary visas, and other workers in insecure work arrangements
- the prevalence, nature, reporting, impacts of and responses to sexual harassment for workers in these population groups
- behaviours, characteristics and trends in relation to sexual harassers
- risk factors that create an environment in which sexual harassment is more likely to occur in particular workplace settings, arrangements, industries and sectors

- the impacts (particularly long-term) of workplace sexual harassment on individuals, businesses and society more broadly and the economic costs of workplace sexual harassment
- the effectiveness of strategies for the primary prevention of sexual harassment.

The Commission recommends that Australia's National Research Organisation for Women's Safety (ANROWS) leads the development of the National Sexual Harassment Research Agenda in consultation with the Workplace Sexual Harassment Council. ANROWS is an initiative of the *National Plan*, with a mission to deliver 'research evidence which drives policy and practice leading to a reduction in the levels of violence against women and their children.'[1424]

ANROWS is leading an update of *Australia's National Research Agenda to Reduce Violence against Women and their Children* (ANRA) for 2020–25. This comprehensive research agenda was first developed by ANROWS in 2013–14. It established a framework for a cohesive national evidence base, informing the development of ANROWS's research priorities to date, and providing guidance for researchers, research organisations and funders on evidence gaps for policy and practice across Australia.

Given the view outlined earlier in this report—that sexual harassment is driven by gender inequality and is a form of violence against women—as well as ANROWS's oversight of ANRA, the Commission considers that ANROWS is best placed to lead the development of the National Sexual Harassment Research Agenda and ensure it aligns with the broader national agenda for research on reducing violence against women.

RECOMMENDATION 4:

The Australian Government supports the development and implementation of a National Sexual Harassment Research Agenda, which will identify priorities for research relating to sexual harassment (in addition to the National Sexual Harassment Survey) and contribute to a national evidence base on sexual harassment that can guide policy and practice. ANROWS should lead this work in consultation with the Workplace Sexual Harassment Council (as recommended in Recommendation 14).

1 Individual, Submission 29, *Sexual Harassment Inquiry*.
2 Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*.
3 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 12.
4 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 14.
5 The survey also asked those people whether they had experienced workplace sexual harassment in the last 12 months. See Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 12, 150.
6 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26.
7 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26.
8 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 25.
9 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 28.
10 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 28.
11 Marian Baird et al, *Women and the Future of Work* (Report 1 of the Australian Women's Working Futures Project, 2018) 92.
12 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 8, 27.
13 Unpublished data from the 2018 national survey on sexual harassment in Australian workplaces.
14 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 27.
15 Unpublished data from the 2018 national survey on sexual harassment in Australian workplaces.
16 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 102–3. It is important to note that a change in methodology occurred in 2012, with all survey respondents being asked about their experiences of sexual harassment behaviours. See also the discussion at Section 3.2(b), above.
17 See Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 99–100 for an outline of changes to the National Survey over time.
18 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 101.
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73 The numbers of complaints are counted by complainant. Each complainant may make allegations in relation to more than one respondent and more than one ground and area. The data presented here may differ from the data published in annual reports for some State and Territory jurisdictions which count the number of complaints by ground, area or respondent, rather than by complainant.
74 The following is the proportion of sexual harassment enquiries related to the area of employment in each jurisdiction: 90% in NSW; 82% in the NT; 61% in Queensland; 79% in SA; 90% in Tasmania; 87% in Victoria; and 84% in WA. Meanwhile, 76% of sexual harassment enquiries received by the Commission related to the area of employment. The ACT did not provide the Commission with data on enquiries. Meanwhile, 76% of sexual harassment enquiries received by the Commission related to the area of employment.
75 The numbers of complaints are counted by complainant. Each complainant may make allegations in relation to more than one respondent and more than one ground and area. The data presented here may differ from the data published in annual reports for some State and Territory jurisdictions which count the number of complaints by ground, area or respondent, rather than by complainant.
76 For example, in Tasmania in 2017–18, of the 13 employment-related sexual harassment complaints received, the highest proportion of complaints were lodged by people aged 30–39 years (5 complaints, or 38%), followed by people aged 20–29 (4 complaints, or 31%). Data from the Equal Opportunity Commission WA shows that the 25–34 age group had the highest share of sexual harassment complaints in WA in 2017–18.
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349 The full-time total remuneration gender pay gap based on 2018–19 Workplace Gender Equality Agency data is 20.8%. See Australian Government, Workplace Gender Equality Agency, 'All Industries: Gender Pay Gaps', *WGEA Data Explorer* (Database) <data.wgea.gov.au/industries/1#pay_equity_content>. The Workplace Gender Equality Agency explains the gender pay gap 'measures the difference between the average earnings of women and men in the workforce' and is 'an internationally established measure of women's position in [the] economy in comparison to men'. See Australian Government, Workplace Gender Equality Agency, 'The Gender Pay Gap', *Topics* (Web Page, 2018) <www.wgea.gov.au/topics/the-gender-pay-gap>.

350 In 2018–19, the underemployment rate was 9.4% for women aged 20–74 and 5.6% for men in the same age group. See Australian Bureau of Statistics, 4125.0—Gender Indicators, Australia, Feb 2015 2015 ('4125.0—Gender Indicators, Australia, Feb 2015'), Table 1.15. The glossary for the Australian Bureau of Statistics' Labour

Force, Australia survey defines 'underemployment rate' as 'the number of underemployed workers expressed as a percentage of the labour force'. Australian Bureau of Statistics, *Labour Force Australia* (Catalogue No 6202.0, 14 November 2019). 'Underemployed workers' are 'employed people aged 15 years and over who want, and are available for, more hours of work than they currently have'. See Australian Bureau of Statistics, *Labour Force Australia* (Catalogue No 6202.0, 18 October 2018) 11.

351 Kim Webster and Michael Flood, *Framework Foundations 1: A Review of the Evidence on Correlates of Violence Against Women and What Works to Prevent It* (companion document to *Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and their Children in Australia*, Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and Victorian Health Promotion Foundation (VicHealth), 2015) 22.

352 Kim Webster and Michael Flood, *Framework Foundations 1: A Review of the Evidence on Correlates of Violence Against Women and What Works to Prevent It* (companion document to *Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and their Children in Australia*, Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and Victorian Health Promotion Foundation (VicHealth), 2015) 23–4.

353 Our Watch, Submission 281, *Sexual Harassment Inquiry*, 10–11.

354 Consultation with men (male-dominated industries), Albury Wodonga.

355 Prof L Heap, Submission 293, *Sexual Harassment Inquiry*, 3.

356 Prof L Heap, Submission 293, *Sexual Harassment Inquiry*, 2.

357 Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 6.

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360 Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and the Victorian Health Promotion Foundation (VicHealth), *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (2015) 23.

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370 Individual, Submission 26, *Sexual Harassment Inquiry*.

371 Individual, Submission 266, *Sexual Harassment Inquiry*.

372 See, eg, Office of the eSafety Commissioner, Submission 253, *Sexual Harassment Inquiry*; Springvale Monash Legal Service, Submission 278, *Sexual Harassment Inquiry*; Our Watch, Submission 281, *Sexual Harassment Inquiry*; Diversity Council Australia, Submission 282, *Sexual Harassment Inquiry*; Women with Disabilities Victoria, Submission 312, *Sexual Harassment Inquiry*; Science & Technology Australia, Submission 327, *Sexual Harassment Inquiry*; Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*.

373 Purna Sen et al, *Towards an End to Sexual Harassment: The Urgency and Nature of Change in the Era of #MeToo* (UN Women, November 2018) 3, 7.

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376 Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*, 12.

377 International Labour Office, *Ending Violence and Harassment Against Women and Men in the World of Work* (ILC.107/V/1, International Labour Conference, 2018) 30 [119]–[120].

378 International Labour Office Director-General, *Fifth Supplementary Report: Outcome of the Meeting of Experts on Violence against Women and Men in the World of Work*, International Labour Office Governing Body, 328th sess, Agenda Item 17, GB.328/INS/17/5 (25 October 2016) 7 [12].

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380 Helen Campbell and Suzi Chinnery, *What Works? Preventing and Responding to Sexual Harassment in the Workplace: A Rapid Review of Evidence* (CARE Australia, November 2018) 33.

381 Chelsea R Willness, Piers Steel and Kibeom Lee, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60(1) *Personnel Psychology* 127, 148, 150; Louise F Fitzgerald et al, 'Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model' (1997) 82(4) *Journal of Applied Psychology* 578, 219; Louise F Fitzgerald and Lilia M Cortina, 'Sexual Harassment in Work Organizations: A View From the 21st Century' in Cheryl B Travis and Jacquelyn W White (eds), *APA Handbook of the Psychology of Women, Volume 2: Perspectives on Women's Private and Public Lives* (APA Handbooks in Psychology Series, 2018) 215, 219; Paula A Johnson, Sheila E Widnall, and Frazier F Benya (eds), *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Committee on the Impacts of Sexual Harassment in Academia and Committee on Women in Science, Engineering, and Medicine, Policy and Global Affairs, The National Academies of Sciences, Engineering, and Medicine, 2018) 47.

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388 Individual, Submission 13, *Sexual Harassment Inquiry*; Individual, Submission 94, *Sexual Harassment Inquiry*.

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412 Consultation with employers, Adelaide.

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414 See also Consultation with employers (manufacturing and mining industries), Newcastle; Consultation with men (STEM industry), Melbourne; Consultation with women (Aboriginal and Torres Strait Islander workers), Darwin; Consultation with policy stakeholders (CALD women and girls), Melbourne.

415 Consultation with policy stakeholders, Canberra.

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417 Consultation with government stakeholders, Melbourne.

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447 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26.

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Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth) sch 1, pt 1(12). Under the Sex Discrimination Act, 'gender identity' is defined as 'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth'. 'Transgender' is a general term used to describe a person whose gender identity is different from the sex they were assigned at birth. *Sex Discrimination Act 1984* (Cth) s 4(1). 'Intersex status' means the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male, a combination of female and male, or neither female nor male. *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) sch 1, pt 1(7). Respondents to the 2018 National Survey were given the option of identifying their sexual orientation in their preferred way from the following list: straight or heterosexual, gay, lesbian, bisexual, pansexual, queer, asexual or aromantic, undecided, not sure or questioning, and other (please specify). This report also uses LGBTI where this is the term that has been used by the relevant reference or submission.

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662 Unions NSW, Submission 354, *Sexual Harassment* Inquiry, 43–8; National Union of Workers, Submission 365, *Sexual Harassment Inquiry*, 23–7; Jesuit Refugee Service, Submission 396, *Sexual Harassment Inquiry*, 3–5; Federation of Ethnic Communities' Councils of Australia, Submission 414, *Sexual Harassment Inquiry*, 3–6.
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665 Unions NSW, Submission 354, *Sexual Harassment Inquiry*, 45.
666 Australian Government, Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working Under the 417 Working Holiday Visa Program* (October 2016) 27.
667 Unions NSW, Submission 354, *Sexual Harassment Inquiry*, 45.
668 Consultation with policy stakeholders, Melbourne.
669 Unions NSW, Submission 354, *Sexual Harassment Inquiry*, 43–8; National Union of Workers, Submission 365, *Sexual Harassment Inquiry*, 23–7; Jesuit Refugee Service, Submission 396, *Sexual Harassment Inquiry*, 3–6.
670 Victoria Legal Aid, Submission 283, *Sexual Harassment Inquiry*, 18.
671 Since 2015, the Department of Home Affairs and the Fair Work Ombudsman have engaged in data sharing, through the Australian Border Force's Taskforce Cadena, to cooperate on issues related to illegal work, visa fraud and exploitation of migrant workers. Consultation with policy stakeholders (temporary visa holders), Sydney (Ashfield); Public consultation, Hobart.
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673 Jesuit Refugee Service, Submission 396, *Sexual Harassment Inquiry*, 4.
674 For an assessment of the Assurance Protocol and recommendations to improve it, see Australian Government, *Report of the Migrant Workers' Taskforce* (March 2019) 49–52.
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676 Australian Government, *Report of the Migrant Workers' Taskforce* (March 2019) 12.
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690 JobWatch, Submission 449, *Sexual Harassment Inquiry*, 13.
691 Australian Council of Trade Unions, Submission 306, *Sexual Harassment Inquiry*, 15.
692 Union roundtable, Melbourne.
693 Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*.
694 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 29–31.

695 Anthony D LaMontagne et al, 'Unwanted Sexual Advances at Work: Variations by Employment Arrangement in a Sample of Working Australians' (2009) 33(2) *Australian and New Zealand Journal of Public Health* 173, 176.

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701 Australian Council of Trade Unions, Submission 306, *Sexual Harassment Inquiry*, Victorian Trades Hall Council, Submission 329, *Sexual Harassment Inquiry*, 14.

702 Our Watch, Submission 281, *Sexual Harassment Inquiry*, 12.

703 Australian Council of Trade Unions, 'The Future of Work in Australia: Dealing with Insecurity and Risk: An ACTU Options Paper on Measures to Promote Job and Income Security' (Options Paper, 28 November 2011) 3.

704 Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 10.

705 Women's Electoral Lobby, Submission 297, *Sexual Harassment Inquiry*, 10.

706 Women with Disabilities Victoria, Submission 312, *Sexual Harassment Inquiry*, 17. Latest trends in the disability support workforce show that casual employment as a proportion of the total increased from 40% in September 2015 to 46% in March 2018. See National Disability Services, *Australian Disability Workforce Report* (3rd ed, July 2018) 5.

707 Springvale Monash Legal Service, Submission 278, *Sexual Harassment Inquiry*, 4; Prof S Bertone and Prof L Colley, Submission 338, *Sexual Harassment Inquiry*, 4; Young Women's Advisory Groups of Equality Rights Alliance and Harmony Alliance, Submission 353, *Sexual Harassment Inquiry*, 3; Federation of Ethnic Communities' Councils of Australia, Submission 414, *Sexual Harassment Inquiry*, 3. Victoria Legal Aid, Submission 283, *Sexual Harassment Inquiry*, 18.

708 Prof P McDonald and Prof S Charlesworth, Submission 170, *Sexual Harassment Inquiry*, 15.

709 Consultation with policy stakeholders (health and social services sector), Sydney (Parramatta).

710 Consultation with policy stakeholders, Melbourne.

711 Public consultation, Melbourne.

712 Individual, Submission 20, *Sexual Harassment Inquiry*.

713 NSW Young Lawyers Human Rights Committee, Submission 308, *Sexual Harassment Inquiry*, 12.

714 Consultation with policy stakeholders (temporary visa holders), Sydney (Ashfield).

715 National Union of Workers, Submission 365, *Sexual Harassment Inquiry*, 32.

716 Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 6.

717 Individual, Submission 292, *Sexual Harassment Inquiry*.

718 As noted in Section 1.5, 'Terminology used in this report', this report uses the term 'harasser' to describe a person who has had an allegation made against them, as well as a person who has been found or proven to have engaged in workplace sexual harassment through a formal process. The use of the term 'harasser' is not intended to suggest that there has been a finding of guilt in relation to a criminal offence or a breach of anti-discrimination legislation (or other relevant law).

719 See, eg, Paula McDonald, 'Workplace Sexual Harassment 30 Years on: A Review of the Literature' (2012) 14(1) *International Journal of Management Reviews* 1, 7; Joni Hersch, 'Sexual Harassment in the Workplace' (IZA World of Labor, No 188, September 2015) 5; Afroditi Pina, Theresa A Gannon and Benjamin Saunders, 'An Overview of the Literature on Sexual Harassment: Perpetrator, Theory, and Treatment Issues' (2009) 14(2) *Aggression and Violent Behavior* 126,129

720 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 32.

721 United States Merit Systems Protection Board, 'Update on Sexual Harassment in the Federal Workplace' (Research Brief, March 2018) 7.

722 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 32.

723 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 32.
724 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 32.
725 Research into multiple perpetrators of sexual assault is more accessible. For a literature review relating to multiple perpetrator sexual assault, see Sarah Michal Greathouse et al, *A Review of the Literature on Sexual Assault Perpetrator Characteristics and Behaviors* (RAND Corporation, 2015).
726 Beth A Quinn, 'Sexual Harassment and Masculinity: The Power and Meaning of "Girl Watching"' (2002) 16(3) *Gender & Society* 386.
727 Sarah Michal Greathouse et al, *A Review of the Literature on Sexual Assault Perpetrator Characteristics and Behaviors* (RAND Corporation, 2015) xiii.
728 Individual, Submission 225, *Sexual Harassment Inquiry*.
729 Individual, Submission 197, *Sexual Harassment Inquiry*, 2.
730 Individual, Submission 166, *Sexual Harassment Inquiry*, 5.
731 Individual, Submission 11, *Sexual Harassment Inquiry*.
732 Individual, Submission 89, *Sexual Harassment Inquiry*.
733 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 33.
734 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 33.
735 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 34.
736 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 35.
737 Figure 3.3 shows all incidents of workplace sexual harassment by men and/or women where there was a single harasser or where there were multiple harassers. As the data collected for multiple harassers could include men, women or a mix of genders, the total sum is more than 100%. This data excludes any incident where the gender was other than male or female, was unknown or was not disclosed by the respondent. See Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 33.
738 See, eg, Paula McDonald, 'Workplace Sexual Harassment 30 Years on: A Review of the Literature' (2012) 14(1) *International Journal of Management Reviews* 1, 7; Joni Hersch, 'Sexual Harassment in the Workplace' (IZA World of Labor, No 188, September 2015) 5; Afroditi Pina, Theresa A Gannon and Benjamin Saunders, 'An Overview of the Literature on Sexual Harassment: Perpetrator, Theory, and Treatment Issues' (2009) 14(2) *Aggression and Violent Behavior* 126,129.
739 For example, in 2016 the Trades Union Congress polled more than 1,533 women in the United Kingdom and surveyed union members, and found that in 9 out of 10 cases, the perpetrator was male. See Trades Union Congress in Association with the Everyday Sexism Project, *Still Just a Bit of Banter?* (2016); a 2016 survey of federal government employees in the United States found that approximately two-thirds (68%) of sexual harassment perpetrators were male, 18% were women and 14% involved both males and females. See United States Merit Systems Protection Board, 'Update on Sexual Harassment in the Federal Workplace' (Research Brief, March 2018).
740 See, eg, Victorian Health Promotion Foundation (VicHealth), Submission 147, *Sexual Harassment Inquiry*; Our Watch, Submission 281, *Sexual Harassment Inquiry*.
741 Australian Human Rights Commission, *Everyone's Business: Survey on Sexual Harassment of Members of the Shop, Distributive and Allied Employees' Association* (2019) 66.
742 Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*. Note that complaints data received by the Commission as set out in Appendix 5 did not include the gender of the alleged harassers.
743 Individual, Submission 294, *Sexual Harassment Inquiry*; Individual, Submission 139, *Sexual Harassment Inquiry*; Individual, Submission 341, *Sexual Harassment Inquiry*.
744 Consultation with policy stakeholders, Hobart; Individual, Submission 60, *Sexual Harassment Inquiry*.
745 Individual, Submission 75, *Sexual Harassment Inquiry*; Individual, Submission 341, *Sexual Harassment Inquiry*.
746 Individual, Submission 81, *Sexual Harassment Inquiry*; Individual, Submission 266, *Sexual Harassment Inquiry*.
747 Individual, Submission 29, *Sexual Harassment Inquiry*.
748 Individual, Submission 216, *Sexual Harassment Inquiry*; Individual, Submission 454, *Sexual Harassment Inquiry*.
749 Individual, Submission 21, *Sexual Harassment Inquiry*.
750 Individual, Submission 47, *Sexual Harassment Inquiry*.
751 Individual, Submission 120, *Sexual Harassment Inquiry*.
752 Individual, Submission 79, *Sexual Harassment Inquiry*; Individual, Submission 81, *Sexual Harassment Inquiry*; Individual, Submission 175, *Sexual Harassment Inquiry*; Individual, Submission 229, *Sexual Harassment Inquiry*.
753 Individual, Submission 11, *Sexual Harassment Inquiry*.
754 Individual, Submission 217, *Sexual Harassment Inquiry*; Individual, Submission 445, *Sexual Harassment Inquiry*.
755 Individual, Submission 184, *Sexual Harassment Inquiry*; Individual, Submission 266, *Sexual Harassment Inquiry*.
756 Individual, Submission 132, *Sexual Harassment Inquiry*.
757 Individual, Submission 150, *Sexual Harassment Inquiry*; Individual, Submission 187, *Sexual Harassment Inquiry*.
758 Consultation with women (engineering sector), Darwin; Individual, Submission 29, *Sexual Harassment Inquiry*; SDA National, Submission 455, *Sexual Harassment Inquiry*.
759 Individual, Submission 206, *Sexual Harassment Inquiry*; Individual, Submission 235, *Sexual Harassment Inquiry*.
760 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 33.

761 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 33. This was out of 1,522 female respondents and 1,042 male respondents.
762 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 34.
763 Unpublished data from the 2018 National Sexual Harassment Survey.
764 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 34.
765 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 35.
766 Paula McDonald and Sara Charlesworth, 'Workplace Sexual Harassment at the Margins' (2016) 30(1) *Work, Employment and Society* 118, 121.
767 Individual, Submission 166, *Sexual Harassment Inquiry*, 5.
768 Individual, Submission 40, *Sexual Harassment Inquiry*, 3.
769 Individual, Submission 229, *Sexual Harassment Inquiry*, 1.
770 Individual, Submission 444, *Sexual Harassment Inquiry*, 1.
771 Individual, Submission 12, *Sexual Harassment Inquiry*.
772 Individual, Submission 24, *Sexual Harassment Inquiry*.
773 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 59.
774 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 59.
775 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 36.
776 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 12.
777 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 37.
778 Aged 51 years or more. Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 36.
779 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 36.
780 Aged 41 years or more. See Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 37.
781 Bianca Fileborn, 'Conceptual Understandings and Prevalence of Sexual Harassment and Street Harassment' (Resource Sheet, Australian Centre for the Study of Sexual Assault (ACSSA), Australian Institute of Family Studies, July 2013).
782 Individual, Submission 81, *Sexual Harassment Inquiry*.
783 Individual, Submission 26, *Sexual Harassment Inquiry*.
784 Individual, Submission 88, *Sexual Harassment Inquiry*.
785 Individual, Submission 8, *Sexual Harassment Inquiry*.
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787 Individual, Submission 135, *Sexual Harassment Inquiry*.
788 Consultation with policy stakeholders, Hobart; Consultation with policy stakeholders, Melbourne; Consultation with employers, Geraldton; Individual, Submission 81, *Sexual Harassment Inquiry*; Individual, Submission 157, *Sexual Harassment Inquiry*; Individual, Submission 163, *Sexual Harassment Inquiry*.
789 Individual, Submission 11, *Sexual Harassment Inquiry*.
790 Individual, Submission 298, *Sexual Harassment Inquiry*.
791 Aged 21–40 years. Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 36.
792 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 36.
793 Aged 21–30 years. Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 37.
794 Sarah Michal Greathouse et al, *A Review of the Literature on Sexual Assault Perpetrator Characteristics and Behaviors* (RAND Corporation, 2015) 48.
795 Individual, Submission 326, *Sexual Harassment Inquiry*.
796 Individual, Submission 106, *Sexual Harassment Inquiry*.
797 Individual, Submission 87, *Sexual Harassment Inquiry*.
798 Individual, Submission 113, *Sexual Harassment Inquiry*, 1.
799 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 38.
800 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 38–9.
801 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 38–9.
802 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 38.
803 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 38.
804 A survey of more than 6,000 adults in the United Kingdom conducted on behalf of the BBC found that colleagues at the same hierarchical level as the victim were the mostly likely to engage in certain types of sexually harassing behaviours. These types of behaviour include: 'Displays of pornographic or sexually offensive materials which made me feel uncomfortable' (39%), 'Receiving unwanted messages from colleagues with material of a sexual nature on social media' (36%), 'Unwelcome jokes or comments of a sexual nature' (37%), 'Receiving unwelcome advances' (28%), 'Sexual Assault' (31%). See ComRes, *Sexual*

Harassment in the Workplace 2017 (Commissioned by BBC, December 2017) 107. See also United States Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges: A Report to the President and the Congress of the United States* (1995) 18; Deloitte, *Safe Space Survey Report* (January 2019); Jeanette N Cleveland and Melinda E Kerst, 'Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship' (1993) 42(1) *Journal of Vocational Behavior* 49; Eros DeSouza and A Gigi Fansler, 'Contrapower Sexual Harassment: A Survey of Students and Faculty Members' (2003) 48(11–12) *Sex Roles* 529; E Lafontaine and Leslie Tredeau, 'The Frequency, Sources, and Correlates of Sexual Harassment among Women in Traditional Male Occupations' (1986) 15(7–8) *Sex Roles* 433; Kay Hartwell Hunnicutt, 'Women and Violence on Campus' in Allan M Hoffman, John H Schuh and Robert H Renske (eds), *Violence on Campus: Defining the Problems, Strategies for Action* (Aspen Publishers, 1998) 149.

805 Paula McDonald and Sara Charlesworth, 'Workplace Sexual Harassment at the Margins' (2016) 30(1) *Work, Employment and Society* 118, 123–4; Colleen E O'Connell and Karen Korabik, 'Sexual Harassment: The Relationship of Personal Vulnerability, Work Context, Perpetrator Status, and Type of Harassment to Outcomes' (2000) 56(3) *Journal of Vocational Behavior* 299, 308–9.

806 See Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'Sexual Harassment, Workplace Authority, and the Paradox of Power' (2012) 77(4) *American Sociological Review* 628, 634, 673, 641.

807 Kathleen M Rospenda, Judith A Richman and Stephanie J Nawyn, 'Doing Power: the Confluence of Gender, Race, and Class in Contrapower Sexual Harassment' (1998) 12(1) *Gender and Society* 40, cited in Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'Sexual Harassment, Workplace Authority, and the Paradox of Power' (2012) 77(4) *American Sociological Review* 625, 626.

808 Charmaine Mohipp and Charlene Y Senn, 'Graduate Students' Perceptions of Contrapower Sexual Harassment' (2008) 23(9) *Journal of Interpersonal Violence* 1258; Regina D Langhout et al, 'Sexual Harassment Severity: Assessing Situational and Personal Determinants and Outcomes 1' (2005) 35(5) *Journal of Applied Psychology* 975.

809 Regina D Langhout et al, 'Sexual Harassment Severity: Assessing Situational and Personal Determinants and Outcomes 1' (2005) 35(5) *Journal of Applied Psychology* 975, 1000.

810 Individual, Submission 294, *Sexual Harassment Inquiry*, 1.

811 Individual, Submission 209, *Sexual Harassment Inquiry*.

812 Consultation with policy stakeholders (health and social services sector), Sydney (Parramatta).

813 Consultation with women, Darwin.

814 Individual, Submission 35, *Sexual Harassment Inquiry*.

815 Individual, Submission 70, *Sexual Harassment Inquiry*.

816 Individual, Submission 18, *Sexual Harassment Inquiry*, 2.

817 Individual, Submission 94, *Sexual Harassment Inquiry*.

818 Individual, Submission 90, *Sexual Harassment Inquiry*.

819 Individual, Submission 13, *Sexual Harassment Inquiry*.

820 Individual, Submission 13, *Sexual Harassment Inquiry*.

821 Individual, Submission 32, *Sexual Harassment Inquiry*.

822 Paula McDonald, 'Workplace Sexual Harassment 30 Years on: A Review of the Literature' (2012) 14(1) *International Journal of Management Reviews* 1, 8.

823 For example, the results of the Commission's 2019 survey of SDA members indicated that in one in three (36%) incidents of workplace sexual harassment experienced by SDA members in the last five years, one or more of the harassers was a client or customer compared to 18% in the working population. See Australian Human Rights Commission, *Everyone's Business: Survey on Sexual Harassment of Members of the Shop, Distributive and Allied Employees' Association* (2019) 67–9. See also SDA, 'No One Deserves a Serve—SDA Launches Major National Campaign to Stop Abuse of Retail and Fast Food Workers This Christmas' (Media Release, 13 March 2018) <www.sda.org.au/no-one-deserves-a-serve-sda-launches-major-national-campaign-to-stop-abuse-of-retail-and-fast-food-workers-this-christmas/>.

824 Individual, Submission 1, *Sexual Harassment Inquiry*; Individual, Submission 10, *Sexual Harassment Inquiry*; Individual, Submission 24, *Sexual Harassment Inquiry*; Individual, Submission 81, *Sexual Harassment Inquiry*; Individual, Submission 150, *Sexual Harassment Inquiry*; Individual, Submission 356, *Sexual Harassment Inquiry*; SDA National, Submission 455, *Sexual Harassment Inquiry*.

825 Individual, Submission 175, *Sexual Harassment Inquiry*, 1.

826 Individual, Submission 356, *Sexual Harassment Inquiry*, 2–3.

827 Consultation with policy stakeholders (health and social services sector), Sydney (Parramatta).

828 Consultation with policy stakeholders (health and social services sector), Sydney (Parramatta).

829 Individual, Submission 59, *Sexual Harassment Inquiry*, 1.

830 Individual, Submission 233, *Sexual Harassment Inquiry*.

831 Jocelyn Handy, 'Sexual Harassment in Small-Town New Zealand: A Qualitative Study of Three Contrasting Organizations' (2006) 13(1) *Gender, Work & Organization* 1, 16, cited in Paula McDonald and Michael Flood, *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace* (Australian Human Rights Commission, June 2012) 27.

832 National Tertiary Education Union, Submission 325, *Sexual Harassment Inquiry*.

833 Law Council of Australia, Submission 249, *Sexual Harassment Inquiry*. See also Keiran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (International Bar Association, 2019) 60–1.

834 Individual, Submission 57, *Sexual Harassment Inquiry*. See also Volunteering Australia and Justice Connect, Submission 310, *Sexual Harassment Inquiry*; Individual, Submission 343, *Sexual Harassment Inquiry*; Individual, Submission 402, *Sexual Harassment Inquiry*; Individual, Submission 454, *Sexual Harassment Inquiry*.

835 Individual, Submission 53, *Sexual Harassment Inquiry*; Individual, Submission 226, *Sexual Harassment Inquiry*. See also Independent Inquiry into Insecure Work in Australia, *Lives on Hold: Unlocking the Potential of Australia's Workforce* (Report Commissioned by the Australian Council of Trade Unions, 2012) 53, cited in Australian Council of Trade Unions, Submission 306, *Sexual Harassment Inquiry*.

836 Sixty-two percent of people sexually harassed by a single harasser who were aware of others in the same workplace being sexually harassed in the same way said the harassment was perpetrated by the same person. Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 44–5.

837 Individual, Submission 257, *Sexual Harassment Inquiry*, 1.

838 Individual, Submission 445, *Sexual Harassment Inquiry*.

839 Individual, Submission 232, *Sexual Harassment Inquiry*, 1.

840 Consultation with men (CEOs), Melbourne.

841 Consultation with men (CEOs), Melbourne.

842 Legal roundtable, Sydney.

843 Legal roundtable, Sydney.

844 Consultation with employers, Perth.

845 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 131.

846 Australian Bureau of Statistics, *Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006* (Catalogue No 1292.0, 28 February 2006).

847 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 60.

848 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 60, 66 n. 20. Data on the proportion of the Australian workforce employed in each industry was sourced from Australian Bureau of Statistics, *Labour Force, Australia, Detailed, Quarterly, May 2018* (Catalogue No 6291.0.55.003, 21 June 2018).

849 The survey asked all people who had been in the workplace in the last five years, and who had been sexually harassed in the workplace during that time, for details of the most recent incident of workplace sexual harassment, including the industry in which the incident occurred. Details for those who had not experienced workplace sexual harassment in the last five years were not collected, as they could have been working in multiple industries during that period. To provide an indication of the relative prevalence of sexual harassment occurring within different industry sectors, a distribution of industry across all those who had been in the workplace in the last five years was imputed. This was based on an assumption that the distribution of this population (weighted to reflect the age, gender and geographical distribution of the Australian population) across industry groups would be similar to the actual distribution of the workforce across industries as measured by the Australian Bureau of Statistics (ABS) (Australian Bureau of Statistics, *Labour Force, Australia, Detailed, Quarterly, May 2018* (Catalogue No 6291.0.55.003, 21 June 2018) Table 06. Employed persons by industry sub-division of main job (ANZSIC) and sex). The ABS, for example, estimated in 2018 that 13% of the women in the workforce were employed in the education and training industry sector, so it was assumed that 13% of the women identified in the survey as having worked at some time over the last five years would have worked in the education and training sector (that is, a weighted population of approximately 929,000 women). As the survey results estimated that the weighted population of women who were sexually harassed in the workplace while working in the education and training sector was 329,000, the proportion of women harassed in this industry was imputed as 35%. Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 66.

850 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 59.

851 See Figure 34, Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 59. The figure of 31% for all industries differs from the national prevalence rate of 33% (Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26) for a number of reasons, including: there were some instances where survey respondents did not know, or preferred not to say, the industry in which the most recent incident of workplace sexual harassment had occurred; the data on page 59 of *Everyone's Business* relates to the most recent incident of workplace sexual harassment, while data on page 26 does not; and the data on page 59 is modelled on ABS estimates, using the method outlined above to calculate prevalence rates by industry.

852 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 63.

853 Australian Bureau of Statistics, *Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006* (Catalogue No 1292.0, 28 February 2006) 60–1.

854 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 62.

855 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 62.

856 Women in Film & Television Australia, Submission 440, *Sexual Harassment Inquiry*; Consultation with policy stakeholders (media, arts and entertainment), Sydney. See also Individual, Submission 53, *Sexual Harassment Inquiry*; Individual, Submission 87, *Sexual Harassment Inquiry*; Individual, Submission 125, *Sexual Harassment Inquiry*; Individual, Submission 133, *Sexual Harassment Inquiry*; Individual, Submission 185, *Sexual Harassment Inquiry*; Individual, Submission 215, *Sexual Harassment*

Inquiry; Individual, Submission 226, *Sexual Harassment Inquiry*.

857 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

858 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

859 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

860 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

861 Consultation with policy stakeholders (media, arts and entertainment), Sydney. See also Individual, Submission 133, *Sexual Harassment Inquiry*, 1.

862 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

863 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

864 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

865 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

866 Individual, Submission 125, *Sexual Harassment Inquiry*, 6.

867 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

868 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

869 Australian Bureau of Statistics, *Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006* (Catalogue No 1292.0, 28 February 2006) 64.

870 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 64.

871 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 62.

872 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 63.

873 Media, Entertainment and Arts Alliance, *Sexual Harassment, Criminal Misconduct & Bullying in Australian Live Performance* (2017) 1.

874 Media, Entertainment and Arts Alliance, *Sexual Harassment, Criminal Misconduct & Bullying in Australian Live Performance* (2017) 3.

875 Media, Entertainment and Arts Alliance, *Sexual Harassment, Criminal Misconduct & Bullying in Australian Live Performance* (2017) 4.

876 Media, Entertainment and Arts Alliance, *Sexual Harassment, Criminal Misconduct & Bullying in Australian Live Performance* (2017) 4.

877 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

878 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

879 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

880 Consultation with policy stakeholders (media, arts and entertainment), Sydney.

881 Individual, Submission 33, *Sexual Harassment Inquiry*, 2.

882 Individual, Submission 33, *Sexual Harassment Inquiry*, 1.

883 National Association for the Visual Arts, Submission 321, *Sexual Harassment Inquiry*, 1.

884 National Association for the Visual Arts, Submission 321, *Sexual Harassment Inquiry*, 4.

885 Louise F Fitzgerald et al, 'Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model' (1997) 82(4) *Journal of Applied Psychology* 578, 586; James C Quick and M Ann McFadyen, 'Sexual Harassment: Have We Made Any Progress?' (2017) 22(3) *Journal of Occupational Health* 286, 291; Chelsea R Willness, Piers Steel and Kibeom Lee, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60(1) *Personnel Psychology* 127, 146; Paula A Johnson, Sheila E Widnall, and Frazier F Benya (eds), *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Committee on the Impacts of Sexual Harassment in Academia and Committee on Women in Science, Engineering, and Medicine, Policy and Global Affairs, The National Academies of Sciences, Engineering, and Medicine, 2018) 26; US Equal Employment Opportunity Commission, *Select Task Force on the Study of Harassment in the Workplace* (Report of Co-Chairs Chai R Feldblum & Victoria A Liping, June 2016) 26.

886 Chelsea R Willness, Piers Steel and Kibeom Lee, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60(1) *Personnel Psychology* 127, 146; Louise F Fitzgerald and Lilia M Cortina, 'Sexual Harassment in Work Organizations: A View From the 21st Century' in Cheryl B Travis and Jacquelyn W White (eds), *APA Handbook of the Psychology of Women, Volume 2: Perspectives on Women's Private and Public Lives* (APA Handbooks in Psychology Series, 2018) 215, 218; Paula A Johnson, Sheila E Widnall, and Frazier F Benya (eds), *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Committee on the Impacts of Sexual Harassment in Academia and Committee on Women in Science, Engineering, and Medicine, Policy and Global Affairs, The National Academies of Sciences, Engineering, and Medicine, 2018) 26; Frank Dobbin and Alexandra Kalev, 'Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will', *Harvard Business Review* (News Article, 15 November 2017) <hhbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will> 2.

887 Paula A Johnson, Sheila E Widnall, and Frazier F Benya (Eds), *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Committee on the Impacts of Sexual Harassment in Academia and Committee on Women in Science, Engineering, and Medicine, Policy and Global Affairs, The National Academies of Sciences, Engineering, and Medicine, 2018) 46; James C Quick and M Ann McFadyen, 'Sexual Harassment: Have We Made Any Progress?' (2017) 22(3) *Journal*

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890 Chelsea R Willness, Piers Steel and Kibeom Lee, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60(1) *Personnel Psychology* 127, 134. See also Paula McDonald, Sara Charlesworth and Tina Graham, 'Developing a Framework of Prevention and Response Strategies in Workplace Sexual Harassment' (2015) 53(1) *Asia Pacific Journal of Human Resources* 41, 46.

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893 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 59. Data on the proportion of women and men in each industry's workforce was sourced from Australian Bureau of Statistics, *ABS Gender Indicators November 2019* (Catalogue No 4125.0, 1 November 2019) Table 1.3, which showed that in 2018–19 women made up 15.9% of the workforce in mining, 25.65% of the workforce in electricity, gas, water and waste services, and 40.5% of information, media and telecommunications.

894 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 59. Data on the proportion of women and men in each industry's workforce is sourced from Australian Bureau of Statistics, *ABS Gender Indicators November 2019* (Catalogue No 4125.0, 1 November 2019) Table 1.3, which showed that in 2018–19, women made up: 48.8% of the workforce in arts and recreation services; and 55% in retail trade. Following the *National Community Attitudes Towards Violence against Women Survey* (NCAS) analysis of 'male-dominated' occupations (discussed above, at Section 3.7(b)), the Commission has considered an industry with a workforce that is 50 to 59% male or female to be a mixed workplace (that is, neither male- nor female-dominated). See Kim Webster et al, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (ANROWS Research Report, 2018) 105.

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901 Vicki Schultz, 'Open Statement on Sexual Harassment from Employment Discrimination Law Scholars' (2018) 71 *Stanford Law Review Online* 17, 24

902 Academic roundtable, Sydney.

903 The *National Community Attitudes Towards Violence against Women Survey* (NCAS) analysed the occupations of survey respondents according to whether they were male-dominated (60% or more male; for example technicians and trade, machinery operators and drivers and labourers), mixed (50-59% male/female; for example professionals), or female-dominated (60% or more female; for example clerical and administrative, and community and personal service). See Kim Webster et al, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (ANROWS Research Report, 2018) 103.

904 Kim Webster et al, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (ANROWS Research Report, 2018) 106.

905 Kim Webster et al, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (ANROWS Research Report, 2018) 106.

906 Paula A Johnson, Sheila E Widnall, and Frazier F Benya (eds), *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Committee on the Impacts of Sexual Harassment in Academia and Committee on Women in Science, Engineering, and Medicine, Policy and Global Affairs, The National Academies of Sciences, Engineering, and Medicine, 2018) 291.

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908 In 2019, females comprised 50.2% of the Australian workforce and males comprised 49.8%. See Australian Government, Workplace Gender Equality Agency, 'Workforce Composition', *WGEA Data Explorer* (Database, 2018) <data.wgea.gov.au/industries/1#gender_comp_content>.

909 Australian Government, Workplace Gender Equality Agency, *Standardised Occupational Categories of Managers* (February 2018) 2 defines 'other executives/general managers' as 'hold[ing] primary responsibility for the equivalent of a department or a business unit within AN INDIVIDUAL ENTITY. In a large organisation, this manager might not participate in organisation-wide decisions with the CEO/head of business (or equivalent) OF THE INDIVIDUAL ENTITY…' (emphasis in original).

910 Australian Government, Workplace Gender Equality Agency, *Standardised Occupational Categories of Managers* (February 2018) 2 defines 'key management personnel' as 'those persons who have authority and responsibility for planning, directing and controlling the activities of the INDIVIDUAL ENTITY, directly or indirectly, including any director (whether executive or otherwise) of that entity … They are likely to be functional heads such as head of operations or head of finance and direct how that component contributes to the entity's outcome, with a strategic focus' (emphasis in original).

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912 In 2019, females comprised 50.2% of the Australian workforce and males comprised 49.8%. Australian Government, Workplace Gender Equality Agency, 'Workforce Composition', *WGEA Data Explorer* (Database, 2019) <data.wgea.gov.au/industries/1#gender_comp_content>.

913 Australian Government, Workplace Gender Equality Agency, 'Workforce Composition', *WGEA Data Explorer* (Database, 2018) <data.wgea.gov.au/industries/1#gender_comp_content>.

914 For example, in relation to the media industry: Consultation with policy stakeholders (media, arts and entertainment), Sydney. In relation to the medical profession: Level Medicine, Submission 346, *Sexual Harassment Inquiry*, 6. In relation to the legal profession: Law Council of Australia, Submission 249, *Sexual Harassment Inquiry*, 65; NSW Women Lawyers Association, Submission 340, *Sexual Harassment Inquiry*, 17; Victorian Women Lawyers, Submission 337, *Sexual Harassment Inquiry*, 3.
915 Science & Technology Australia, Submission 327, *Sexual Harassment Inquiry*, 13.
916 Diversity Council Australia, Submission 282, *Sexual Harassment Inquiry*, 14.
917 Consultation with employers (male-dominated industries), Melbourne, 6; Australian Salaried Medical Officers' Federation, Submission 390, *Sexual Harassment Inquiry*, 15.
918 Chelsea R Willness, Piers Steel and Kibeom Lee, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60(1) *Personnel Psychology* 127, 146; Paula A Johnson, Sheila E Widnall, and Frazier F Benya (eds), *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (Committee on the Impacts of Sexual Harassment in Academia and Committee on Women in Science, Engineering, and Medicine, Policy and Global Affairs, The National Academies of Sciences, Engineering, and Medicine, 2018) 46; Louise F Fitzgerald and Lilia M Cortina, 'Sexual Harassment in Work Organizations: A View From the 21st Century' in Cheryl B Travis and Jacquelyn W White (eds), *APA Handbook of the Psychology of Women, Volume 2: Perspectives on Women's Private and Public Lives* (APA Handbooks in Psychology Series, 2018) 215, 218.
919 Australian Human Rights Commission, *Women in Male-Dominated Industries: A Toolkit of Strategies* (Report, 21 May 2013) 4–5.
920 Victoria Legal Aid, Submission 283, *Sexual Harassment Inquiry*, 17.
921 Women, Work and Leadership Research Group, Submission 260, *Sexual Harassment Inquiry*, 1.
922 Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*, 19.
923 Individual, Submission 166, *Sexual Harassment Inquiry*, 2, 5.
924 Electrical Trades Union of Australia, Submission 318, *Sexual Harassment Inquiry*, 8.
925 Consultation with women (engineering sector), Darwin.
926 Academic roundtable, Sydney; Electrical Trades Union of Australia, Submission 318, *Sexual Harassment Inquiry* 8; Consultation with women (male-dominated industries), Perth.
927 Australian Council of Trade Unions, Submission 306, *Sexual Harassment Inquiry*, 12.
928 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 62.
929 Natalie Galea et al, *Demolishing Gender Structures* (Built Environment, Australian Human Rights Institute and Centre for Social Impact, UNSW Sydney, 2018) 13.
930 Natalie Galea et al, *Demolishing Gender Structures* (Built Environment, Australian Human Rights Institute and Centre for Social Impact, UNSW Sydney, 2018) 5, 13.
931 Natalie Galea et al, *Demolishing Gender Structures* (Built Environment, Australian Human Rights Institute and Centre for Social Impact, UNSW Sydney, 2018) 5, 7.
932 Natalie Galea et al, *Demolishing Gender Structures* (Built Environment, Australian Human Rights Institute and Centre for Social Impact, UNSW Sydney, 2018) 20.
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934 Natalie Galea et al, *Demolishing Gender Structures* (Built Environment, Australian Human Rights Institute and Centre for Social Impact, UNSW Sydney, 2018) 8.
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939 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 62.
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941 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 63.
942 AMMA, Submission 376, *Sexual Harassment Inquiry*, 5.
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945 Individual, Submission 294, *Sexual Harassment Inquiry*, 5.
946 Individual, Submission 294, *Sexual Harassment Inquiry*, 5.
947 Individual, Submission 167, *Sexual Harassment Inquiry*.
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949 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 38. The most common category of harasser was 'a co-worker at the same level' as the victim (27% of cases).
950 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 38.

951 Transport Workers' Union of Australia, Submission 407, *Sexual Harassment Inquiry*, 2. See also '#CabinCrewToo', *Transport Workers Union* (Web Page) <www.twu.com.au/aviation/cabincrewtoo/>. Of those who noted their gender, 71% were female and 29% were male (see '#CabinCrewToo', *Transport Workers Union* (Web Page) <www.twu.com.au/aviation/cabincrewtoo/>).
952 Consultation with medical professionals, Melbourne; Consultation with women (legal professionals), Sydney.
953 Australian Bureau of Statistics, *Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006* (Catalogue No 1292.0, 28 February 2006) 69–70, 262.
954 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 59.
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957 Australian Human Rights Commission, *Everyone's Business: Survey on Sexual Harassment of Members of the Shop, Distributive and Allied Employees' Association* (2019) 36, 69.
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959 Australian Human Rights Commission, *Everyone's Business: Survey on Sexual Harassment of Members of the Shop, Distributive and Allied Employees' Association* (2019) 68, 85.
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1269 The reduction in wellbeing is measured in disability-adjusted life years (DALYs). The DALY represents a monetised estimate of the wellbeing impact experienced by victims of workplace sexual harassment (the model was only able to estimate this for victims of actual attempted sexual assault). In 2018, the estimated value of a statistical life year was close to $200,000. See Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, February 2019) 1, 5.

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1272 Absenteeism and presenteeism costs are likely to be conservative as they were based on raw data from the 1995 Merit Systems Protection Board survey (USA), which found that the vast majority of employees did not take any leave after being harassed and reported no reduction in productivity; a finding which may not reflect the current attitudes and responses to workplace sexual harassment.
Staff turnover costs for individuals were calculated based on the following assumptions: (1) of those who resigned, 99% had already organised another job. The lost income for these individuals was estimated at 4 weeks' wages; and (2) those who had their employment terminated, or who resigned without another job organised, were assumed to have become unemployed and received welfare benefits for the average period of unemployment (51 weeks). The model was also unable to include a range of turnover-related impacts such as moving to a lower-paid or less well-suited career. See Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, February 2019) 4, 28, 36–7.

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1301 As noted in Section 1.5, 'Terminology used in this report', this report uses the term 'harasser' to describe a person who has had an allegation made against them, as well as a person who has been found or proven to have engaged in workplace sexual harassment through a formal process. The use of the term 'harasser' is not intended to suggest that there has been a finding of guilt in relation to a criminal offence or a breach of anti-discrimination legislation (or other relevant law).

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SECTION 4:

Prevention outside the workplace

Sexual harassment is not confined to workplaces. The high rate of sexual harassment experienced by women in many other areas, including public spaces, social venues and online contexts, points to the need for a holistic approach to what is a broad social problem.[1]

SNAPSHOT

- To address workplace sexual harassment, primary prevention must not only address the drivers of this behaviour in a workplace context but also in society more broadly.
- Sexual harassment is a form of gendered violence and the social norms, structures, attitudes and practices that drive violence against women are the same drivers that enable sexual harassment.
- Effective primary prevention of sexual harassment requires strategies that recognise and aim to shift the gendered drivers that underpin sexual harassment and that promote gender equality. This is the approach recommended in *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia,* which provides an evidence-based framework to guide efforts to prevent sexual harassment.
- The primary prevention of sexual harassment should also address other inequalities, aside from gender inequality, that increase the risk of sexual harassment for some people, including Aboriginal and Torres Strait Islander people, people with a disability, people of CALD backgrounds and LGBTQI people.
- In line with *Change the Story*, and with evidence from other work aimed at preventing violence against women, strategies to prevent sexual harassment should consider how to:
    - » take a whole-of-community approach across a range of settings, including in workplaces, education, arts, sports and the media
    - » encourage bystanders to take action
    - » engage men and boys in transforming gender norms that underlie sexual harassment
    - » address backlash or resistance to prevention efforts.
- To be effective, primary prevention needs long-term sustained effort and a high level of leadership and political will. To ensure efforts to address sexual harassment are coordinated and effective, sexual harassment must be included as a key area for action and investment under any national policy framework to address violence against women. In addition, all Australian governments should have:
    - » gender equality strategies that address sexual harassment
    - » prevention of violence against women strategies that include the prevention of sexual harassment as a key area for action.
- A number of areas should be immediately prioritised for primary prevention initiatives, including:
    - » social marketing to increase understanding of, and shift the gendered attitudes and behaviours that underpin, sexual harassment
    - » strategies that reach populations at higher risk of sexual harassment
    - » strategies that reach young people
    - » the development of media guidelines on reporting sexual harassment, which are victim-centred, gender-responsive and balance public interest considerations.

4.1 Overview

This section of the report examines the prevention of sexual harassment, including workplace sexual harassment, through focusing action at a whole-of-community level.

The foundation of this discussion is the recognition that the key underlying driver of sexual harassment is gender inequality. As discussed in Section 3.4, 'Cultural and systemic drivers of sexual harassment in the workplace', gender inequality is reinforced and maintained through gendered norms, practices and structures across society. These gendered norms and practices operate within workplaces, but also outside workplaces—at an individual and relationship level, on an organisational level and a broader societal level.

This section focuses on how primary prevention can be effective in eliminating sexual harassment in the wider community, outside of workplaces. Sexual harassment is recognised at an international level as a form of violence against women, and shares many of the same underlying drivers as other forms of violence against women (see Section 3.4). Much of the evidence for the primary prevention of sexual harassment is drawn from research into the prevention of other forms of violence against women.

The most recent action plan under the *National Plan to Reduce Violence against Women and their Children 2010–2022* recognises the significance of action to prevent violence against women across broader society, noting that 'reducing violence against women and their children is everyone's business and we all have a role to play.'[2]

This section outlines what primary prevention is, why it is important and how it can contribute to the prevention of sexual harassment by using levers outside of workplaces.

Section 4.2 discusses the strong view put forward in submissions and consultations, and supported by other evidence, that effective primary prevention of sexual harassment requires strategies that recognise and aim to shift the gendered drivers of sexual harassment.

Section 4.3 sets out the evidence in relation to effective approaches to primary prevention of workplace sexual harassment. Section 4.4 discusses the gap in the existing national policy framework regarding the prevention of sexual harassment and the role of government strategies on gender equality and the prevention of violence against women.

Section 4.5 examines key areas for action for the primary prevention of sexual harassment and makes recommendations targeting these areas.

Other sections of this report consider in detail the prevention of sexual harassment within (rather than outside) workplaces (see Section 6, 'Preventing and responding to sexual harassment in the workplace'). The report also makes recommendations in Section 5, 'The legal and regulatory framework', to strengthen Australia's laws and the regulatory model to better support employers to prevent workplace sexual harassment.

4.2 Primary prevention of sexual harassment

> Sexual harassment is a systemic problem, not an individual one, and is driven primarily by gender inequality, including pervasive attitudes that condone violence against women and structural power imbalances. Effective responses to sexual harassment therefore demand a focus on primary prevention and systemic change, and not just on individual responses.[3]

(a) Understanding primary prevention

In Section 3.4, the Commission set out evidence supporting the view that societal norms and practices which condone and promote gender inequality are the fundamental drivers for violence against women, including sexual harassment. It is important to recognise that these norms and practices are not innate elements of human behaviour, nor are they fixed practices of society.[4] Sexual harassment, like other forms of violence against women, is preventable, and it is the aim of primary prevention to stop the harassment before it occurs.[5]

Work to prevent violence against women is heavily influenced by the public health model conceptualisation of prevention.[6] Public health approaches aim to prevent disease across the community through action at three different levels:

- improving the overall health of the population, and avoiding the manifestation of a disease, for example through routine immunisation programs and health promotion initiatives (primary prevention)
- interrupting or minimising the progress of a disease, such as through screening programs for early detection (secondary prevention)
- improving treatment and recovery through patient-centred disease management (tertiary prevention).[7]

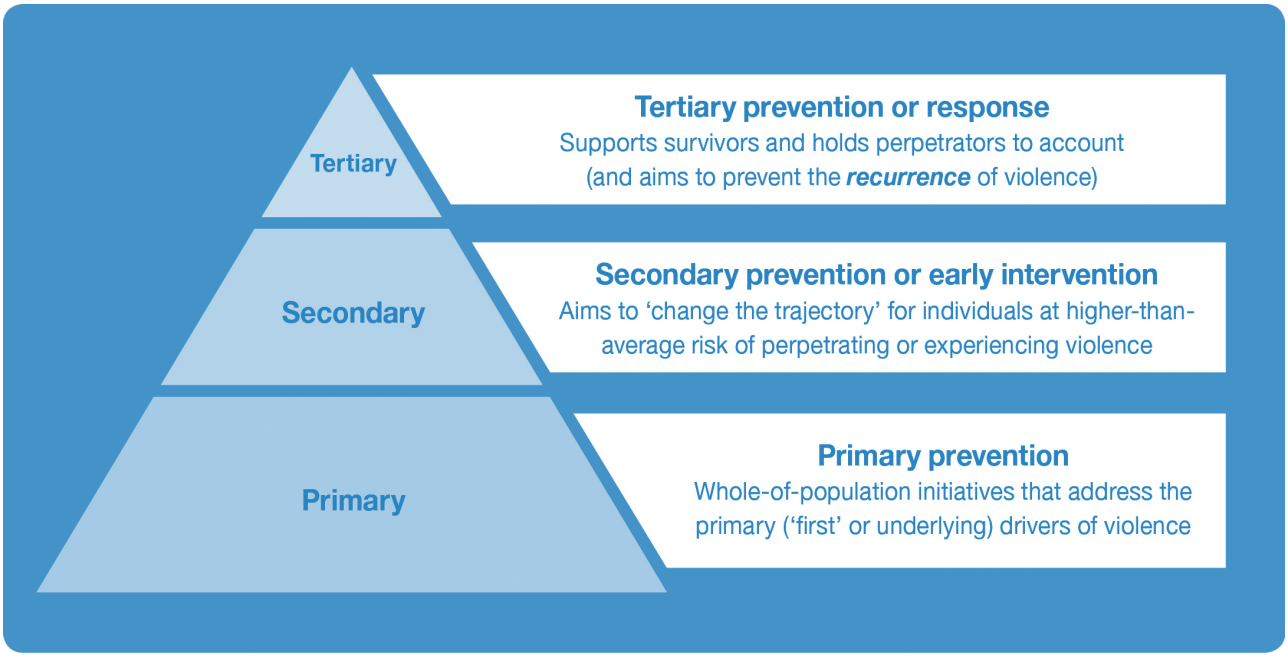
The public health model has been applied to the prevention of violence against women in the following way:

- **Primary prevention** refers to violence prevention initiatives that take place before violence has occurred. These initiatives target the whole population and aim to transform the key drivers of violence against women, so that the violence does not happen in the first place.
- **Secondary prevention** (or early intervention) aims to stop early signs of violence among people at higher risk of experiencing or perpetrating violence.

- **Tertiary prevention** (or response) applies in situations where violence has already occurred. Work at this level aims to minimise the impacts of violence, support people who have experienced violence (for example, with services to ensure their health and safety), and stop the recurrence of violence.[8]

The relationship between these different forms of prevention is reflected in Figure 4.1 below:

Figure 4.1: Relationship between primary prevention and other work to prevent violence against women



Source: Our Watch et al (2015) *Change the Story* p. 15.

The norms and practices that support violence against women, including sexual harassment, can be shifted through primary prevention efforts that challenge gender inequality and support gender equality at the community level.[9] This requires 'broader change in the underlying drivers of such violence across communities, organisations and society as a whole.'[10] As such, rather than working specifically with people at risk of perpetrating or experiencing violence against women, primary prevention means working with all people, across all levels of society, to transform the social context that gives rise to violence against women.[11]

Primary prevention is critical because, of the three levels of prevention, it is recognised as having the potential to make the largest impact on reducing violence against women, whereas '[t]ertiary and secondary prevention, while essential, are unlikely to significantly reduce the rates of violence against women on their own.'[12]

(b) Targeting the gendered drivers of sexual harassment

As discussed in Section 3.4, the evidence suggests that sexually harassing behaviours are driven by the same gendered drivers (particular expressions of gender inequality) that underlie other forms of violence against women: rigid gender roles and stereotyped constructions of masculinity and femininity; male peer relations that emphasise aggression and disrespect towards women; men's control of decision-making and limits to women's independence in public and private life; and condoning of violence against women.

The Commission heard from numerous organisations that effective primary prevention needs to tackle the underlying gendered drivers of sexual harassment and promote gender equality in all areas of life.[13]

For example, the Australian Institute of Employment Rights told the Commission that:

> Sexual harassment cannot be adequately addressed in the workplace without broader attention given to understanding sexism and gender-based inequality as drivers of the behaviour. These drivers … provide an informed starting point for programmes for preventative action.[14]

Employers and industry groups also acknowledged that people's attitudes and conduct, developed outside the workplace, fundamentally influence their behaviour within the workplace. For example, the Australian Mines and Metals Association submitted that employers need assistance to understand 'the cultural issues in Australia that impact people's attitudes towards sexual harassment', as:

> [n]o amount of legal intervention of [sic] compliance framework will assist employers to abolish sexual harassment in their workplaces if the broader societal attitudes of Australians towards sexual harassment are not changed in the first place.[15]

Discussing sexual harassment in small businesses, the Australian Chamber of Commerce and Industry (ACCI) recognised that messages about gender equality in the broader community could lead to change in 'the prevalence and impact of sexual harassment in smaller businesses'.[16]

Elsewhere in its submission, ACCI noted that '[t]he attitudes Australians bring into workplaces are critically important. Employees do not enter our workplaces as clean slates upon which employers can imprint acceptable attitudes and behaviours', and that '[c]hanging attitudes across society seems fundamental.'[17]

There is strong evidence that the prevention of violence against women (which includes sexual harassment) is most likely to be effective when it tackles the underlying gendered drivers of this violence, so that attitudes, behaviours and norms that support violence are shifted to ones that reject violence and promote gender equality.[18]

In its *Framework to underpin action to prevent violence against women*, UN Women stated that prevention is most likely to succeed when:

> '[t]here is a high level of awareness that VAW [violence against women] is a form and a manifestation of discrimination against women and that efforts to prevent it must be framed within the promotion of women's human rights and gender equality as a whole.[19]

UN Women similarly emphasised that prevention of sexual harassment can only be effective if there is 'action to end sex and gender inequality.'[20]

This view is also expressed in Australia's key guiding framework for the primary prevention of violence against women and children, *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia* (discussed below): 'Primary prevention requires changing the social conditions, such as gender inequality, that excuse, justify or even promote violence against women.'[21]

The Commission received a joint statement signed by more than one hundred organisations and academics, including the Australian Council of Social Service, Australian Council of Trade Unions, Australian Discrimination Law Experts Group and National Association of Community Legal Centres, which called for efforts to prevent sexual harassment to be informed by the framework for prevention set out in *Change the Story*.[22] This framework seeks to change the norms, structures and practices that underpin gender inequality and drive violence against women in all its forms, including sexual harassment. For example, the National Working Women's Centres told the Commission that they supported *Change the Story* 'as an appropriate framework for addressing sexual harassment in workplaces'.[23]

Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia

Change the Story emerged from a commitment in the Second Action Plan of the *National Plan to Reduce Violence Against Women and their Children 2010–2022* to develop a national framework to guide the prevention of violence against women.[24]

Change the Story was developed by Our Watch in partnership with Australia's National Research Organisation for Women's Safety (ANROWS) and the Victorian Health Promotion Foundation (VicHealth).

Change the Story is informed by a major review of the evidence on the factors driving violence against women and what works to prevent it, as well as substantial consultation with researchers, practitioners and policymakers.

Change the Story sets out that:

- Violence against women is driven by gender inequality.
- Violence against women is preventable.
- The actions that will prevent violence against women involve challenging gender inequality (for example, challenging gender stereotypes) and promoting and normalising gender equality in public and private life.
- Actions must be taken by governments, organisations and individuals in the different settings where people live, work, learn and socialise, and must be tailored to the context and needs of different groups.[25]

The Australian government and all state and territory governments are members of Our Watch and all support the national approach to violence prevention set out in *Change the Story*.[26]

The following discussion considers how the evidence-based approaches outlined in *Change the Story*, and in other key primary prevention research, can inform action for primary prevention of sexual harassment outside of workplaces.

4.3 Effective approaches to primary prevention

While responding to instances of sexual harassment is critical, it is specific, comprehensive and sustained primary prevention strategies that are required in order to stop sexual harassment from happening before it starts.[27]

There is a growing body of research on effective approaches to primary prevention of violence against women. However, a 2015 evidence review noted that 'population-level prevention is a relatively new area of activity, and the literature on the conditions required to support this form of prevention is not extensive.'[28] The evidence base relating to the prevention of sexual assault and intimate partner violence is better developed than other forms of violence against women.[29]

Given that sexual harassment and other forms of violence against women are driven by the same underlying societal norms and practices, a range of general principles and approaches to primary prevention have been drawn from this evidence base that are relevant to sexual harassment.

A number of these approaches are discussed below, including:

- addressing sexual harassment against people who experience intersecting forms of harassment and discrimination (for example, relating to their race, sexual orientation or disability)
- taking a whole-of-community approach by addressing different aspects of the problem across multiple settings
- considering what strategies have been implemented and what the evidence says on their effectiveness
- encouraging bystanders to take action
- engaging men and boys in prevention
- monitoring and evaluating primary prevention initiatives
- dealing with backlash or resistance to prevention efforts.

(a) Address the intersection of different forms of harassment and discrimination

To be effective in stopping sexual harassment before it starts, primary prevention strategies must take account of inequalities that may be experienced by particular groups of people.

Together with gender inequality, other inequalities that arise from a person's race, age, cultural and linguistic background, disability, sexual orientation, gender identity or intersex characteristics can influence the risk of sexual harassment, shape how it is experienced and how people respond to it.

As discussed in Section 3.4, and as Our Watch has recognised, while placing gender at the centre of prevention work is important, it cannot be considered in isolation to other social inequalities:

> [I]f we don't simultaneously work to transform norms, structures and practices around other forms of inequality and discrimination, then we can never create gender equality for all.[30]

An intersectional approach also aims 'to go beyond mere comprehension of intersectional dynamics to transform them'.[31] Intersectionality can be used as a tool of social reform, first by uncovering intersectional disadvantage, and then by focusing effort 'to break the cycle of the patterns of group disadvantage which afflict those belonging to multiple disadvantaged groups.'[32] Put simply, it means 'looking at where extra work needs to be done on addressing particular norms, practices and structural forms of discrimination.'[33]

Recognising the particular risk of sexual harassment faced by women and girls who suffer multiple forms of discrimination, the United Nations (UN) General Assembly resolution on sexual harassment, adopted in 2018, urges governments to develop prevention activities that are aimed at transforming discriminatory social attitudes and patterns of conduct that condone sexual harassment.[34]

The International Labour Organization emphasised that for the primary prevention of workplace violence (including sexual harassment) to be effective:

> There is a need to identify, and take into account, the specific needs and circumstances of members of such groups [women, LGBTQI people, Indigenous people and people with disabilities] who may experience violence more frequently, or in unique ways.'[35]

Similarly, UN Women advocates that a recognition of how different types of inequality intersect 'needs to be woven through all work on sexual harassment.'[36]

In Australia, the national framework for primary prevention of violence against women, *Change the Story*, also takes this approach:

> A holistic and truly universal approach to prevention involves challenging not only gender inequality, but other kinds of structural inequalities, negative stereotypes and discrimination, including those based on Aboriginality, disability, class and socio-economic status, ethnicity, religion, sexual identity and refugee status.
>
> To promote gender equality and respectful relationships between all women and men, the participation, representation and decision-making power of groups that are marginalised, or who experience multiple and compounded forms of discrimination, is crucial.[37]

A number of submissions to the Commission highlighted the importance of ensuring primary prevention initiatives for sexual harassment address the intersection of different types of inequalities and harassment.[38]

For example, Women's Health Victoria told the Commission that an intersectional approach to addressing sexual harassment will:

> [r]ecognise and be responsive to the ways in which the experience of disability, cultural or racial minority status, migration status, sexuality and gender diversity, rurality, and socio-economic status intersect with gender to intensify gender-based inequality and experiences of harassment and violence.[39]

A 2015 review of the evidence on the primary prevention of violence against women pointed out that effective strategies to prevent violence against people affected by multiple forms of discrimination should target the general community.[40] This is because the drivers of violence do not lie with affected groups 'but rather in the structures, norms and practices of the wider society.'[41]

These norms and practices are manifested through, for example, heterosexism, racism and disability discrimination. Strategies to address sexual harassment of different groups must target the broader community that holds discriminatory attitudes.

Our Watch emphasised this point in its submission to the Commission, stating that primary prevention strategies:

> need to address the gendered drivers of violence together with other drivers (such as homophobia, transphobia, and the impacts of colonisation) that are present in both the broad social environment and workplaces.[42]

The Commission is of the view that to prevent sexual harassment from happening in the first instance, primary prevention activities must challenge and transform discriminatory social norms—racist, sexist, ableist attitudes and behaviours that underpin sexual harassment.

Section 4.5(b) below discusses the importance of tailored approaches to engaging specific communities and contexts, particularly those most exposed to sexual harassment.

(b) Take a whole-of-community approach

A number of submissions to the Commission expressed the view that, because workplace sexual harassment is driven by societal norms and practices that operate both outside and within workplaces, a whole-of-community approach is necessary to address sexual harassment.[43] Targeting prevention efforts at workplaces alone will not shift the key drivers of sexual harassment; instead, there is a need 'for a holistic approach to what is a broad social problem.'[44] VicHealth explained that:

> [c]hange in one setting is more likely to be achieved and sustained where there are parallel and consistent changes occurring across multiple settings. In other words, the achievement of change in workplaces will require significant activity both within and outside workplaces.[45]

ACCI told the Commission that '[e]mployers are being asked to prevent behaviour by employees that has been entrenched from a young age, outside of the workforce'.[46] ACCI submitted:

> [c]ombating sexual harassment must be a shared responsibility across the community. It requires a multifaceted approach as a community in order to change deep-seated attitudes prevalent across all aspects of our society.[47]

A 2015 evidence review on the prevention of violence against women drew on lessons from the public health sphere to conclude that effective primary prevention of violence against women should move beyond a focus on the individuals affected by the problem, to consider how organisations, communities and wider institutions share responsibility for the problem and can contribute to solutions.[48]

A key component of UN Women's framework to prevent violence against women is '[m]aximizing impact by working through multiple entry points'.[49] The different entry points included in the framework cover a wide range of sectors, such as government, health, social services, law, media, workplaces and transport.[50]

Similarly, *Change the Story* notes that effective prevention efforts target 'the largest possible number of people and organisations … [to] encourage shifts in the way people think and behave in relation to gender inequality and violence'.[51]

To be effective, this should occur across the many different settings 'where people live, work, learn, socialise and play'.[52]

Priority mainstream settings for the primary prevention of violence against women set out in *Change the Story* include workplaces, sports, arts, education and media, among others. All of these settings have the potential to significantly influence 'the social norms, organisational practices and institutional structures that can drive change.'[53]

(i) Workplaces

While this section of the report focuses on prevention of sexual harassment outside the workplace, drawing from *Change the Story*, Our Watch told the Commission that workplaces are a key setting for the primary prevention of violence against women (including sexual harassment) because they reach large populations, including men, and because prevention strategies 'that influence aspects of organisational culture, work environment and practices, have strong potential to shape social norms and relationships.'[54]

The Commission heard about the importance of prevention in workplace settings in numerous submissions and during consultations.[55] For example, ACCI told the Commission:

> Businesses increasingly accept responsibility to ensure they have, as appropriate to their business, policies and procedures in place, and to instil a positive workplace culture aimed at preventing sexual harassment in the workplace.[56]

The importance of prioritising prevention within workplaces was also emphasised by the National Association of Community Legal Centres and a number of other community legal centres that provide legal representation to people affected by workplace sexual harassment: '[i]nstead of responding to incidents as they arise, workplaces must adopt holistic, systemic approaches that include systems to prevent sexual harassment.'[57]

The Commission has considered a wide body of information including academic research, consultations and submissions from employers, industry bodies, unions, community organisations and individuals, about effective strategies that can be implemented by workplaces to prevent workplace sexual harassment. Advancing gender equality more broadly across the organisation is a key primary prevention strategy. This is discussed in more detail in Section 6, 'Preventing and responding to sexual harassment in the workplace.'

(ii) Media

The media, including print, radio and television, is also an important setting for primary prevention of workplace sexual harassment, as it reaches broad segments of the population and has significant influence in shaping and maintaining social norms.[58] Media reporting also plays a role in shaping community attitudes and public understanding of violence against women.[59]

A 2015 study on media representations of violence against women, published by Australia's National Research Organisation for Women's Safety, found that the emotional response of news audiences, and their views on who was responsible for violence experienced by women, was affected (and could be manipulated) by the way news stories were framed by the media.[60] This study found that the media can play a role in dispelling myths and reinforcing factual information about the nature and extent of the problem of violence against women.[61] The Commission also heard about the influence of media reporting in shaping understanding of sexual harassment: 'the media can be so destructive but it can be so powerful at the same time.'[62]

Media reporting of violence against women

A 2015 study on media representations of violence against women identified a range of issues that may also be relevant to the reporting of sexual harassment, and include:

- Coverage of violence against women tended to focus on individual incidents without providing information about the social context or the underlying drivers of violence.
- Physical and sexual violence, particularly fatal events, were reported more frequently than other forms of gender-based violence.
- The use of sensational headlines, graphic language and photographs that minimised or trivialised the issue were a concern, although these were in the minority.
- Some media reports on sexual violence referenced the behaviour of women, suggesting this may have contributed to the abuse.
- Many media reports provided no information about male perpetrators, rendering their presence invisible in most media coverage.
- Media relied primarily on criminal justice professionals as sources of information in news reports on violence against women (rather than women with lived experience, advocates, service providers and researchers).[63]

The Commission's recommendations for improving media reporting of sexual harassment are discussed below in Section 4.5(d).

(iii) Education

The education system is a critical setting for primary prevention as it has almost universal reach to children and young people, who are recognised as a key cohort in efforts to change attitudes and behaviours around gender inequality and violence against women.[64]

The Commission heard about the importance of primary prevention of sexual harassment in an educational setting, to shift young people's attitudes and conduct in relation to gender equality and sexual harassment before they enter the workforce:

> If we're actually talking about systemic change over a period of time, then there does need to be a conversation that … happens in our schools with our children, so that when they … do get to the working environment, they've already had the conversation [about sexual harassment and respectful relationships]. You can't just expect everything just to fall in place once the youth turn 18.[65]

> It's to start either in a primary school or a high school setting. [There are] so many things we are trying to give to our children, but stuff like this [understanding of sexual harassment] lays a boundary of what is acceptable and what is not when you hit society as an adult. I think that's really important.[66]

Universities and other tertiary education institutions, such as technical and further education colleges, are also important sites for the primary prevention of sexual harassment and of violence against women more broadly. *Change the Story* notes that they provide an avenue to directly influence attitudes on gender inequality and shift social norms during the critical transition from school to work or career change.[67]

This view was reflected in consultations, where the Commission heard that tertiary education institutions (both universities and vocational education institutions) should play a more active role in supporting primary prevention efforts by educating young people, especially young men, around behavioural expectations once they join the workforce:

> [U]niversities have a bigger role to play [in] actually educating young men who are going to go out and be leaders in business and professions, about the ways in which we have particular expectations about the way they behave.[68]

> The education in the TAFE doesn't measure up when it comes to behavioural expectations within the community. And that's where it's got to be—in the education scheme.[69]

In relation to both secondary and tertiary education settings, Women's Health Victoria told the Commission:

> [S]exual harassment is prevalent and normalised on high school and higher education campuses. Some high school students and many university and higher education students will also already be employees … At the same time, the attitudes, behaviours and structures that drive sexual harassment (such as rigid gender norms, limits to girls' and women's independence, and disrespect towards women and girls) are established and reinforced from a young age at school and in higher education.[70]

The Commission recognises the importance of initiatives for the primary prevention of sexual harassment that reach young people. These are discussed in more detail below in Section 4.5.

(iv) Arts

Change the Story notes that the arts 'are a valuable medium for exploring and challenging social norms and also encouraging community participation'.[71] The Commission also heard that the arts are an important setting for the prevention of sexual harassment (and gender inequality more broadly), because '[w]ell-told and engaging stories inform our sense of who we are, shape our view of the world, and can resonate for generations.'[72]

Screen Australia told the Commission that to redress the gender imbalance in the Australian screen industry, it established the *Gender Matters* program, which is designed to 'drive cultural change' in the industry.[73] Initiatives under *Gender Matters* include:[74]

- supporting the production of stories led by women in key creative roles
- developing new stories that are female led
- funding the best ideas from industry that address gender inequality.

Initiatives in the arts industry specifically aimed at preventing sexual harassment in those workplaces, such as the Australian Screen Industry Code of Practice, are discussed in Section 6.3, 'Industry-based approaches to addressing workplace sexual harassment'.

(v) Sports

Sport is another area where prevention activities can influence community norms around gender inequality. Sport settings may cover local and regional sporting clubs, professional institutions and sporting associations.

A recent evidence guide on the prevention of violence against women through sport reinforces the importance of sport as a setting for primary prevention efforts:

> Sport is an intrinsic part of Australian society and a pivotal and influential mechanism to meaningfully address gender inequality, promote respectful relationships and prevent violence against women. Evidence has proven that sport has the capacity to reach a large number of Australians and influence their attitudes and behaviours to end violence against women in Australia.[75]

The Commission understands that work is underway at all levels, including among local sports clubs, to promote gender equality in sports and to use sport as a setting to prevent violence against women.[76]

A key national initiative is *Play by the Rules*, a collaboration between the Commission, state and territory departments of sport and recreation, state and territory human rights and anti-discrimination agencies and other partners to increase the capability of the sport sector to prevent and address harassment, discrimination and child protection in sport.[77] The *Play by the Rules* website provides information, resources, tools and free online training on these issues (see further Section 6.4, 'Resources for workers and employers').

The following case study provides another example of work to promote gender equality and prevent violence against women in a sports setting.

Case study:

Australian Football League – *Taking the Tackle: Respect is for Everyone*

Taking the Tackle is an online training module for local AFL clubs on how to deliver education to local club members on the issue of violence against women.[78] It supports the AFL's Respect and Responsibility Policy, which outlines the AFL's commitment to promoting gender equality.[79]

The purpose of *Taking the Tackle* is to:

- raise awareness around the prevalence, causes and impacts of violence against women
- provide information about what individuals can do in their everyday lives to help prevent violence and to promote respect
- provide information about how to get involved in community campaigns.[80]

The training covers topics including laws relating to consent, sexual assault and family violence, making informed choices about behaviour, community misconceptions about violence against women, and what men can do to prevent it.[81]

(c) Effective or promising strategies

Evidence on the most effective strategies for the primary prevention of violence against women has also drawn from public health research.[82]

VicHealth's submission to the Commission suggested that a range of strategies used in the public health sphere could be applied to the primary prevention of sexual harassment.[83] Strategies broadly fall into the following categories:

- **Community mobilisation and strengthening:** Community-driven strategies that shift community practices and norms that contribute to gender inequality.[84]
- **Communications and social marketing:** Includes social marketing campaigns and group education to shift social norms and practices.[85] These are discussed in more detail below in Section 4.5(a).
- **Organisational development:** Aims to change policies, structures and cultures within organisations, for example through auditing processes that identify and address structures and practices within organisations that contribute to gender inequality.[86]

- **Direct participation programs supporting skills development:** Aim to develop knowledge and skills in individuals about gender equality and respectful relationships. Examples include group interventions for respectful relationships (see below for discussion of respectful relationships education in schools) and bystander interventions (also discussed below).[87]
- **Advocacy:** Includes capacity building for organisations that advocate for gender equality, and leadership programs that support influential individuals to speak out on gender inequality and the elimination of violence against women (such as the Male Champions of Change program).[88]
- **Legislative and policy reform:** Shifts the policy agenda within government to address the underlying drivers of violence against women.[89] Examples include the *National Plan to Reduce Violence against Women and their Children 2010–2022* (discussed below), and the *Workplace Gender Equality Act 2012* (Cth), whose objectives include improving gender inequality in the workplace and supporting employers to remove barriers to the equal participation of women in the workforce.[90]

Evidence on the effectiveness of these strategies has been set out in detail in *Change the Story* and elsewhere.[91] It is important to note that evidence suggests mixed results in terms of effectiveness for some strategies, such as media campaigns without other supporting activities.[92]

Other strategies have been successfully implemented but not yet evaluated for impact on violence against women (such as the impact of leadership programs supporting influential individuals to speak out on gender inequality).[93]

A 2014 evidence review on the prevention of violence against women and girls concluded that 'multi-component interventions', that combine multiple strategies and target more than one level of the community, are more effective than 'single-component ones'.[94] Evidence also suggests that approaches that aim to transform gender relations are more effective than interventions that simply target attitudes and behaviour change.[95] Our Watch has explained that gender transformative approaches:

> move beyond 'gender blind' or 'gender specific' approaches to encourage critical awareness of, and explicitly challenge harmful gender roles, practices, and norms, and shift the unequal distribution of power and resources between women and men.[96]

(d) Encouraging bystanders

The Commission was informed that prevention techniques that encourage bystanders to take action show promise in the prevention of violence against women, and have been applied specifically to the prevention of sexual harassment.[97]

In the context of sexual harassment, a bystander is a person who observes sexual harassment firsthand or hears about it subsequently (see 'Who are bystanders?' in Section 3.8(b)(i)). Although bystanders are not directly involved, they have the opportunity to assist or intervene in a potentially harmful event.[98]

The 2017 National Community Attitudes towards Women Survey (NCAS) found that the majority of Australians said they would act or like to act when witnessing abuse or disrespect towards women. Results from the NCAS showed that 76% of people said they would feel bothered by a male friend telling a sexist joke about women. Of these, 45% said they would take action and 13% said they would like to act (but would not know how).[99]

The Commission's 2018 National Survey found, however, that in reality only a small proportion of bystanders took action about sexual harassment in their workplace: 38% of people said they witnessed or heard about sexual harassment in their workplace in the last five years, but of these, only 35% said they took any action.[100]

Bystander interventions focus on training people across different settings and in a range of organisations to build their understanding of sexist and gendered norms and their capacity to take action in the face of such attitudes and behaviours.[101]

Bystander action is a potentially useful strategy in the prevention of violence against women because it recognises that people across the community (not only victims or perpetrators) have the potential to influence the gendered drivers of violence against women:

> [R]ather than being limited to intervening in violent incidences or potentially harmful situations, bystanders can also intervene in the social conditions that lead to violence occurring in the first place.[102]

VicHealth told the Commission that:

> [t]he potential for bystander action to have a positive impact on the drivers and factors influencing violence against women—such as sexism, disrespect and poor attitudes towards women, and discrimination—has gained increasing traction.[103]

Evidence has suggested that best practice for bystander initiatives (like other direct participation programs) is when these are implemented in conjunction with organisational development strategies.[104] As noted above, organisational development aims to change policies, structures and cultures within organisations.

Professors McDonald and Charlesworth emphasised that while bystander interventions 'are an important component of any multifaceted strategy to eradicate workplace sexual harassment and abuse', organisations should make sure they do not use bystander strategies as a way of transferring the responsibility of addressing sexual harassment onto individuals.[105]

There is also evidence that bystander approaches that focus solely on how bystanders respond in potentially violent situations (as opposed to challenging the gendered norms and attitudes that underlie such violence) are less effective.[106]

VicHealth informed the Commission of a resource it has developed to assist organisations in different settings to introduce bystander initiatives to tackle sexual harassment. The resource sets out key features of good practice, including:

- ensuring there is organisational support for tackling sexual harassment (such as a clear, enforced sexual harassment policy and reporting process)
- improving understanding of sexism and sexually harassing behaviours
- providing specific examples of how a bystander should act in different scenarios
- implementing other activities to change behaviour, not only bystander training.[107]

VicHealth also informed the Commission of a recent research project in partnership with the Behavioural Insights Team and the Victorian Department of Premier and Cabinet's Office for Women, which applied behavioural insights to the problem of bystander inaction against sexism and sexual harassment in a university setting.[108] Behavioural insights is an approach to policymaking that 'combines insights from psychology, cognitive science, and social science with empirically-tested results to discover how humans actually make choices.'[109]

The main question guiding the bystander research project was 'how to best equip individuals with the information and skills they will need to take action, and to then motivate them to use this new found knowledge.'[110] The research implemented two complementary interventions (a series of emails and an e-learning module), both informed by behavioural insights, at two universities in Victoria. These interventions were evaluated in randomised controlled trials. The research found:

- The series of emails, which told recipients that the majority of people at their university said they would intervene if they saw sexism and sexual harassment on campus, increased the frequency with which recipients took action after observing sexual harassment.[111]

- eLearning modules, which provided strategies for active bystanding against sexism and sexual harassment and an opportunity to practise these, attracted fewer students to take bystander action. Those they did attract were already engaged on the issue of bystander action before completing the training.[112]
- Social norms stating that active bystanding is common are more effective than messages suggesting it is rare.[113] This means that people were more likely to take bystander action when they heard that it was common to do so; people were less likely to take bystander action when they thought it was rare to do so.

Bystander action as a prevention strategy in a workplace context is discussed in Section 6.2(d), 'Knowledge'.

(e) Engaging men and boys

There is increasing recognition that a critical factor in the prevention of violence against women is work with men and boys to advance gender equality, by transforming gender norms and stereotypes that lead to inequality and harm women.[114] UN Women has noted that men and boys are a key population group 'to promote non-violent, non-dominant roles and constructions of masculinity and equal, respectful relationships.'[115]

In 2018, the UN High Commissioner for Human Rights similarly noted that:

> Engaging men and boys as partners in the effort to bring about gender equality holds the potential to engage them in resisting and rejecting harmful masculinity, misogyny and discriminatory gender roles, which is key for the achievement of gender equality and the elimination of gender-based violence.[116]

Additionally, the 2018 UN General Assembly resolution on sexual harassment emphasised the need to engage men and boys as partners in the prevention of sexual harassment specifically.[117]

The Commission heard from a number of organisations on this issue. The Diversity Council of Australia told the Commission that men have 'an especially important role' to play in changing 'deeply entrenched ideas about sexism and behaviour'.[118] The submission observed that when men call out sexist jokes or other sexual harassment, this 'not only stops the behaviour from happening, it can empower more men to speak out.'[119]

Consult Australia observed that engaging men is 'critical for delivering real and lasting change', but noted that men are often left 'out of the conversation' about gender equality and sexual harassment in the workplace.[120] Similarly, the submission from Restaurant and Catering Australia argued that conversations about sexual harassment required 'all stakeholders to be engaged and participating'.[121]

The Commission noted the challenges in engaging men to share their experiences and views on sexual harassment as part of this Inquiry. Restaurant and Catering Australia's submission reflected this sense of disengagement, expressing concern that discussions around sexual harassment and gender equality could result in blame and:

> [d]isengagement from groups who feel unwelcome to engage in discussion or contribute their perspective. In particular, men feel unwelcome to contribute perspectives on issues such as domestic violence, gender pay gap and gender equality.[122]

An individual submission emphasised the importance of engaging with men and boys about sexual harassment in a way that avoids alienating them: '[b]oys should not be demonised during this process, just educated in appropriateness, dignity and being a good human being.'[123]

There is increasing evidence that well-designed programs can lead to changes in men's attitudes and practices around gender.[124] The best practice principles that inform these programs, as well as recent research, recommend that to engage men and boys, policy and programs should:

- work with men as potential allies and partners
- use a strengths-based approach focusing on men's capacity for positive change
- highlight the benefits that can flow to men (not just women) from challenging harmful notions of masculinity
- support self-reflection by men to consider their personal male privilege and power, and to critically explore their own assumptions about gender roles and stereotypes
- be inclusive of and responsive to diversities among men.[125]

Case study:

Promundo's Program H

Promundo is a Brazilian-based non-government organisation that works internationally to promote gender equality and prevent violence 'by engaging men and boys in partnership with women and girls'.[126]

Program H (named after '*homens*', the Portuguese word for 'men') targets young men aged 15 to 24 to reflect critically about rigid gender norms related to manhood and to transform stereotypical roles associated with gender (such as the distribution of household responsibilities).

Program H uses group education sessions combined with youth-led campaigns and provides resources such as a video, a toolkit with guidance for program facilitators and a range of supporting activities. Program H is delivered in more than 34 countries. According to Promundo, young men who have participated in Program H activities:

> have reported many positive changes, from higher rates of condom use and improved relationships, to a greater willingness to take on domestic work and lower rates of sexual harassment and violence against women.[127]

The importance of engaging with men in a workplace context to improve gender equality and the particular benefits of providing education programs for men is discussed in Section 6.2(d), 'Knowledge'.

(f) Monitoring and evaluation

Primary prevention of violence against women is most likely to be successful when prevention efforts are monitored and evaluated.[128] Ongoing evaluation helps to build the evidence base, enables the sharing of 'lessons learned' and assists effective approaches to be 'scaled up'.[129]

Change the Story highlights the importance of a comprehensive, coordinated system for monitoring, evaluation and reporting, with shared objectives, outcomes and measures, that guides all participating agencies and organisations, both government and non-government.[130]

Submissions to the Commission from a number of organisations emphasised the importance of monitoring and evaluation of primary prevention efforts. Both Our Watch and Gender Equity Victoria recommended that 'robust monitoring and evaluation frameworks' for primary prevention should be included in a second *National Plan to Reduce Violence against Women and their Children*.[131]

Women's Health Victoria argued that evaluation of any 'new sexual harassment prevention initiatives was critical, to continue to build the international evidence base on effective strategies'.[132]

The Commission heard from VicHealth that a key issue for evaluation of sexual harassment prevention was the 'gap at the national level with regards to a centralised function to monitor the delivery and impact of prevention strategies on prevalence of sexual harassment.'[133] VicHealth noted that this coordination gap 'is likely to be limiting the scope, quantity and quality' of primary prevention efforts across the country, and recommended the establishment of a 'national, centralised function to coordinate consistent, evidence-based delivery of prevention policies and programs and to conduct robust monitoring and evaluation.'[134]

VicHealth informed the Commission of a range of evaluation resources developed to assist both project deliverers and funders to consider how to evaluate initiatives aimed at preventing violence against women.[135]

In 2017, Our Watch published *Counting on Change: A guide to prevention monitoring*.[136] The guide is focused on measuring population-level (rather than project-level) progress towards the elimination of violence against women, and identifies indicators that should be used to measure change in the drivers of violence against women. While it is not a monitoring and evaluation framework for individual prevention initiatives, the guide noted that it may be 'a useful reference for policymakers or program designers seeking to develop their own, context-specific monitoring and evaluation frameworks'.[137]

The Commission recognises that monitoring and evaluation are critical components of effective action to prevent sexual harassment, and are necessary to develop the evidence base on effective prevention, share key learnings, and inform policy development, planning and investment.

(g) Dealing with backlash

'Backlash' refers to the resistance to change that occurs in societies 'where existing or expected power differentials and hierarchies are challenged.'[138] In the context of preventing violence against women, UN Women has observed that backlash may occur if prevention is perceived to challenge existing gender power dynamics or breach particular social norms, and that prevention is most likely to be successful when measures are in place to prevent it or respond to it should it occur.[139]

Change the Story identifies backlash as a factor that reinforces the gendered drivers of violence, noting that backlash is a 'normal and expected part of the change process'[140] and should be planned for in prevention practice.[141]

The Commission heard that a critical component in the prevention of sexual harassment is the management of backlash and resistance.[142] Professors McDonald and Charlesworth told the Commission that backlash is usually ideologically driven, with adherence 'to the idea that the roles of men and women are traditional or natural' and efforts to preserve existing gender norms and hierarchies.[143]

Professors McDonald and Charlesworth stated that backlash 'includes attempts to discredit arguments about gender equality or the gendered nature of violence.'[144]

VicHealth reported that there is limited practical guidance available for mainstream organisations in different settings (such as education, sport and workplaces) to manage backlash to gender equality, and that it is developing more material for this purpose.[145]

(En)countering resistance: Strategies to respond to resistance to gender equality initiatives[146]

Published by VicHealth in 2018, this resource draws together effective tools and strategies to prepare for and respond to backlash to gender equality initiatives, focusing on:

- **Framing strategies:** how an initiative can be articulated, communicated or 'framed', and how its importance can be explained.
- **Organisational strategies:** engaging leaders, individuals and groups, and addressing policies, practices and organisational structures.
- **Teaching and learning strategies:** relating to teaching processes, the learning environment, the content of programs and their educators.
- **Individual strategies:** including identifying allies, self-care and focusing efforts on those open to influence.

The resource also details steps to manage backlash. It points out that resistance may take different forms and identifying the type of resistance can help in crafting an effective response. It also highlights the importance of creating space for diverse views and being willing to listen, and of engaging senior leaders.

Strategies for dealing with backlash that can arise in a workplace context are discussed in Section 6.2(c), 'Culture'.

4.4 Government action to prevent sexual harassment

> Governments can play an important role in changing community-wide attitudes.[147]

To be effective, primary prevention needs long-term sustained effort and a high level of leadership and political will.[148] *Change the Story* states that leadership is required by all levels of government to 'help legitimise, support and motivate widespread efforts by a range of stakeholders' to prevent violence against women.[149]

Policy reform is an essential element of the political leadership that is required,[150] and plans to guide prevention at both national and jurisdictional levels are recognised as an important means to support efforts by all stakeholders—governments, employers, non-government organisations and individuals.[151]

Similarly, UN Women has recognised that a foundation for prevention is provided by national planning and coordination mechanisms (as well as mechanisms at the organisational and community levels), and strong leadership by government.[152] UN Women stated that prevention of violence against women is most likely to be successful when it 'has the support of government and civil society to ensure adequate resources and coordinated action, as well as to enable structural and cultural changes and sustainable prevention efforts.'[153]

(a) Gap in existing national policy framework

In Australia, a coordinated national policy approach to addressing violence against women is currently provided by the *National Plan to Reduce Violence against Women and their Children 2010–2022* (the National Plan), which was endorsed by the Council of Australian Governments (COAG) and released in 2011.[154] The National Plan provides the framework for action by the Australian, state and territory governments to reduce violence against women and their children, extending beyond prevention to supporting victims of violence and holding perpetrators accountable for their actions.

The central goals of the National Plan are 'to reduce violence against women and their children and to improve how governments work together, increase support for women and their children, and create innovative and targeted ways to bring about change.'[155] The National Plan covers six national outcomes, the first two of which are focused on primary prevention:[156]

1. Communities are safe and free from violence.
2. Relationships are respectful.
3. Indigenous communities are strengthened.
4. Services meet the needs of women and their children experiencing violence.
5. Justice responses are effective.
6. Perpetrators stop their violence and are held to account.

The National Plan is driven by a series of four three-year Action Plans. Each Action Plan covers the above six outcomes of the National Plan and provides a coordinated framework within which states and territories can develop and implement strategies that are relevant and responsive to local issues and contexts.[157] The Action Plans are also intended to encourage increased consistency across jurisdictions.[158]

Neither the National Plan nor the first three Action Plans directly identify sexual harassment as an area for action. The National Plan notes that while there are many forms of violence against women, the National Plan 'targets two main types of violence: domestic and family violence and sexual assault.'[159]

The Commission received several submissions calling for sexual harassment to be included in either (or both) the Fourth Action Plan or a second National Plan, once the current National Plan expires in 2022.[160]

By drawing attention to this issue, these submissions highlight the significant gap in the existing national policy framework for addressing sexual harassment.

The Victorian Equal Opportunity and Human Rights Commission and NOW Australia told the Commission that the primary prevention of sexual harassment should be 'integrated into a holistic national prevention strategy promoting gender equality and addressing the underlying gendered drivers of violence against women, as part of the implementation of Change the Story'.[161]

VicHealth argued that 'there is a gap at the national level with regards to a centralised function to coordinate and enable evidence-based prevention strategies across States and Territories and across Australian communities.'[162] VicHealth noted that this coordination gap at the national level extended to the prevention of sexual harassment.[163]

In September 2018 the Commission provided a submission to the Department of Social Services, which has responsibility for the National Plan, on a range of issues that should be considered in development of the *Fourth Action Plan 2019–2022*. This included that the Fourth Action Plan incorporate adequate measures for the prevention of and response to sexual harassment in workplaces.[164]

The Commission welcomes the endorsement of the Fourth Action Plan by COAG on 9 August 2019, which directly addresses sexual harassment through the following actions under 'National Priority Four: Respond to sexual violence and sexual harassment':[165]

- Prevent sexual violence and sexual harassment before it happens through national and targeted initiatives that promote informed consent, bodily autonomy and respectful relationships.
- Deliver client-centred, trauma-informed, specialised and consistent support to victims and survivors of sexual violence.

- Strengthen the capacity of all sectors to address sexual harassment to ensure women are safe at work, while studying, in public and online.

The inclusion of specific areas for action on sexual harassment in the Fourth Action Plan provides a promising foundation for work by all Australian governments to address sexual harassment.

However, as both the Fourth Action Plan and the National Plan expire in 2022, several submissions called for Australian governments to commit to the development of a second National Plan as a matter of priority.[166]

The Commission's view

To ensure that action to address sexual harassment is coordinated and effective, it should be guided by a national policy framework that is endorsed by all Australian governments and commits them to action and investment to address sexual harassment.

As there is significant overlap between the gendered drivers of sexual harassment and the drivers of other types of violence against women, this should be the same framework agreed to by governments for reducing violence against women more broadly.

This will ensure there is a coordinated and accountable national system for addressing the different forms of violence against women, including sexual harassment, and that efforts to address sexual harassment are informed by the evidence base relating to violence against women more broadly (and vice versa), and avoid duplication.

The Commission recognises that a second National Plan would be an effective mechanism for coordinating cross-jurisdictional work and supporting a shared national approach to addressing the prevention of violence against women, including sexual harassment. Regardless of the mechanism that is agreed to by Australian governments to provide a national policy framework for reducing violence against women and their children following the expiry of the National Plan, the Commission considers it vital that this mechanism include sexual harassment as a key area of focus, informed by the findings in this report.

RECOMMENDATION 5:

The Council of Australian Governments agrees to incorporate sexual harassment as a key area for action and investment under any national framework to address violence against women.

(b) Government strategies to address gender equality

The Australian, state and territory governments are important participants in efforts to address gender inequality, including sexual harassment. *Change the Story* notes that state and territory governments play a lead role in key portfolio areas that intersect with violence prevention work, such as early childhood, primary and secondary education, health and sport.[167]

A 2017 International Labour Organization (ILO) report noted that gender equality strategies provide a means for action to be taken 'to link the elimination and prevention of violence and harassment with measures to end discrimination against women … by addressing deeply embedded gender gaps in pay and employment, occupational segregation and the lack of a living wage.'[168]

A 2016 report by the COAG Advisory Panel on Reducing Violence against Women and their Children highlighted that action to achieve gender equality is a key step 'in breaking down underlying drivers of violence against women.'[169] The COAG Advisory Panel said:

> To improve gender equality in Australian workplaces, governments should develop and implement strategies to boost women's workforce participation and economic security … [and address] hidden gender biases that continue to limit women's participation and advancement.[170]

Our Watch told the Commission that gender equality strategies developed and implemented by Australian governments are an important means to address systemic and structural issues, such as the gender pay gap, workforce gender segregation and access to affordable child care.[171] Our Watch pointed out that gender equality strategies, by taking steps towards a more gender-equitable society, contribute 'to the essential actions that are needed to address all forms of violence against women.' [172] This view was also supported by Gender Equity Victoria.[173]

To address sexual harassment specifically, the National Working Women's Centres noted that sexual harassment 'must be addressed in all areas of life, over the life cycle and as part of a broader gender equity strategy.'[174] The Australian Council of Trade Unions told the Commission that regulatory responses aimed at addressing gender inequality at work, such as family-friendly work arrangements and 'fairer superannuation', are 'crucial to addressing the underlying causes of sexual harassment.'[175]

Our Watch suggested that government gender equality strategies address the gender inequalities that underlie violence against women, including sexual harassment and should include:

- gender-responsive policymaking (considers how a policy might affect gender roles and norms and the implications of a policy in terms of resource distribution[176])

- gender-responsive budgeting (a gender-responsive budget ensures that the needs and interests of individuals from different social groups—for example, based on sex, age, race, ethnicity and location—are addressed in expenditure and revenue policies[177])
- data collection to monitor progress on gender equality
- quotas and targets for women's leadership and representation
- mechanisms for consultation and expert advice.[178]

As well as driving sexual harassment and other forms of violence against women, gender inequality (and sexual harassment itself) also directly impacts women's economic security and opportunities for leadership. Government strategies that address gender inequality can play an important role in changing structural barriers that impede women's economic security. Section 3.8, 'Impacts of sexual harassment in the workplace', discusses the economic impacts of sexual harassment, including on women's workforce participation.

Many jurisdictions have developed a gender equality strategy,[179] although at the time of writing this report, Western Australia's and the Northern Territory's strategies were still in development, and South Australia was working on a Women's Employment and Leadership Strategy (consultations began in June 2019).[180]

There is considerable variation across states and territories in terms of the scope and commitments of governments' gender equality strategies.

While there is no specific Australian government gender equality strategy, in 2017 the Australian Government released a strategy to boost women's workforce participation.[181] This strategy aims to reduce the workforce gender participation gap (the gap between men and women in the workforce) to 9.1% by 2025.[182] The strategy notes that increasing women's workforce participation will lead to increased economic independence and financial security for women, improve the 'bottom line' of business and drive national economic growth.[183]

There is also a focus on increasing women's representation in senior leadership roles.[184]

However, neither the strategy nor the 2017–18 implementation plan[185] refer to the effects of sexual harassment on women's workforce participation or include actions to address sexual harassment.

All state and territory gender equality strategies include a focus on improving women's economic security. Most, however, do not consider the impact of sexual harassment on women's economic security or include actions to address these impacts.

The Australian Capital Territory's (ACT's) First Action Plan under the ACT Women's Plan 2016-26 and the Victorian gender equality strategy are exceptions. The ACT's First Action Plan 2017–19 includes the following actions relating to sexual harassment (under the priority area of 'Equity and Wellbeing'):

- Provide information and advice to women about legal protections against discrimination and sexual harassment.
- Develop training for Respect, Equity and Diversity Officers on discrimination, including sex discrimination and sexual harassment in the workplace.[186]

Victoria's gender equality strategy, under the 'work and economic security' focus area, recognises the prevalence of workplace sexual harassment and other workplace violence.[187]

While it does not refer to sexual harassment specifically, the strategy includes an action on 'gendered violence in the workplace' more broadly, committing to have WorkSafe Victoria 'examine how gendered violence in the workplace can be addressed by facilitating training of Health and Safety Representatives in gender equality.'[188]

The Queensland and Tasmania gender equality strategies do, however, acknowledge the gendered drivers of violence against women and frame their approaches in this light.

This is important because, as discussed above, there is strong evidence that the prevention of sexual harassment (a form of violence against women) is most effective when the underlying gendered drivers are recognised and targeted (see section 4.2(b)).

For example, Queensland's Women's Strategy recognises that '[i]mproving gender equality is fundamental if we are to see a reduction in violence against women'.[189] Tasmania's Women's Strategy 2018–21 notes the gendered drivers underlying violence against women and recognises that '[b]y promoting and normalising gender equality in public and private life, we will have a positive impact on ending violence against women in the long term.'[190]

The Commission's view

The Commission recognises that the prevention of sexual harassment is most effective when gender inequality—the key underlying driver of sexual harassment—is identified and targeted. Government strategies that address gender inequality are a critical means through which governments can commit to action that will enhance efforts to address gender inequality, including structural inequalities in the workforce such as the gender pay gap, women's workforce participation and gender segregation.

Given the strong evidence outlined in this report of the impacts of sexual harassment on women's economic security, the Commission considers that government strategies to address gender inequality (including, for example, implementation and action plans under women's workforce participation and leadership strategies) should include actions to address sexual harassment in the workplace as a means to improve women's autonomy and economic security.

RECOMMENDATION 6:

All Australian governments have gender equality strategies that address sexual harassment and that recognise sexual harassment is driven by gender inequality and is a form of gender-based violence.

(c) Government strategies to prevent violence against women

In addition to gender equality strategies, the Commission also heard of the importance of all governments implementing strategies to prevent violence against women.

Both Our Watch and Gender Equity Victoria recommended that 'Australian governments should introduce comprehensive and multifaceted strategies for the primary prevention of violence against women, based on *Change the Story*'.[191]

Our Watch told the Commission that state and territory governments 'can play a lead role in crucial prevention settings that fall within their remit, such as education and health', and that state and territory prevention plans should be 'tailored and responsive to specific jurisdictional contexts and needs'.[192]

Most state and territory plans for the prevention of violence against women identified by the Commission did not include specific actions addressing sexual harassment, or did so only indirectly.[193] The exceptions were those of New South Wales (NSW) and South Australia, both of which included at least one action directly addressing sexual harassment.

NSW's *Sexual Assault Strategy 2018–2021* contains the following sexual harassment-specific actions:

- Launch a community education campaign utilising social media. The campaign will identify the continuum of sexual harassment to sexual assault, and the role the bystander and community can play in identifying sexual offending and speaking out. The campaign will also highlight gender inequality as a driver of sexual assault and harassment.[194]

- Develop a best practice guide for grievance handling of sexual assault and harassment allegations in TAFEs.[195]
- The NSW Minister's Domestic Violence Corporate Leadership Group is to support employees' understanding of their right to a workplace free from harassment.[196]

South Australia's framework for addressing domestic, family and sexual violence includes a 'long-term' action relating to sexual harassment: [197] 'consider options to address sexual harassment in key industries under the remit of [Consumer and Business Services—an agency that provides licensing for certain occupations, trades and businesses in South Australia[198]]'.

Other violence prevention plans, such as those of Victoria and Queensland, include sexual harassment in the definition of violence against women, but do not set out specific actions that address sexual harassment.[199]

The Commission understands that Queensland is currently developing a Sexual Violence Prevention Framework, which will include 'a refresh of actions under the *Violence Against Women Prevention Plan 2016–22*'[200] and will cover issues related to sexual harassment.[201]

Western Australia's violence prevention strategy is more limited in scope, restricted to domestic and family violence.[202] The ACT appears not to have any strategy currently in place, following the expiry of the *ACT Prevention of violence against women and children strategy 2011–2017*.[203]

The Commission's view

The Commission recognises there is significant work in progress across jurisdictions to prevent violence against women, especially in the area of domestic and family violence. The Commission supports broader work for the prevention of violence against women, recognising that efforts to shift the underlying attitudes, norms and practices feed into efforts to prevent sexual harassment, which shares these underlying drivers.

The Commission recognises that *Change the Story* is the key guiding framework for the primary prevention of violence against women and children, informed by comprehensive reviews of the evidence base on this issue and by extensive consultation with stakeholders to test research findings.[204]

The Commission considers that governments' violence prevention strategies should be based on this framework and notes that most governments have adopted aligned approaches. The Commission also acknowledges the widespread support for *Change the Story* among organisations who made submissions to this Inquiry.

To ensure that governments' violence prevention efforts effectively target sexual harassment, including in the workplace, the Commission also believes that violence prevention strategies should include actions that address sexual harassment directly.

These might be informed by *Change the Story*, the findings of this report and of the Commission's national surveys of workplace sexual harassment, government consultation and research processes, and the National Sexual Harassment Research Agenda recommended by the Commission (see Recommendation 4 in Section 3.9, 'National Sexual Harassment Research Agenda').

RECOMMENDATION 7:

All Australian governments have strategies for the prevention of violence against women that are based on *Change the Story,* recognise that sexual harassment is driven by gender inequality and is a form of gender-based violence, and include the prevention of sexual harassment as a key area for action.

4.5 Key areas for sexual harassment primary prevention

> [P]eople don't walk into workplaces and create cultures out of nowhere … workplaces are key area for this work but there are many other places that we can create a change that we would have an influence there as well.[205]

In this section, the Commission outlines the areas that have been identified as immediate priorities for the primary prevention of sexual harassment outside of workplaces. These are:

- social marketing (with supporting resources) to increase understanding of and shift attitudes and behaviours around sexual harassment and the gendered drivers that underlie it
- interventions that reach populations at higher risk of sexual harassment
- prevention initiatives that reach young people
- respectful relationships education in schools that recognises sexual harassment as a form of violence against women
- resources on workplace rights for young people

- education by tertiary education institutions that recognises sexual harassment as a form of gender-based violence and focuses on workplace rights
- guidelines to ensure responsible reporting of sexual harassment by the media.

This section outlines what these actions will entail and why they have been identified by the Commission as immediate priorities for primary prevention outside of workplaces.

(a) Social marketing and social change strategies

(i) Changing attitudes and behaviours related to sexual harassment

The Commission heard consistently that there is a lack of awareness in the general community and across the workforce of what constitutes sexual harassment, of its prevalence and of its harm. As discussed in Section 3.4, the Commission heard that this lack of understanding extended to both workers and employers, and included lack of awareness of available complaint processes and avenues for advice and support.

The Commission also heard that there is a need to increase understanding across the community that sexual harassment is a form of violence against women and to change the gendered drivers (the norms and behaviours) that underlie it.

There is little evidence that simple 'awareness campaigns' as a standalone strategy are effective in preventing violence against women.[206] Lack of effectiveness may be due to the fact that existing evaluations have not measured violence as an outcome, and because it is difficult to determine whether changes in attitudes and behaviours are due to the campaign itself or to other factors.[207] A further issue is where communication campaigns are not 'sufficiently theory-driven to transform norms or change actual behaviours',[208] for example, if they do not clearly identify the gendered drivers of violence against women and seek to shift them.

However, a 2015 evidence review also noted that 'raising awareness of the prevalence, nature and consequences' of violence against women is 'necessary to engage stakeholders in prevention and as such is a necessary foundation for prevention activity.'[209]

Change the Story also notes that there are positive evaluations of the impact of communications and social marketing techniques on the drivers of violence against women when these are 'implemented in a sustained way', using different platforms and combined with other techniques such as group education.[210] Our Watch reinforced this point, telling the Commission that:

> [n]ational communications and social marketing strategies are an important strategy to address all forms of violence against women, including sexual harassment, when combined with other techniques in a multifaceted approach. Raising awareness is important, however it is crucial that awareness is translated into knowledge and skills for taking action to address the issue.[211]

Our Watch noted that the focus should be on 'social change strategies to move beyond awareness and towards changes to knowledge, attitudes and behaviours relating to the drivers of this violence.'[212]

A 2018 UN General Assembly resolution on sexual harassment highlighted the crucial role of 'educational and awareness-raising programmes, policies and legislation' in preventing and eliminating sexual harassment against women and girls and stressed the need to change social norms through (but not limited to) 'training and awareness-raising campaigns conducted in the workplace'.[213]

A 2017 report published by the ILO recommended the implementation of 'awareness raising' campaigns around violence and harassment (including sexual harassment) at work. The report stated:

> More awareness raising, education and training are needed to ensure that employers, managers and workers and their representatives understand violence and harassment at work, the causes and consequences of violence, and ways in which solutions can be jointly agreed and implemented.[214]

The report also suggested that awareness-raising campaigns focus on the general public, not only employers and workers.[215]

The Commission received numerous submissions from individuals and organisations calling for education campaigns in relation to sexual harassment.[216] Professor Lisa Heap submitted that it should not be assumed there is widespread understanding or acceptance of the drivers of gender inequality, or that gender equality is a workplace concern.

Professor Heap argued that initiatives to end gendered violence at work 'must include education and awareness of the drivers of violence against women in society and in the workplace and measures to address these.'[217]

Professors McDonald and Charlesworth also called for 'a public education campaign which contributes to community awareness that the drivers of workplace sexual harassment are unequal power between men and women and rigid adherence to gender stereotypes', rather than 'individual aberrant behaviour'.[218]

The Diversity Council of Australia told the Commission that '[p]reventing sexual harassment requires education, at a workplace and community level, about what sex-based and sexual harassment is.'[219] The Australian Institute of Employment Rights similarly argued for a 'broad-based public education campaign', recognising that 'sexism and gender-based power imbalances' are the drivers of sexual harassment, and 'their origin in community culture and standards'.[220]

Employer representatives also supported a broad community campaign on sexual harassment. Ai Group supported 'the specific allocation of Government funding for an effective community campaign to change attitudes and behaviours around sexual harassment.'[221] ACCI noted that addressing sexual harassment must be a shared responsibility across the community to change deep-seated 'violence supportive' attitudes that contribute to sexual harassment and are entrenched from a young age outside the workforce.[222]

ACCI told the Commission that there is a need to build on already successful campaigns that seek to change societal attitudes and behaviours, and that governments:

> should deliver an advertising campaign (or other comparable initiative) to prevent sexual harassment across the community [and] change attitudes and behaviours as a key predicate to reducing its incidence in workplaces.[223]

(ii) Existing social marketing campaigns

A number of social marketing campaigns currently target the problem of violence against women and aim to increase understanding of the gendered drivers that underlie such violence. These include:

- COAG's *Stop it at the Start* campaign[224]
- Our Watch's *Doing Nothing Does Harm* campaign[225]
- Respect Victoria's *Respect Women: Call it out* campaign.[226]

These campaigns highlight through everyday scenarios the way attitudes and behaviours that disrespect women are excused or trivialised, and contribute to different forms of gender-based harm, including sexual harassment. The Commission heard that these campaigns, which are delivered in small 'grabs' through television, bus stop advertisements, social media feeds and elsewhere, had considerable impact.[227]

Stop it at the Start campaign

Stop it at the Start is an initiative under the National Plan aimed at adults who interact with young people: parents and family members of children aged 10 to 17, and teachers, coaches, community leaders and employers of young people. It aims to help break the cycle of violence against women by encouraging adults to reflect on their attitudes, and have conversations about respect with young people.

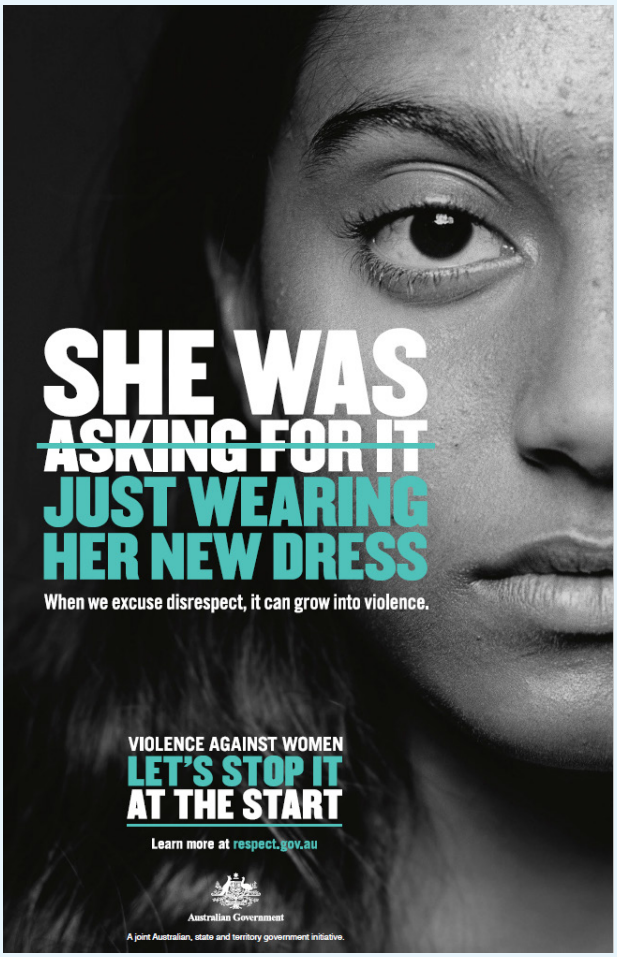
The campaign's starting point is that violence against women begins with disrespectful behaviour, that adults have the strongest influence on young people's attitudes about disrespect towards women, and that excusing disrespectful and aggressive behaviours towards girls and women is learned from an early age.

There has been an overwhelming response to the campaign:

- Television commercials have been viewed more than 45 million times online.
- The website received 1.3 million page views.
- There have been more than 68,000 downloads of key resources.[228]

Evaluation shows the campaign is making an impact, with 70% of people recalling an element of the campaign, and 60% of these having taken action, such as starting a conversation about respect. The evaluation also found that more people now understand the link between disrespect and violence against women.[229]

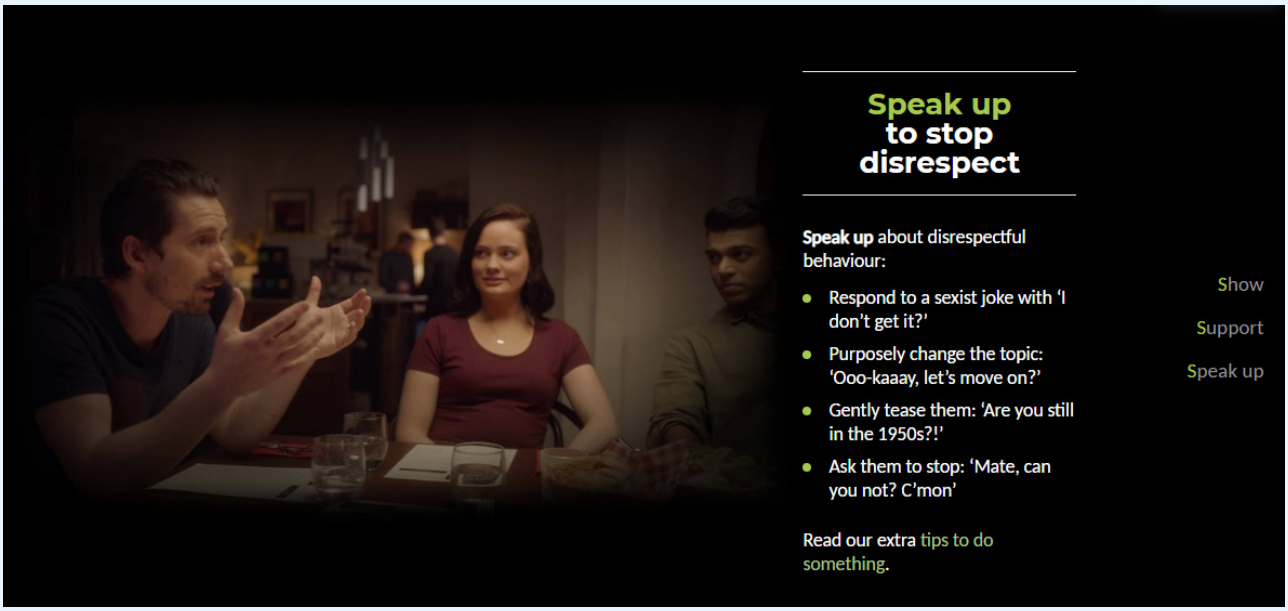
Figure 4.2: *Violence Against Women, Let's Stop it at the Start* poster



Source: Australian Government, Poster from Phase Two of *Stop it at the Start*, accessed at https://www.respect.gov.au/the-campaign/campaign-materials/

Our Watch's *Doing Nothing Does Harm* campaign recognises that disrespect towards women is an underlying driver of high levels of violence against women, and seeks to create a culture where disrespect towards women is unacceptable. Its focus is on encouraging active bystander action across the community and motivating people to do something when they see or hear disrespect towards women.[230]

Figure 4.3: *Doing Nothing Does Harm* campaign



Source: Our Watch, *Doing Nothing Does Harm* campaign, accessed at https://www.ourwatch.org.au/doingnothingdoesharm/home

Respect Victoria's *Respect Women: Call it out–active bystander* campaign targets sexual harassment on public transport. The campaign's webpage outlines what behaviours may constitute sexual harassment and sets out simple steps to become an active bystander. The campaign aims to 'get as many people from right across the state of Victoria to understand the most effective and safest ways to call out all forms of sexual harassment witnessed on public transport'.[231]

Figure 4.4: *Respect Women: Call it out–active bystander* campaign

Source: Respect Victoria, *Respect Women: Call it out–active bystander* campaign, accessed at https://www.respectvictoria.vic.gov.au/campaigns/respect-women-call-it-out-active-bystander

All of these campaigns have in common a recognition of the gendered drivers of violence against women and that eliminating violence means shifting these societal attitudes and norms. For example, Respect Victoria's campaign identifies that '[v]iolence against women is primarily driven by gender inequality … this campaign aims to disrupt the social norms, practices and structures that allow it to happen'.[232] The campaigns all use examples from 'real life' to show the subtle (and sometimes overt) nature of the behaviours that condone and reinforce gender inequality.

As they are universal campaigns—targeting all people across the community—they also ensure high levels of engagement with men.

The Commission heard that effective social marketing to prevent sexual harassment should be developed jointly by stakeholders in different key settings, in recognition of the need for whole-of-community initiatives.

For example, the Law Council of Australia stated that 'public education and awareness raising' on sexual harassment should be a 'joint initiative' between government, the media, professional groups, health and social services organisations, workplace health and safety regulators, corporate bodies, schools and universities.[233]

A 2017 report on violence and harassment at work suggested that awareness-raising campaigns could be jointly developed by governments, employers and unions.[234]

The Commission's view

The Commission considers that a national social marketing campaign is a necessary foundational activity to raise awareness of the prevalence, nature and consequences of sexual harassment. Additionally, the Commission considers that social marketing relating to sexual harassment should form part of a broader social change strategy to shift attitudes and behaviours in relation to sexual harassment, which takes as its starting point that:

- Sexual harassment is a form of violence against women, with many of the same gendered drivers.
- The prevention of sexual harassment requires targeting these gendered drivers and shifting the attitudes, norms and practices that underlie sexual harassment.

As noted above, it is vital that social marketing and social change strategies recognise and address other drivers of sexual harassment, in addition to gender inequality, for people who experience intersecting forms of discrimination. Section 3.5, 'People who experience sexual harassment in the workplace', discusses these drivers. It is also crucial that social marketing campaigns are relevant and accessible for people from all population groups.

Social marketing directly focused on sexual harassment can help meet community needs and expectations for clearer understanding of the types of behaviour that constitute sexual harassment, what the law says about it, how to report it or seek support and advice, and how to encourage bystander action.

As social marketing has universal application, targeting everyone across the community, it is an important means to generate conversations that raise awareness about sexual harassment. It is also especially important as a source of knowledge on workplace rights relating to sexual harassment for people in casual or contract work, who may lack access to workplace induction or training on sexual harassment.

The Commission notes that social change strategies relating to sexual harassment, including social marketing, could encompass:

- advertisements for film and television
- online videos
- tweets for social media

- posters for workplaces and other settings
- conversation guides for use in local clubs, community groups and workplaces
- checklists for self-reflection for use in local clubs, community groups and workplaces
- tailored resources for groups at higher risk of workplace sexual harassment.

It is essential that social marketing campaigns and associated initiatives focused on sexual harassment complement, and are coordinated with, existing campaigns on gender equality and violence against women, such as COAG's *Stop it at the Start*, Respect Victoria's *Respect Women: Call it out–active bystander*, and Our Watch's *Doing Nothing Does Harm* campaigns.

(b) Strategies and actions that prevent sexual harassment of people at higher risk

In addition to gender and age influencing people's experience of sexual harassment, people who experience multiple forms of discrimination and inequality—for example, on the basis of their race, cultural or linguistic diversity, sexual orientation, gender identity, disability, immigration status or visa conditions—have a higher risk of experiencing workplace sexual harassment and may face additional barriers to reporting and seeking support.

Section 3.5, 'People who experience sexual harassment in the workplace' outlines some of the underlying and contributing factors that increase the risk of sexual harassment occurring.

Tackling inequalities, discrimination and social norms that underpin sexual harassment requires working with people at higher risk of perpetrating, and being subject to, sexual harassment. Strategies can target the general as well as specific segments of the population.[235] The Commission heard about the importance of ensuring mainstream prevention actions are culturally aware, relevant and reach people from diverse communities.[236]

The Commission was told that increasing awareness on sexual harassment and shifting cultural and social norms that excuse or minimise the problem, or stigmatise or blame the victim, may require tailored approaches to different groups of people and settings.[237] This is consistent with research on primary prevention of violence against women which suggests that some communities require targeted prevention efforts.[238]

Cross-cultural research on community attitudes and norms towards gender equality is growing.[239] Research and practice have highlighted the importance of addressing the way gendered and cultural factors shape understandings of sexual harassment for CALD and Aboriginal and Torres Strait Islander men and women in implementing primary prevention approaches.[240]

For example, *Change the Story* recognises that:

> Aboriginal and Torres Strait Islander women … may not always place gender inequality as central to their understanding of violence against women. Gender inequality therefore needs to be considered and addressed alongside a range of other significant factors.[241]

Good practice in violence prevention also places importance on participatory and community-driven approaches that are healing-informed and culturally sensitive, and that engage both women and men.[242] In consultations for the Inquiry, Aboriginal and Torres Strait Islander workers highlighted the need to work directly with community organisations and community members, and use existing community-based channels to target Aboriginal and Torres Strait Islander peoples:

> I feel like those messages will be heard from their [own] women a lot easier, and … go through the generations and be passed on to the young children … as opposed to 'we've got a Commission coming in and we're going to teach you what is right and wrong, what's acceptable in your culture and what is not.'[243]

> Especially in those remote communities, [the message needs] to come from an elder or to come from an Aboriginal woman, so that the women and the girls … really get it from somebody that's inside their community … and those girls will pass that message on because it's come from an elder.[244]

Similarly, the Commission also heard about the ways in which cultural factors influence CALD workers' understanding and recognition of sexual harassment:

> Women from CALD backgrounds usually think that sexual harassment is something that is physical. So, if someone rapes you or … touches you, whatever. That's the definition of sexual harassment. They don't understand that it's, you know, comments and all that stuff.[245]

As discussed in Section 3.5, language barriers and lack of awareness regarding both sexual harassment and workplace rights more broadly were identified as issues both for CALD workers and CALD employers.[246] This is consistent with research that found that migrants' understanding of workplace conditions and obligations is relatively low.[247]

Some submissions drew attention to the need for targeted education programs that raise awareness of workplace laws and rights, for workers and employers from CALD backgrounds, including newly arrived migrants and people on temporary visas.[248] The Commission notes the work already being done in this area in support of the Migrant Workers' Taskforce recommendations, discussed further below.

As well as being part of worker induction processes in workplaces, the Commission heard that this information and education could be more effectively driven and delivered at the community level, for example, through community organisations and a 'multilingual hotline' with capacity to 'respond to community queries in their own language'.[249] The Commission also heard in consultations about the importance of delivering accessible information to newly arrived migrants, international students or temporary workers through programs or information packs, before or on their arrival into Australia.[250]

Stakeholders also suggested that education and training for migrant workers and employers from CALD backgrounds should be co-designed, culturally sensitive and community-led,[251] and should occur at key points during settlement by tapping into existing infrastructure—for example, through parenting groups, university inductions, settlement services, faith-based groups and job network providers, among others.[252]

The Commission was told about the need to ensure information and education is accessible, especially for people who cannot read or write well in English due to language or literacy and people with disability.[253] Recognising that people with intellectual disability may face unique barriers to reporting, the NSW Council for Intellectual Disability emphasised that it is important that they have clear information about their rights and avenues for making complaints.[254]

However, in addition to measures that support understanding and awareness of sexual harassment, employment rights and complaints pathways for people at risk, the Commission recognises the need to tackle discriminatory social norms that underpin sexual harassment in the workplace. Women with Disabilities Victoria drew attention to the importance of disability awareness and inclusion to address sexual harassment of people with disabilities:

> For us, an end to sexual harassment also means an end to forms of disability harassment and disability discrimination. It involves, firstly, employing us, supporting us in the workplace and creating safe workplaces that are free from all kinds of harassment … a commitment to creating inclusive, non-discriminatory workplaces, supporting us in the workplace and ensuring that gender equity campaigns represent and reach us.[255]

Similarly, the Commission heard that heterosexism and homophobia frequently intersected with the sexual harassment of LGBTQI people. The LGBTI Legal Service told the Commission that a lack of mainstream understanding of how an individual's sex, gender identity, variation of sex characteristics and/or sexual orientation plays a role in experiences of sexual harassment for LGBTI workers, emphasising the importance of 'delivering LGBTI cultural competency training to staff'.[256]

The Commission also heard that lack of understanding contributed to workplace sexual harassment of transgender and gender-diverse people, for example due to intrusive questions about their bodies and sexual activities.[257] The LGBTI Legal Service noted that readily available information, such as a resource by the Queensland Anti-Discrimination Commission which provides information for employers, workers who are transitioning and their co-workers, is 'vital to foster an inclusive workplace where LGBTI people can feel comfortable and report their concerns such as sexual harassment.'[258]

The Commission's view

Given the evidence that some groups of people are at higher risk in the workplace, the Commission considers that targeted strategies and actions to address sexual harassment of these groups should be an immediate priority for action as part of the development of evidence-based strategies for prevention, led by Our Watch.

This requires that prevention initiatives, at both the community and workplace level, recognise the diverse circumstances of women, men and non-binary/gender diverse people in these groups and take into account the different ways they may understand, experience and respond to sexual harassment.

A key focus for prevention of sexual harassment of at-risk groups must be challenging discriminatory social norms and practices, including sexist, racist, heterosexist or ableist attitudes, that support or lead to sexual harassment. Strategies to address sexual harassment must target the broader community that holds, and acts on, such discriminatory attitudes. Addressing structural factors and prevention activities in the workplace is discussed in Section 6.

Prevention initiatives which aim to increase awareness and understanding of sexual harassment, workplace rights and avenues of action should be tailored to engage and reach specific communities and contexts, particularly those most exposed to sexual harassment. Awareness-raising and education strategies in community and work settings should be evidenced, designed and implemented in partnership with higher-risk population groups to strengthen effectiveness for specific groups and contexts.

More broadly, the Commission has recommended that the Fair Work Ombudsman update information and guidance relating to workplace rights under the Fair Work Act to include information about sexual harassment (see Section 5, 'The legal and regulatory framework').

However, consistent information and education should also be provided through a wide range of existing channels outside the workplace to ensure it is accessible, culturally appropriate and more effectively reaches workers of CALD backgrounds, Aboriginal and Torres Strait Islander workers, workers with disability, and LGBTQI workers.

These avenues could include other relevant agencies, non-government organisations including peak bodies and advocacy and support organisations, community legal or health centres, migrant resource centres, community programs, groups or forums, disability employment services and religious or community leaders.

In relation to workers on temporary visas, the Commission acknowledges the work undertaken by the Migrant Workers' Taskforce to review information products and services to migrant workers, including international students.[259] The Commission supports the Migrant Workers' Taskforce recommendations to enhance messaging, information products and services available from government agencies to migrant workers, and considers that this should include information on sexual harassment, external support services and avenues for action.[260]

(c) Prevention strategies that reach young people

(i) The importance of targeting young people for sexual harassment prevention

A consistent theme from the research, consultations and submissions was that the primary prevention of sexual harassment must target young people as a priority group.[261]

The 2018 National Survey found that young workers (aged 18–29) had the highest prevalence rate of workplace sexual harassment of all age groups in the workforce.[262] The Commission heard that this was due to their age, sex and unequal power in employment relationships. As discussed in Section 3.5, a range of factors associated with young people's work status makes them more likely to experience sexual harassment and other exploitation in the workplace, including higher rates of casual employment, lower than average earnings, and high youth unemployment.

The 2018 National Survey also found that young people aged 15–17 had the lowest level of awareness of what constitutes sexual harassment of all age groups.[263] The Commission heard consistently that this lack of understanding of sexual harassment, and of what to do if it occurs, was amplified for young people by their lack of experience and lower seniority in the workplace (see Section 3.5).

Evidence from the 2017 *National Community Attitudes towards Violence against Women Survey* (NCAS) on young Australians' attitudes to violence against women and gender equality also suggested that young people should be a priority focus for the primary prevention of sexual harassment.[264] While overall the NCAS survey findings for young Australians (aged 16 to 24) were very similar to the findings for Australians aged 25 and over,[265] the survey found that, contrary to commonly held perceptions, young people did not have more positive attitudes in relation to violence and gender equality than people aged 25 to 64.[266]

Although the NCAS survey found that most young Australians supported gender equality and rejected attitudes supportive of violence against women, 'a sizeable minority' held 'attitudes that contribute to violence against women'.[267] For example, nearly one quarter (24%) of young people disagreed that violence against women is common, and one in seven (14%) believed that women often make false allegations of sexual assault.[268] The survey noted that, overall, 'young people have a lower level of understanding of violence against women'.[269]

The NCAS survey report also highlighted that, as adolescence and young adulthood are formative stages for the development of gender identities, roles and relationships, supporting young people to establish positive relationship practices had many benefits: 'It can help to reduce the risk of violence and abuse in the present, prevent future harm and maximise the prospects of a violence-free environment for future generations.'[270] The report concluded that for violence prevention, 'a particular focus on young people and environments influencing their attitudes towards, and experiences of, violence is warranted.'[271]

The NCAS survey also found that the strongest predictors of young people holding violence-supportive attitudes included having a low level of support for gender equality and having a low level of understanding of violence against women (rather than demographic factors such as age or sex).[272] This finding reinforces the importance of focusing prevention efforts with young people on attitudes, norms and practices that support gender inequality and violence against women, rather than on demographic factors such as parents' occupation or where a young person lives.[273]

There is also evidence that there is already some degree of tolerance for violence against women and girls among children and young people; and young people are already subjected to violence and perpetrate violence themselves—further reasons for targeting prevention at young people.[274]

Consultations and submissions also raised the importance of investing in prevention actions that reach young people. Women's Health Victoria told the Commission that the attitudes and behaviours that drive sexual harassment, such as rigid gender norms and disrespect towards women and girls, are 'established and reinforced from a young age',[275] making prevention in settings that reach young people a priority:

> [T]he prevalence of sexual harassment in education settings, the over-representation of young workers as victims of workplace sexual harassment, and the importance of shifting the attitudes and behaviours that drive sexual harassment from a young age demonstrate the importance of ensuring that efforts to prevent sexual harassment at work include primary prevention programs in schools and higher education settings.[276]

One worker told the Commission:

> I do not remember ever receiving any warnings at high school (when many young women start casual jobs) or at university regarding sexual harassment awareness, what it is, how prevalent it is and what to do about this. I know my sisters and my mother who are all across different generations have experiences similar to mine so this topic has been around for many decades.[277]

The Commission heard similar views from employers:

> [By] ingraining it in the next generation, on what is appropriate, whether it's environmental, whether it's domestic violence, whether it's sexual harassment, they almost then teach the older generation, to a degree.[278]

> Hopefully there's a lot of work being done in our schools to help address this [sexual harassment], but don't get me wrong, it doesn't excuse action being taken in the workplace.[279]

(ii) Existing prevention initiatives directed at young people

The Commission heard about a number of prevention initiatives directed specifically at young people, including:

- a community legal education initiative focused on sexual harassment, developed by Kingsford Legal Centre for delivery to years 9 and 10 students, called *#MeToo, It's About You*[280]
- a more general national primary prevention behaviour change campaign led by Our Watch, called *The Line,* targeting young people aged 12 to 20[281]
- respectful relationships education (discussed in Section 4.5(c)(iv) below).

Primary prevention targeting young people

#MeToo, It's About You

The *#MeToo, It's About You* community legal education presentation, developed by Kingsford Legal Centre, aims to start a conversation about sexual harassment and to educate young people on their rights and responsibilities in relation to sexual harassment. The goals are for young people to:

- understand what sexual harassment is
- be able to identify sexual harassment in day-to-day life
- know what they can do to help put a stop to sexual harassment.[282]

The interactive presentation recognises that young people in years 9 and 10 are old enough to have conversations about sexual harassment and may be about to enter the workforce, taking on part-time jobs. The presentation covers sexual harassment in the workplace and in other settings, such as sexual harassment of a student by a peer at school, by a salesperson when purchasing goods at a shop, and by a landlord.

As of September 2018, the presentation had been delivered to around 110 students at two Sydney high schools, with positive feedback from students and teachers, including that students 'had learnt something new including how jokes and or sexual propositioning could be sexual harassment and that they did not have to put up with this kind of behaviour.'[283]

The Line

The Line was a behaviour change campaign led by Our Watch launched in 2015 targeting young people aged 12 to 20. It encouraged young people to develop healthy and equal relationships, and to reject violence.

The long-term goal of the campaign was to prevent violence against women by addressing the gendered drivers of this violence. The Line aimed to help young people 'to understand what's ok and what's not when it comes to intimate relationships, and encourages them to call out behaviours that hurt and disrespect others'.[284]

The Line used 'a multi-pronged approach including social media, content marketing, ambassadors and partners, resources for 'influencers' (e.g. parents and teachers), public relations, advertising and stakeholder engagement.[285] A large range of interactive resources has been delivered under *The Line*, for young people themselves and to support adults who interact with young people.

Our Watch commissioned research in 2017 to measure attitudinal changes of young people aged 12 to 20, based on evaluation surveys conducted in 2015 and 2017. Compared with the 2015 survey, the 2017 survey found that a greater proportion of young people rejected male control, non-physical forms of violence, rigid gender roles and victim blaming.[286] The evaluation also found that young people who recognised *The Line* campaign were more likely to have talked to someone else recently about what makes relationships healthy, non-abusive or respectful than those who had not seen the campaign (28% and 17% respectively).[287]

More recently, a new campaign called *Never Follow* has been delivered under *The Line*. *Never Follow* targets young men, supporting them to:

> [d]evelop positive personal identities not constrained by gender stereotypes [and] focuses on promoting healthier masculinities so that all young men can live free from limiting and rigid stereotypes of how a 'real man' should act, feel [and] behave.[288]

Never Follow also recognises that these stereotypes can 'subsequently impact young women.'[289] *Never Follow* has produced a range of resources including advertising, campaign ambassadors, online content and videos.

The Commission's view

In view of the evidence outlined above, the Commission considers that primary prevention of sexual harassment must target young people as a priority. The Commission notes emerging evidence from prevention initiatives such as *The Line* of a positive shift in attitudes amongst young people in relation to sex, dating and relationships. The Commission supports existing work to address attitudes and behaviours among young people that enable violence against women, including *#Me Too, It's About You, The Line* and *Never Follow*, and believes it is essential that the development of primary prevention resources for young people focused on sexual harassment complements and is coordinated with these existing initiatives.

The Commission considers that Our Watch is best placed to lead the primary prevention work recommended in this Section. Our Watch was established under the National Plan as the national centre of excellence for the primary prevention of violence against women and their children.[290] All Australian governments are now members of Our Watch and support its violence prevention work.[291] Additionally, the Commission was advised by a wide range of stakeholders that the prevention of sexual harassment should be guided by *Change the Story*, the primary prevention framework jointly developed by Our Watch.

As the Commission noted in Section 3.9, National Sexual Harassment Research Agenda, there is a need to develop the evidence base in relation to the effectiveness of strategies for the primary prevention of sexual harassment. Our Watch should monitor and evaluate the strategies it develops for the primary prevention of sexual harassment, to contribute to this evidence base.

Key primary prevention initiatives identified by the Commission for action by Our Watch are set out below.

RECOMMENDATION 8:

Our Watch lead the development of evidence-based strategies for the prevention of sexual harassment, including implementation, monitoring and evaluation. Immediate priorities for action should include:

a. **social change strategies on sexual harassment, including a national campaign to increase knowledge of, and change behaviours that drive, sexual harassment**

b. **targeted, evidence-based prevention strategies to address sexual harassment of populations who are at higher risk**

c. **initiatives targeted towards young people that focus on sexual harassment as a form of gender-based violence.**

(iii) Workplace rights education for young people

As noted above, the Commission heard that young people are less likely to be educated about their rights at work, and the high rate of casual employment among young workers means that they are less likely to receive on-the-job training. These issues are discussed in more depth in Section 3.5.

The importance of workplace rights education for young people was raised in consultations:

> [i]t is about knowing what your rights are in the workplace. And they do go out to schools and talk about sexual harassment, but also how much you should be paid and all of those is encapsulated. Because I think you do start a job in a precarious nature, and you're just there kind of going, 'Oh, great, I've got my 12 dollars an hour. I can go buy a piece of clothing.' … [A]nd employers getting away with that.[292]

> I agree with the education, educating young people approach … [E]ven girls age 15 to 17 are experiencing sexual harassment in their first job. And I think often when you're younger you know that you have rights in terms of pay, like public holiday pay—all that sort of thing. I think it's important that young girls also know their rights in terms of what's acceptable and not acceptable in the workplace both from staff and from customers and clients.[293]

This is also important because while young people may enter the workforce from a young age,[294] as noted above, they may not receive information about sexual harassment or workplace rights and responsibilities until they have been in the workforce for some time and receive formal induction and training. The Young Women's Advisory Group to the Harmony Alliance and Equality Rights Alliance told the Commission that there should be 'educational initiatives to inform young people of their rights, the spectrum that encompasses workplace sexual harassment, and clear avenues for complaint and redress'.[295]

The Commission notes that there are existing resources in this area. For example, the Australian Institute of Employment Rights has developed a curriculum resource on workplace rights and responsibilities for young people called *Work Right* (see below), and the Fair Work Ombudsman publishes a best practice guide for young workers.[296] As discussed in Section 5, 'The legal and regulatory framework', the Fair Work Ombudsman has also developed a Fair Work Information Statement which employers are required to give to new employees before, or as soon as possible after, they start their job. The Information Statement provides general information on conditions of employment.[297]

In addition, Youth Law Australia provides online information for young people on their work rights, including workplace bullying and sexual harassment.[298]

Work Right

Work Right was commissioned by the Victorian government, and developed by the Australian Institute of Employment Rights and the Teacher Learning Network, for use by all teachers working with secondary school students.[299]

Work Right is intended to raise awareness about workplace rights and responsibilities among young people entering the workforce for the first time and aims to help young people understand and manage workplace culture and their rights and responsibilities in the workplace.[300] It consists of:

- a curriculum resource including classroom activities
- student and teacher resources
- web applications and a website.[301]

The resource is built around ten workplace themes:

1. Everyone should have a fair go at work.
2. Everyone has a right to be treated with dignity.
3. Discrimination and harassment are against the law!
4. Everyone has a right to a safe and healthy workplace.
5. Everyone should get a say about the things that affect them.
6. You should always be able to ask someone to speak on your behalf.
7. No one should be asked to leave without a fair reason.
8. Everyone is entitled to fair basic conditions.
9. You (or your representative) should be allowed to bargain for a fairer deal.
10. Disputes should be resolved quickly and fairly.[302]

Work Right is designed to be as flexible as possible for the diverse range of schools and contexts in which teachers work.[303]

The Commission's view

In view of these issues, and given the reasons explored above for focusing primary prevention effort on young people, the Commission considers it is important that young people are educated about workplace rights more broadly, as well as in relation to sexual harassment.

The Commission is of the view that existing resources that can assist young people to understand their rights at work and how to pursue them should be identified and, if necessary, adapted to include specific content on workplace sexual harassment. The Commission and the Fair Work Ombudsman are best placed to undertake this work through the Workplace Sexual Harassment Council (see Section 5.2, 'Towards a new regulatory model', for information about the Council). The Commission and the Fair Work Ombudsman should also promote these materials for use in settings that reach young people, including schools, universities and other tertiary and higher education institutions.

RECOMMENDATION 9:

Educational resources for young people of working age on workplace rights be identified, adapted to ensure relevance to workplace sexual harassment and promoted by the Australian Human Rights Commission and Fair Work Ombudsman for use in schools, tertiary education institutions and other settings that reach young people.

(iv) School-based respectful relationships education

As noted above in Section 4.3(b)(iii), the education system is a critical setting for primary prevention, and there are a range of reasons for focusing prevention efforts on children and young people in a school setting.

Schools themselves provide 'an existing universal infrastructure' for the delivery of primary prevention that addresses the causes of violence against women and how to shift attitudes that underpin this violence.[304] There is also strong evidence that school-based prevention, if implemented correctly, is effective in preventing violence against women and girls.[305]

The Commission heard from a range of organisations and individuals about the importance of reaching young people in school settings before they join the workforce:

> [T]o remove … this kind of behaviour [sexual harassment] from the workplace, you actually need to start before the people are entering the workplace. So I think education needs to be focused on kids going through schools and all that prior to them getting into the workplace, because once they're in, that behaviour has already entered the workplace so if they develop, you know, positive behaviours through school then it shouldn't trickle into the workplace.[306]

> Schools and universities must include workplace preparation education and awareness-raising activities to help prepare students for the workforce. It is hoped this will mitigate the risk of sexual harassment occurring. This should include age-appropriate communication and adhere to existing education guidelines. It should include explanations of what is deemed as inappropriate sexual behaviour and sexual misconduct, acceptable boundaries between, and negative consequences of, sexual harassment.[307]

In 2015, all Australian governments agreed to strengthen respectful relationships education in the Australian Curriculum.[308] The relevant section of the Australian Curriculum states:

> The content supports students to develop knowledge, understanding and skills that will help them to establish and manage respectful relationships. It also supports them to develop positive practices in relation to their reproductive and sexual health and the development of their identities. In doing so, students will gain an understanding of the factors that influence gender and sexual identities.[309]

For students in years 3 to 10, the curriculum states that, 'at appropriate intervals across the continuum of learning', students will learn about (among other things) 'bullying, harassment, discrimination and violence (including discrimination based on race, gender and sexuality)' and 'strategies for dealing with relationships when there is an imbalance of power (including seeking help or leaving the relationship)'.[310]

Respectful relationships education was also identified as a national priority by all governments with the inclusion of a specific action to support its delivery in the *Third Action Plan* of the National Plan:

> Support schools and teachers to deliver age-appropriate and evidence-based respectful relationships education to all schoolchildren covering sexual violence, gender equality issues and a range of other relationship issues and tailored to vulnerable cohorts.[311]

Evidence reviews of respectful relationships education in Australia highlight core elements for good practice.[312] The key starting point identified in these reports is that, to be effective, respectful relationships education must address the drivers of gender-based violence. [313] In some cases, as a result of resistance among some teachers, schools and students to a gender-based analysis of violence against women, some respectful relationships education programs have adopted gender-neutral content and explain violence in terms of individual behaviour, rather than exploring the social and structural factors that drive violence against women.[314] However, there is strong evidence that, to be effective, respectful relationships education must 'recognise the role of inequality, gender and power in the occurrence of gender-based violence and seek to address these explicitly.'[315]

A further feature of effective respectful relationships education is that it should take a 'whole school' approach, which extends beyond classroom learning[316] and includes:

- teaching across a broad range of learning areas (integrating key concepts across the curriculum, not only in health and physical education)[317]
- ensuring school policies, practices, culture and working conditions for staff promote gender equality and respectful relationships[318]
- providing specialist training and resources for teachers and other staff[319]
- modelling behaviour that reflects respectful and equitable relationships by teachers, non-teaching staff and school leaders[320]
- establishing partnerships with local community organisations with expertise in gender-based violence and gender equity, who can support the work of the school.[321]

Our Watch told the Commission that its experience to date indicates that:

> if education systems do not implement a whole-of-school approach, respectful relationships education will not be effective in shifting the underlying drivers of gender-based violence. In particular, a lack of investment in building the skills and knowledge of teaching staff can limit cultural change in schools and, in some cases, cause adverse outcomes (for example, conveying misinformation to students). A whole-of-school approach is crucial to transforming schools to ensure that they promote gender equality and model respectful relationships.[322]

Other features of effective respectful relationships education include:[323]

- a long-term approach and commensurate funding
- evaluation and continual improvement

- resources and support for teachers
- age-appropriate interactive curriculum
- capacity-building for school staff to be able to deal with disclosures of violence or sexual assault.[324]

Despite the commitment in the *Third Action Plan* of the National Plan to support delivery of evidence-based respectful relationships education across all jurisdictions, and the growing body of evidence of effectiveness, the Commission understands that there is a lack of consistency across Australia in how this commitment, or how the Australian curriculum relating to respectful relationships education, is implemented.

Victoria has invested significantly in respectful relationships education, acting on the recommendation of the Victorian Royal Commission into Family Violence.[325] In 2016, respectful relationships education became a core component of the Victorian Curriculum from foundation to year 12, and is taught in all government and Catholic schools and many independent schools.[326] In accordance with evidence of best practice, and in line with the recommendation of the Royal Commission into Family Violence, the Victorian Government is implementing a whole-school approach.[327]

However, in some jurisdictions respectful relationships education is not compulsory, and not all jurisdictions have developed respectful relationships curricula.[328] Our Watch told the Commission that: 'There has been uneven implementation of a whole of school approach to [respectful relationships education] across States and Territories and alignment to the evidence base has also been uneven.'[329]

Similarly, the Australian Education Union told the Commission that, '[w]hile Respectful Relationships Education sits in the curriculum of some states and territories, not all of them are currently resourcing a whole school approach', even though a whole-school approach is best practice.[330] The Australian Education Union recommended that state and territory Departments of Education 'adopt the Respectful Relationships in Schools curriculum designed to teach students the underlying beliefs and attitudes that lead to gender-based discrimination and violence.'[331]

Women's Health Victoria told the Commission that respectful relationships education is well established in school settings and 'could be adapted to include more specific content on sexual harassment.'[332]

The Commission's view

In the context of domestic and family violence, the Commission has previously noted the importance of respectful relationships education as a means for instilling generational change by addressing the root causes of violence, including gender inequality.[333] The Commission's 2018 report to the UN Committee on the Rights of the Child stated that it welcomed the inclusion of respectful relationships education in the Australian Curriculum, with programs starting from Kindergarten, and recommended that 'Australian Governments ensure all children receive respectful relationships education targeted to different group needs.'[334]

Given the strong evidence showing that best practice respectful relationships education—which addresses the gendered drivers of violence against women and uses a whole-school approach—is an effective method for preventing violence against women, the Commission considers it is critical that Australian governments ensure all children and young people receive such education in a school setting.

The Commission believes that respectful relationships education must explicitly recognise sexual harassment as a form of gender-based violence, and provide age-appropriate information that frames sexual harassment as a form of gender-based violence, explains what constitutes sexual harassment, where to seek help and how to report it.

RECOMMENDATION 10:

All Australian governments ensure children and young people receive school-based respectful relationships education that is age appropriate, evidence-based and addresses the drivers of gender-based violence, including sexual harassment.

(v) Prevention strategies by tertiary and higher education institutions

As noted above, universities and other tertiary and higher education institutions are key settings for addressing gender inequality and changing social norms, as they provide an avenue to directly influence people's attitudes during the critical transition from school to work or career change.

'Tertiary and higher education' refers to a broad range of education and training institutions including:

- universities
- other tertiary education providers
- vocational education and training providers
- Technical and Further Education (TAFE) providers.

Universities, in particular, provide unique opportunities to implement prevention initiatives, with:

> potential to drive whole-of-campus activities, link to associated professional development for relevant university educators, develop tools for students to engage in respectful relationships and take bystander action, and reach a number of businesses who are onsite at the university.[335]

Tertiary and higher education providers play an important role in the prevention of sexual harassment because they can contribute to shifting the gendered drivers that underpin sexual harassment by transforming attitudes and behaviours related to gender inequality that:

- affect students in an educational context
- students of the institution will carry with them into the broader Australian workforce
- affect the institutions' staff in a workplace context.

Tertiary and higher education providers can also play a role in building awareness amongst students about their rights at work more broadly, including in relation to sexual harassment.

Sexual harassment education for students

In 2017, the Commission released *Change the course: National report on sexual assault and sexual harassment at Australian universities* (*Change the course*), which presented the findings of a survey and submissions on the prevalence and nature of sexual assault and sexual harassment among Australian university students.[336] *Change the course* recommended (Recommendation 2) that universities undertake attitudinal change by developing:

> [a] plan for addressing the drivers of sexual assault and sexual harassment that: provides students and staff with education about: behaviours that constitute sexual assault and sexual harassment, consent and respectful relationships, 'violence supportive attitudes' and bystander intervention.[337]

The Tertiary Education Quality and Standards Authority (TEQSA—the national quality assurance and regulatory agency for higher education) compiled a report in January 2019 providing an overview of higher education providers' responses to the issue of sexual assault and sexual harassment highlighted in *Change the course*.[338] TEQSA found that 'the majority of universities have accepted the *Change the course* recommendations and are responding comprehensively to the issue of sexual assault and sexual harassment.'[339] TEQSA observed that universities have been well supported by Universities Australia and its *Respect. Now. Always.* campaign.[340]

The University of Sydney's submission to the Commission for this Inquiry outlined a range of actions to implement relevant training and education, including an online educational module on sexual consent which, as of 2018, became a compulsory requirement for all commencing students. These also included in-person training by Rape and Domestic Violence Services Australia and Griffith University on consent, ethical behaviour, respectful relationships and how to intervene as a bystander.[341]

In relation to independent and TAFE higher education providers, TEQSA stated that overall their responses had 'not been as comprehensive as that of the universities'; however, TEQSA noted that the relevant peak bodies 'are committed to working with TEQSA to support their members to respond to the issue of sexual assault and sexual harassment.'[342]

RESPECT. NOW. ALWAYS

In February 2016, Universities Australia (the national peak body for universities) launched *Respect. Now. Always.* This initiative seeks to prevent sexual assault and sexual harassment in university student communities, and improve how universities respond to and support those who have been affected.[343]

Respect. Now. Always. built on work already implemented in individual universities, with the aim of increasing the effectiveness of individual efforts by working together across the entire national university system.[344]

As part of this initiative, Universities Australia engaged the Commission in 2016 to conduct an independent, national survey of university students to gain greater insight into the nature, prevalence and reporting of sexual assault and sexual harassment in Australian universities.[345] The survey findings are reported in *Change the course*.

Universities Australia recommitted to *Respect. Now. Always.* in August 2017, recognising that it is a long-term program of action, and publishing a ten-point Action Plan of sector-wide initiatives including:

- developing respectful relationships education for Australian university students
- developing principles to guide interaction between supervisors and postgraduate students
- sexual assault and sexual harassment awareness training for university leadership and staff.[346]

The Commission heard that some tertiary education institutions are beginning to consider how to educate students more holistically, to build their capacity to support diversity and inclusion and gender equality within the Australian workforce. For example, in a roundtable with academics, the Commission was told about curriculum changes in some universities that support this approach:

> We've actually changed our curriculum in the business school to include a unit, which … doesn't go directly to sexual violence, or use those words, but it's called 'Leading and Influencing in Business' … and it's about who am I, where am I from, what is my identity, what is my experience, who are you—all of those things—how are we different, how are we the same, how can we work together and what does that mean for us being leaders in organisations.[347]

In the vocational education and training (VET) sector, a Victorian initiative has developed an accredited VET pilot course in gender equity.[348] This consists of accredited units of competency, recognised under the VET structure, which can be taken up within a broad range of VET qualifications, or as a standalone course. Accredited units of competency covered in the course include: exploring gender equity policy and practice in the workplace; undertaking a gender assessment within a work context; and developing gender equity strategies. This training will enable workforce development around gender equity, and the accredited course will be piloted in 2020 with three Victorian training partners.[349]

Workplace rights education for students

The Commission heard that tertiary education and higher education institutions also have a role in equipping students with information about workplace rights more broadly, including those relating to sexual harassment, so they understand their rights and how to pursue them:

> I think universities need to step up and be involved, as they are starting to, hopefully, with the sexual assault issues. And also facilitating information and advice to students and international students about sexual harassment, whether it's O Week, whether it's pamphlets that go out with induction packages, but some information about what the law is, where they can access supports, and, yeah, about sexual harassment.[350]

> So, as an apprentice electrician, it was all about putting a screwdriver on a piece of wire. There was nothing about how you behaved. So when I was on construction sites, wolf whistling and ogling women and patting them on the bum and all of that was absolute normal.[351]

In a joint submission, several academics expressed concern that young people are often in a precarious position in workplaces, as interns or in unpaid work experience, and may not be protected against workplace sexual harassment.[352]

The Commission's *Change the course* report noted that some students reported experiencing sexual harassment while completing a professional placement as part of their university degree. Harassers included colleagues and clients in these workplaces or placements.[353]

Sexual harassment education for staff

While there has been considerable focus within tertiary education institutions (particularly universities) on sexual harassment in an educational context (ie. how sexual harassment affects students within these institutions), it is also important that all tertiary and higher education institutions, as employers themselves, consider how to address sexual harassment experienced by their staff.

The National Tertiary Education Union (NTEU) submission to the Commission provided examples of sexual harassment of university staff members. These included evaluation surveys of staff performance, completed anonymously by students, that were used to 'troll' and 'sexually harass' staff members.[354] The Commission also heard about post-graduate students in casual or contracted employment as research assistants and tutors who were reluctant to report sexual harassment to avoid risks to their career prospects, contract renewal or hours of work.[355] The NTEU told the Commission that although staff were 'very well educated on university processes and policy … there is a massive reluctance to formally report instances [of sexual harassment].'[356]

Our Watch also informed the Commission about work that is underway in partnership with Universities Australia and the Victorian Government to develop a 'whole-of-institution' approach to primary prevention in universities.[357] Announced by the project partners in February 2019, this approach includes respectful relationships education developed by Our Watch (to be trialled in four universities), as well as 'enhanced workplace standards, training packages, resources and toolkits for leaders, staff and students to promote equality and prevent violence.'[358]

The Commission's view

The Commission recognises the extensive work universities are already undertaking to give effect to the recommendations in *Change the course* for attitudinal change on sexual harassment and sexual assault, and the continued commitment of universities to a 'long-term program of action led by the university sector to prevent and address sexual assault and sexual harassment', delivered through the *Respect. Now. Always* initiative.[359]

While *Respect. Now. Always.* and *Change the course* focus on universities specifically, and address sexual harassment in an educational setting rather than a workplace context, the Commission is of the view that all tertiary and higher education providers should build on the recommendation for attitudinal change in *Change the course* (Recommendation 2) and provide students with evidence-based information and training on sexual harassment that will equip them to enter the workforce. This should recognise that sexual harassment is driven by gender inequality and address the drivers of gender-based violence.

Recognising that some tertiary and higher education providers are much smaller than universities, and may lack the resources or expertise to develop education programs without some support, the Australian Government should support those providers to deliver sexual harassment information and training, for example, through TEQSA and the Australian Skills Quality Authority.

By changing attitudes and behaviours amongst students that drive gender inequality and contribute to sexual harassment, students who enter the workforce (including those who ultimately become leaders in their workplaces) can contribute to the generational change required to shift the gendered drivers of sexual harassment across society.

Given the higher prevalence rates of workplace sexual harassment among younger workers, and the greater vulnerability of this cohort to adverse experiences within the workplace, the Commission also believes that all tertiary education institutions should ensure students are provided with information about workplace rights more broadly. This information should assist students to understand their rights at work and how to pursue them, including in relation to sexual harassment.

The Commission recognises that tertiary and higher education providers can play a crucial role in changing attitudes and behaviours on gender inequality and violence against women amongst all involved with the provider—both students and staff. As these institutions are also workplaces, broader work is required within them to ensure gender equality is recognised and promoted across all facets of the organisation, including as an educational setting and a workplace setting. Preventing and responding to sexual harassment in a workplace setting is discussed in Section 6.

RECOMMENDATION 11:

Building on work already underway in response to the recommendations in *Change the course*, all tertiary and higher education providers deliver evidence-based information and training on sexual harassment for staff and students that addresses the drivers of gender-based violence and includes content on workplace rights.

RECOMMENDATION 12:

Recognising that some smaller tertiary and higher education providers lack the necessary resources and expertise to deliver the information and training identified in Recommendation 11, the Australian Government should support those providers to do so, for example through the Tertiary Education Quality Standards Authority and the Australian Skills Quality Authority.

(d) Media guidelines

(i) Role of the media in reporting workplace sexual harassment

As discussed in Section 4.3(b)(ii) above, media reporting has an important role in shaping community attitudes and public understanding of violence against women and normalising stereotypical gender roles and behaviours,[360] and is one of the key settings for action in the context of sexual harassment prevention.

The media can shape how society perceives, understands and responds to workplace sexual harassment. In particular, it influences how victims of sexual harassment are portrayed and determines whether reporting occurs with the informed consent of victims.

If the media reports on sexual harassment matters without the consent of the victim, in ways that identify or otherwise harm them, it can have the direct, if unintended, effect of discouraging victims from raising allegations. Victims, especially women, may feel they have lost control over their narrative and story. In light of the fact that a victim's privacy and boundaries have already been violated, this can lead to can lead to re-traumatisation.[361] The impact this has on public awareness and discourse, and above all victims, should not be underestimated.

The Commission heard about the impacts of media reporting on the careers and wellbeing of victims. For example, in a consultation with individuals from the media, arts and entertainment industries, one participant noted, 'There are several cases at the moment of people who have been victim shamed in the media. They are young actors whose careers will suffer.'[362]

Critically, some media reporting can undermine proper workplace and legal processes, and the lack of due process and natural justice can cause damage to all parties, including alleged perpetrators. Further, sensational media reporting that overtly focuses on individual perpetrators or workplaces, rather than the systemic and structural nature of sexual harassment, can act as a disincentive for transparency.

However, the media also has an integral role to play in exposing sexual harassment and improving community understanding of the prevalence and systemic nature of sexual harassment, and this can be especially powerful if done with the informed consent of the victim.

The media's role in shaping the public's understanding of sexual harassment is particularly important given that most victims do not report their experiences and only a small number of victims who do report proceed to court. Most cases are settled privately through confidential agreements. Non-disclosure and confidentiality agreements are discussed further in Section 5.8(a), 'Non-disclosure agreements and confidentiality clauses'.

Associate Professor Karen O'Connell has written about how confidential processes, and the cost and difficulty of pursuing legal action, result in limited public exposure of sexual harassment:

> While these layers of confidentiality and privacy may suit the harassed as well as the alleged harasser, the flip side is that it makes sexual harassment, an enormous social problem, barely known to the public. Only the tiniest number of cases make it to court and into public scrutiny.
>
> And if women speak up publicly through social or conventional media, defamation laws come into play.[363]

Associate Professor O'Connell outlined how defamation decisions that find against a victim of sexual harassment can not only have a silencing effect on discussion and reporting, but also further entrench public perceptions of the risks of speaking up. In relation to the defence of contextual truth, Associate Professor O'Connell outlined the risk that if a court finds there was insufficient evidence to establish the truth of a statement in law, the public may misconstrue this as meaning the victim lied.[364]

Submissions also raised the chilling effect of defamation laws on the media, public discourse and the ability of victims, especially women, to speak out.[365] These issues are discussed further in Section 5.8(b), 'Defamation laws'.

Existing guidance for media reporting

An example of the media's capacity to contribute to better public understanding and improved public discourse on significant public issues is the reporting of suicide.

Historically, the media shied away from reporting suicide for fear it would result in a contagion effect or copycat suicides.[366] While there may be a risk that certain types of reporting on suicide (such as information about the method of suicide) could trigger suicidal ideation and behaviours, it is now understood that sensitive and responsible reporting of suicide can encourage greater community discussion, increase public understanding and form an integral aspect of suicide prevention.[367]

It is for this reason that the Australian Government established Mindframe, Australia's national program supporting safe media reporting, portrayal and communication about suicide, mental ill-health and alcohol and other drugs.[368] Mindframe publishes a range of information to guide the media's reporting of the complex issue of suicide. This includes being mindful of:

- using safe and inclusive language
- presenting confirmed information
- removing method and location details
- including help-seeking pathways.[369]

Case study:

Australian Press Council's Specific Standard on Suicide

Since 2011, the Australian Press Council (the Council) has issued Specific Standards, which apply its Statements of Principles to specific contexts. These standards are legally binding on all publications that are subject to the Council's jurisdiction.[370]

The Specific Standards on Coverage of Suicide concern the coverage of suicide and related issues in print and online media. The standards recognise the public benefit that can come from general reporting and comment on issues relating to suicide.[371]

In summary, the standards require publications to abide by eight principles that fall under the below six categories:

1. General reporting and discussion
2. Reporting individual instances
3. Reporting methods and locations
4. Responsibility and balance
5. Sensitivity and moderation
6. Sources of assistance.[372]

These guidelines highlight the importance of language, focus and emphasis in reporting. In a similar way, Jane Gilmore, journalist and columnist, has explored how gendered violence, sexism and power manifest in media reporting. Through her project 'Fixed It', Gilmore examines article headlines that relate to men's violence against women. [373] She analyses how the language and focus of headlines can blame the victim, over-identify with abusers and excuse or downplay the actions of the abuser. By 'fixing' the headline to frame responsibility on the abuser, Gilmore has sought to change the public understanding of men's violence against women.[374]

What these examples ultimately highlight is how crucial a role the media can play as part of a whole-of-community response to addressing sexual harassment.

(ii) Overview of regulation

A number of bodies have responsibility for media content in Australia.

The Australian Communications and Media Authority (ACMA) is responsible for the regulation of broadcasting, radiocommunications, telecommunications and some online content.[375]

As part of a co-regulatory scheme, the ACMA monitors codes of practice developed by industry and deals with unresolved complaints made under them.[376]

Under this scheme, broadcasting industry groups are responsible for developing codes of practice applicable to their section of the industry and conducting public consultation on their draft codes.

The ACMA's role is to register industry codes of practice, where it is satisfied that a code provides appropriate community safeguards and that members of the public have been given an adequate opportunity to comment on the code.[377]

The ACMA has regulatory responsibilities in relation to a number of codes, including the Commercial Radio Code of Practice, the Community Radio Broadcasting Codes of Practice, the Commercial Television Industry Code of Practice, Community Television Codes of Practice, the ABC Codes of Practice and SBS Codes of Practice.[378] Various guidelines can also apply in relation to these schemes, but these are generally advisory only.[379]

The Australian Press Council is the principal body with responsibility for responding to complaints about Australian newspapers, magazines and associated digital outlets.[380]

The Australian Press Council's Standards of Practice relating to print and online publishing are primarily contained in the Statement of General Principles and the Statement of Privacy Principles.[381] These are binding on all publications that have agreed to be subject to the Council's jurisdiction and complaints process. This represents around 90% of all print media sales in Australia.[382]

In addition, since 2011 the Australian Press Council has issued Specific Standards, which are also binding. There are currently two Specific Standards: Coverage of Suicide and Contacting Patients.[383] The Australian Press Council also has 13 Advisory Guidelines, which may be taken into account and serve to assist publications in complying with the Statement of Principles, but are not binding.[384]

Taken as a whole, these standards, codes and guidelines attempt to establish good media practices across a range of areas, including accuracy, fairness and privacy. Importantly, they seek to reflect community standards and advance the public interest.

The Commission has considered how these media frameworks, in practice, apply to media reporting relating to sexual harassment and whether these frameworks could be improved. Of particular interest to the Commission is the issue of privacy.

All the media codes have clauses and standards relating to privacy. The Australian Press Council has a particularly detailed Statement of Privacy Principles, which includes seven privacy principles. However, the Commission is concerned that the privacy of victims of sexual harassment is not always adequately accounted for in media reporting.

Neither the ACMA or the Australian Press Council has a standard, code or guideline that specifically addresses reporting on sexual harassment.

Without such guidance, there is not only the risk that the media's capacity to drive positive change on addressing sexual harassment may be lost, but that it may unintentionally contribute to damaging and detrimental reporting.

(iii) New guidelines

There are existing subject-specific guidelines for the media that demonstrate how effective and impactful issue-specific guidelines can be. In addition to the guidelines on reporting of suicide discussed above, the media has also made notable developments in how it reports on family and domestic violence.

The Australian Press Council has a non-binding *Advisory Guideline on Family and Domestic Violence Reporting*.[385] The guideline attempts to address the complex issue of family and domestic violence in a nuanced and responsible way.

The Commission notes that many of its key principles could apply in the context of sexual harassment, including:

> The safety and wellbeing of those affected by family violence must be the primary consideration. Publications should not publish information that could cause or contribute to the risk of harm, offence or distress. Survivors of family violence often comment that their pain and suffering was exacerbated by media coverage. In some circumstances, it may not be safe, appropriate or legal to use real names or other identifying information.

> When interviewing a person affected by family violence, journalists should consider whether the person has the necessary support. Publications should consider the unintended consequences that interviews and published material might have on those affected by family violence, especially children, in the immediate short term and the longer term.'[386]

Similarly, the non-binding Commercial Radio Guidelines, associated with the Commercial Radio Code of Practice monitored by the ACMA, include guidance on domestic and family violence and its impacts, which may also be applicable to victims of sexual harassment:

> The emotional impacts of domestic violence often include feelings of intense shame and vulnerability. Make sure you do all you can to report on domestic violence in a way that upholds the survivor's right to dignity, remembering that there might be trauma associated even with an incident that occurred many years ago.
>
> When interviewing survivors, give them as much time as possible to tell their story, check with them a couple of times to ensure you have consent to disclose elements of their story, and where possible, give them the opportunity to review the content.'[387]

Recognising the importance of ensuring the media reports responsibly on violence against women, Our Watch has produced a number of non-binding issue-specific guidelines, to support responsible reporting on sexual violence, domestic violence, family violence in Aboriginal and Torres Strait Islander communities, and child sexual abuse.[388]

These form part of its *Media Making Change* initiative, which Our Watch outlines as recognising that 'evidence-based media reporting on violence against women and their children can help readers, listeners and viewers understand how widespread it is, who is affected, what drives it and how it can be prevented'.[389]

Our Watch provides eight key tips for reporting violence against women:

1. Safety first
2. Name it
3. Keep the perpetrator in view
4. Be respectful
5. Reflect the evidence
6. Use appropriate imagery
7. Quote experts
8. Include support options

Similarly, the Full Stop Foundation has developed fact sheets for journalists specifically in relation to reporting on sexual harassment within university communities, which includes guidance across the whole stage of the reporting process, including the below 'before publishing checklist':

- Do I know why the survivor wants to tell their story?
- Is their objective reflected in the story?
- Have I considered any legal issues?
- Have I explained right-of-reply and fact-checking?
- Have I read back any quotes to the survivor?

- Is my story respectful to the issue?
- Has the survivor informed all necessary family and friends prior to the story release?
- Have I added appropriate support hotlines?
- Have I supplied the survivor with appropriate resources and are they supported?
- Have I kept the survivor informed of the release date?[390]

These types of fact sheets underscore the link between issue-specific guidance and informed, responsible and robust public interest journalism on those issues. Sexual harassment is a complex, multilayered and nuanced issue that the Commission considers should be addressed explicitly and specifically in new guidelines.

(iv) Other measures to promote responsible reporting and improve community understanding

Other measures could also assist in promoting responsible and robust reporting of sexual harassment, such as journalism awards or fellowships.

Awards within the media profession are commonly used to recognise and celebrate excellence in journalism and set a benchmark to encourage journalism of a similar quality.

An award that recognises excellent reporting on sexual harassment could contribute to a broader understanding, both in the media industry and the community, about the value and impact of public interest journalism on sexual harassment.

Fellowships provide journalists an opportunity to learn intensively on a subject as part of the development of mutual knowledge and practice with their peers. One example is the Our Watch Fellowship Program administered by the Walkley Foundation. The fellowship gives 14 journalists the opportunity to build and refine their knowledge of best practice reporting on violence against women and deepen their understanding of the complexities of the issue.[391]

A fellowship program could also be of significant benefit in encouraging best practice reporting on sexual harassment.

These initiatives highlight the importance of practical measures to support best practice reporting on sexual harassment.

In addition to news and current affairs reporting, the media can also improve community understanding on the nature, drivers and impacts of sexual harassment through entertainment and the arts. For example, the four episode show, *The Hunting*, explored image-based abuse and consent, highlighting an important social issue for young people in Australian society.[392] As noted above in Section 4.3(b)(iv), the arts provide a valuable way to challenge social norms and encourage community participation, and are an important setting for the prevention of sexual harassment.

(v) Other measures to support journalists

While the focus of the Commission's recommendation is on the wellbeing and safety of victims, journalists who report on traumatic matters can also experience negative and often distressing impacts, such as post-traumatic stress disorder.[393] The Dart Center for Journalism and Trauma (Dart Center) could be a useful source of guidance. The Dart Center not only provides journalists with advice on reporting ethically and responsibly on sensitive and traumatic issues, but also publishes tips and toolkits to help journalists build their resilience and protect their welfare and wellbeing when reporting on difficult issues.[394]

In addition, the Full Stop Foundation mentioned above provides information and guidance on vicarious trauma for journalists.[395]

The Commission's view

The Commission reiterates the important role of the media in addressing sexual harassment. To enable the media to fulfil this important role, the Commission is of the view that media guidelines on reporting sexual harassment, which are victim-centred, gender-responsive and balance public interest considerations, should be developed.

These guidelines should, among other things, prioritise the consent, safety and welfare of victims when reporting on individual instances of sexual harassment. They should also focus specifically on respecting and upholding a victim's privacy, and reinforcing that sexual harassment is a systemic issue.

To avoid causing further harm to victims, the Commission considers that, in principle, sexual harassment allegations should only be reported with the informed consent of the victim.

Given the Commission recommends that Our Watch lead the development of strategies for the prevention of sexual harassment at a national level, this work and the *Change the Story* framework should inform the development of the guidelines. The new guidelines should also draw on the regulatory and policy expertise of the ACMA and Australian Press Council, as well as the coordinating role of the Workplace Sexual Harassment Council.

The Commission recognises that the ACMA and Australian Press Council have different jurisdictions. It also acknowledges that any guidelines developed by the Workplace Sexual Harassment Council would not be binding on the publications and bodies within the respective jurisdictions of the ACMA and the Australian Press Council.

The Commission recommends that the new guidelines draw upon the multi-stakeholder approach of the Workplace Sexual Harassment Council, the ACMA, the Australian Press Council and Our Watch, but ultimately be implemented according to the code and standard development processes managed by the ACMA and the Australian Press Council.

These guidelines should be supported by practical measures that build the knowledge, skills and capacity of media professionals to implement best practice reporting on sexual harassment.

While the primary purpose of these guidelines would be to improve media reporting, they could have a secondary benefit in raising awareness and reducing sexual harassment within the media. As discussed in Section 3.7, the information, media and telecommunications industry had the highest prevalence of sexual harassment across industry groups at 81%. The media have a crucial role for effecting change both within their profession and society more broadly.

RECOMMENDATION 13:

The Workplace Sexual Harassment Council (as recommended in Recommendation 14) work with the Australian Communications and Media Authority, the Australian Press Council and Our Watch to promote and support best practice reporting on sexual harassment by the media, including through:

a. **guidelines that promote the safe, responsible, victim-centred and gender-responsive reporting of sexual harassment**

b. **practical measures that build the knowledge, skills and capacity of media professionals to implement best practice reporting on sexual harassment.**

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3 Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*, 2.
4 UN Women, *A Framework to Underpin Action to Prevent Violence Against Women* (2015) 8; Our Watch, Submission 281, *Sexual Harassment Inquiry*, 16.
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6 Monique Keel et al, *Putting the Prevention of Violence Against Women into Practice: How to Change the Story* (Our Watch, 2017) 34.
7 See, eg, World Health Organization, Regional Office for Europe, 'EPHO5: Disease Prevention, Including Early Detection of Illness', *The 10 Essential Public Health Operations* (Fact Sheet, 2019) <www.euro.who.int/en/health-topics/health-systems/public-health-services/policy/the-10-essential-public-health-operations/epho5-disease-prevention,-including-early-detection-of-illness2>; World Health Organization, Regional Office for the Eastern Mediterranean, 'Health Promotion and Disease Prevention through Population-Based Interventions, Including Action to Address Social Determinants and Health Inequity', *About Us* (Fact Sheet, 2019) <www.emro.who.int/about-who/public-health-functions/health-promotion-disease-prevention.html>; Australian Government, Australian Institute of Health and Welfare, *Australia's Health 2014* (Australia's Health Series No 14, Cat No AUS178, 2014) 344.
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9 Our Watch, Submission 281, *Sexual Harassment Inquiry*, 16. See also UN Women, *A Framework to Underpin Action to Prevent Violence Against Women* (2015) 8; Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 4; Gender Equity Victoria, Submission 438, *Sexual Harassment Inquiry*, 6; Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and the Victorian Health Promotion Foundation (VicHealth), *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (2015) 12–13; Michael Flood, Lara Fergus and Melanie Heenan, *Respectful Relationships Education: Violence Prevention and Respectful Relationships Education in Victorian Secondary Schools* (Department of Education and Early Childhood Development, Victoria State Government, November 2009) 8.
10 Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and the Victorian Health Promotion Foundation (VicHealth), *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (2015) 13.
11 Monique Keel et al, *Putting the Prevention of Violence Against Women into Practice: How to Change the Story* (Our Watch, 2017) 34.
12 Monique Keel et al, *Putting the Prevention of Violence Against Women into Practice: How to Change the Story* (Our Watch, 2017) 35.
13 See, eg, Victorian Health Promotion Foundation (VicHealth), Submission 147, *Sexual Harassment Inquiry*, 11; Women's Health in the South East, Submission 221, *Sexual Harassment Inquiry*, 18; Australian Women Against Violence, Submission 275, *Sexual Harassment Inquiry*, 8; Northern Territory Anti-Discrimination Commission, Submission 280, *Sexual Harassment Inquiry*, 12; Our Watch, Submission 281, *Sexual Harassment Inquiry*, 16; Victoria Legal Aid, Submission 283, *Sexual Harassment Inquiry*, 27; CASA Forum, Submission 285, *Sexual Harassment Inquiry*, 13; Women's Health East, Submission 286, *Sexual Harassment Inquiry*, 2–3; Women's Electoral Lobby, Submission 297, *Sexual Harassment Inquiry*, 5; Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 4, 7; Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*, 19.
14 Australian Institute of Employment Rights, Submission 300, *Sexual Harassment Inquiry*, 5.
15 AMMA, Submission 376, *Sexual Harassment Inquiry*, 6.
16 Australian Chamber of Commerce and Industry, Submission 349, *Sexual Harassment Inquiry*, 43.
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18 Lori Michau et al, 'Prevention of Violence Against Women and Girls: Lessons from Practice' (2015) 385(9978) *The Lancet* 1672, 1672.
19 UN Women, *A Framework to Underpin Action to Prevent Violence Against Women* (2015) 32.

20 UN Women, *Towards an End to Sexual Harassment: The Urgency and Nature of Change in the Era of #MeToo* (November 2018) 7.
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22 'Power to Prevent: Urgent Actions Needed to Stop Sexual Harassment at Work', (Joint Statement, 28 February 2019) <rlc.org.au/sites/default/files/attachments/endorsed%20power%20to%20prevent%20joint%20statement%20-%2028%20feb%202019.pdf>. Other submissions that supported *Change the Story* as the guiding framework for the primary prevention of sexual harassment included: Victorian Health Promotion Foundation (VicHealth), Submission 147, *Sexual Harassment Inquiry*, 9; Australian Women Against Violence, Submission 275, *Sexual Harassment Inquiry*, 8; Our Watch, Submission 281, *Sexual Harassment Inquiry*, 6; Victoria Legal Aid, Submission 283, *Sexual Harassment Inquiry*, 20; CASA Forum, Submission 285, *Sexual Harassment Inquiry*, 13; Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 2, 7; Young Women's Advisory Groups of Equality Rights Alliance and Harmony Alliance, Submission 353, *Sexual Harassment Inquiry*, 6; Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*, 19; National Working Women's Centres, Submission 383, *Sexual Harassment Inquiry*, 27–8; Gender Equity Victoria, Submission 438, *Sexual Harassment Inquiry*, 7–8; NOW Australia, Submission 439, *Sexual Harassment Inquiry*, 6, 13.
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26 Our Watch, 'Our Watch Welcomes NSW as Newest Member', *Latest News* (Press Release, 10 May 2019) <www.ourwatch.org.au/news-media/latest-news/our-watch-welcomes-nsw-as-newest-member>; Australian Government, Department of Social Services, *National Plan to Reduce Violence Against Women and their Children: Third Action Plan 2016-2019 of the National Plan to Reduce Violence Against Women and their Children 2010-2022* (2016) 9; Australian Government, Department of Social Services, *Fourth Action Plan: National Plan to Reduce Violence Against Women and their Children 2010-2022* (August 2019) 2.
27 Our Watch, Submission 281, *Sexual Harassment Inquiry*, 6.
28 Kim Webster and Michael Flood, *Framework Foundations 1: A Review of the Evidence on Correlates of Violence Against Women and What Works to Prevent It* (companion document to *Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and their Children in Australia*, Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and Victorian Health Promotion Foundation (VicHealth), 2015) 60.
29 UN Women, *A Framework to Underpin Action to Prevent Violence Against Women* (2015) 13.
30 Monique Keel et al, *Putting the Prevention of Violence Against Women into Practice: How to Change the Story* (Our Watch, 2017) 49.
31 Sumi Cho, Kimberle Williams Crenshaw and Leslie McCall, 'Toward a Field of Intersectional Studies: Theory, Applications, and Praxis' (2013) 38(4) *Signs: Journal of Women in Culture and Society* 785, 786, cited in Shreya Atrey, *Intersectional Discrimination* (Oxford University Press, 2019) 52.
32 Shreya Atrey, *Intersectional Discrimination* (Oxford University Press, 2019), 52.
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34 Intensification of Efforts to Prevent and Eliminate All Forms of Violence Against Women and Girls: Sexual Harassment, GA/Res 73/148, UN Doc A/RES/73/148 (17 December 2018) 5.
35 International Labour Office, *Ending Violence and Harassment Against Women and Men in the World of Work* (ILC.107/V/1, International Labour Conference, 2018) 97.
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38 See, eg, Australian Women Against Violence, Submission 275, *Sexual Harassment Inquiry*, 8; Our Watch, Submission 281, *Sexual Harassment Inquiry*, 14; Women's Health East, Submission 286, *Sexual Harassment Inquiry*, 2–3; Women with Disabilities Victoria, Submission 312, *Sexual Harassment Inquiry*, 28; Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 5; Australian Discrimination Law Experts, Submission 423, *Sexual Harassment Inquiry*, 22; Gender Equity Victoria, Submission 438, *Sexual Harassment Inquiry*, 4–6.
39 Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 5.

40 Kim Webster and Michael Flood, *Framework Foundations 1: A Review of the Evidence on Correlates of Violence Against Women and What Works to Prevent It* (companion document to *Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and their Children in Australia*, Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and Victorian Health Promotion Foundation (VicHealth), 2015) 45.

41 Kim Webster and Michael Flood, *Framework Foundations 1: A Review of the Evidence on Correlates of Violence Against Women and What Works to Prevent It* (companion document to *Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and their Children in Australia*, Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and Victorian Health Promotion Foundation (VicHealth), 2015) 45.

42 Our Watch, Submission 281, *Sexual Harassment Inquiry*, 14.

43 Victorian Health Promotion Foundation (VicHealth), Submission 147, *Sexual Harassment Inquiry*, 11; Our Watch, Submission 281, *Sexual Harassment Inquiry*, 15–16; Victoria Legal Aid, Submission 283, *Sexual Harassment Inquiry*, 20; Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 4; Australian Chamber of Commerce and Industry, Submission 349, *Sexual Harassment Inquiry*, 10, 13.

44 Our Watch, Submission 281, *Sexual Harassment Inquiry*, 15. See also Victoria Legal Aid, Submission 283, *Sexual Harassment Inquiry*, 20; Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*, 10.

45 Victorian Health Promotion Foundation (VicHealth), Submission 147, *Sexual Harassment Inquiry*, 11.

46 Australian Chamber of Commerce and Industry, Submission 349, *Sexual Harassment Inquiry*, 13.

47 Australian Chamber of Commerce and Industry, Submission 349, *Sexual Harassment Inquiry*, 10.

48 Kim Webster and Michael Flood, *Framework Foundations 1: A Review of the Evidence on Correlates of Violence Against Women and What Works to Prevent It* (companion document to *Change the Story: A Shared Framework for the Primary Prevention of Violence against Women and their Children in Australia*, Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and Victorian Health Promotion Foundation (VicHealth), 2015) 60–1.

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50 UN Women, *A Framework to Underpin Action to Prevent Violence Against Women* (2015) 31.

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52 Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and the Victorian Health Promotion Foundation (VicHealth), *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (2015) 38.

53 Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and the Victorian Health Promotion Foundation (VicHealth), *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (2015) 38. A list of priority settings for prevention action is also provided on pages 39–40.

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61 Georgina Sutherland et al, 'Media Representations of Violence against Women and their Children: State of Knowledge Paper' (ANROWS Landscapes No 15, November 2015) 2.
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64 Cara Gleeson et al, 'Respectful Relationships: Education in Schools' (Evidence Paper, Our Watch, December 2015) 9.
65 Consultation with policy stakeholders, Perth.
66 Consultation with Aboriginal and Torres Strait Islander workers, Canberra.
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68 Academic roundtable, Sydney.
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SECTION 5:

The legal and regulatory framework

The multiplicity of potential jurisdictions in which to seek a remedy for sexual harassment in the workplace makes it very difficult for a complainant to reach a confident decision about where to commence their complaint. At present, no one jurisdiction offers the 'complete package'.[1]

SNAPSHOT

- Currently, the key areas of legislation relating to sexual harassment in the workplace are anti-discrimination laws, employment laws and work health and safety (WHS) laws.
- Overwhelmingly, the Commission heard that the three broad schemes are complex and confusing for victims and employers to understand and navigate. The current system also places a heavy burden on individuals to make a formal complaint. The evidence shows that victims lack confidence in existing systems to deliver effective responses.
- While recognising their distinct roles, there is a need to improve coordination and consistency between the three key legal and regulatory schemes with respect to sexual harassment, to ensure they work in a complementary and mutually reinforcing manner. The establishment of a Workplace Sexual Harassment Council, funded by the Australian Government, would assist in achieving this.
- The legal and regulatory framework should encourage and support employers to take proactive and preventive measures to address sexual harassment, rather than relying on individual complaints.
- The *Sex Discrimination Act 1984* (Cth) has been effective, but lacks the obligations, powers and coverage to fully achieve its objects. Stronger mechanisms are needed, including:
    - » a positive duty on employers to prevent sexual harassment, sex discrimination and victimisation, with accompanying enforcement powers
    - » expanded definitions and coverage, to adapt to a modern and changing workplace, consistent with developments at an international level to address violence and harassment in the world of work
    - » clarity and consistency in the operation of sexual harassment laws—including across federal, state and territory anti-discrimination legislation—to help make the complaints process more accessible for individuals
- The Commission should also be provided with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment.
- There are complex reasons why a victim of sexual harassment may delay making a complaint. This should be reflected in the timeframes based on which the discretion arises to terminate a sexual harassment complaint to the Commission. There is also a need to provide an avenue for victims who have experienced historical workplace sexual harassment to have their experiences heard and recorded with a view to promoting recovery.
- The *Fair Work Act 2009* (Cth) has the potential to address sexual harassment, but the lack of an express prohibition relating to sexual harassment, and uncertainty on the part of employers regarding the unfair dismissal provisions, limit its capacity to provide protection for victims.

- To improve outcomes for people experiencing sexual harassment, recommendations for the Fair Work system address the prohibition of sexual harassment and ensuring it is understood as serious misconduct. The recommendations also introduce a 'stop sexual harassment order', equivalent to the 'stop bullying order'.
- WHS laws provide an appropriate framework to address sexual harassment, but they are currently underutilised, in large part due to the lack of any express regulation, code or guidance on sexual harassment. This has also led to regulators adopting inconsistent approaches to workplace sexual harassment matters. Additional regulation and guidance may assist in clarifying that the existing duty under the WHS laws includes prevention of sexual harassment, rather than creating new obligations.
- Despite the benefits of a 'no fault principle' workers' compensation scheme, victims are discouraged from making a claim, due to the onerous, lengthy and often re-traumatising process.
- There is a need for all agencies and regulatory bodies under the new regulatory model to improve their understanding of the nature, drivers and impacts of sexual harassment. This should include that sexual harassment is driven by gender inequality and is a form of gender-based violence.
- Non-disclosure agreements (NDAs) are often used in the settlement of sexual harassment cases but are subject to little regulation. NDAs have advantages and disadvantages for all parties involved, but best practice guidance is needed to ensure they are not used to silence victims and protect harassers.
- Sexual harassment complaints also take place against a backdrop of defamation laws that can discourage victims from making a complaint and do not provide sufficient protections for victims. The operation of defamation laws in Australia is currently under review. This includes issues relevant to defamation proceedings where sexual harassment allegations are involved. However, better protections are needed for alleged victims of sexual harassment who are witnesses in civil proceedings.
- Other general civil and criminal laws also relate to workplace sexual harassment. However, the Commission heard that some victims of sexual harassment who reported to police or engaged with the judicial system experienced responses which lacked sensitivity and understanding and were re-traumatising.
- Police and judicial responses to victims and others affected by workplace sexual harassment must be trauma-informed and recognise the nature, drivers and impacts of these behaviours.

5.1 Overview

This section of the report outlines the legal and regulatory framework relating to sexual harassment in the workplace. It draws upon submissions, consultations and extensive research to outline the key legal and regulatory issues relating to sexual harassment and, where necessary, recommends ways of improving how this framework applies to sexual harassment.

Section 5.2 outlines an improved regulatory model to promote coordination, consistency and clarity between the key schemes relating to sexual harassment in the workplace.

Section 5.3 considers Australia's international human rights obligations to prevent sexual harassment and other forms of gender-based violence and discrimination. Section 5.4 examines the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) and state and territory anti-discrimination laws. Sections 5.5, 5.6 and 5.7 consider the Fair Work system, the work health and safety (WHS) system and workers' compensation, respectively.

Section 5.8 considers issues around non-disclosure agreements and defamation laws which have arisen in the context of workplace sexual harassment matters and have contributed to the lack of transparency around these issues. Extending beyond these key schemes, Section 5.9 explores other legal and regulatory responses, including the ways in which a range of general civil and criminal laws and regulatory responses can intersect with sexual harassment in the workplace, police and judicial responses and industry codes of conduct.

Overall, this section makes a suite of recommendations to improve the legal and regulatory framework relating to sexual harassment in Australia for the benefit of victims, employers and the community.

5.2 Towards a new regulatory model

> [I]nconsistencies [between jurisdictions] impact the accessibility of the legislative regime for ordinary Australians, and make a difficult area of the law even more difficult to justify, explain and message, thereby compromising access to justice as well as public awareness raising efforts.[2]

(a) Introduction

Currently, the key pieces of legislation relating to sexual harassment in the workplace are:

- the Sex Discrimination Act
- state and territory anti-discrimination laws
- the *Fair Work Act 2009* (Cth) (Fair Work Act)
- state workplace relations laws
- and WHS laws, which are based on the model Work Health and Safety Act in all states and territories, except in Victoria and Western Australia (which have their own WHS schemes).

The Sex Discrimination Act, together with state and territory anti-discrimination laws, provides the primary framework for understanding and addressing sexual harassment as a form of sex discrimination, and recognises the right to work in an environment free from sexual harassment as a basic human right.

As discussed later in this section, a consistent theme that emerged in the Inquiry was that the interaction between the schemes is complex and confusing for workers and employers to understand and navigate. The Commission also heard that under the current framework, the lack of a positive duty in the Sex Discrimination Act to prevent workplace sexual harassment means that employers place a higher priority on compliance with employment law and WHS laws than discrimination law.

The right of workers to be free from sexual harassment is a *human right*, a *workplace right* and a *safety right*, and in the Commission's view, all three schemes, while recognising their distinct jurisdictions, have an important and mutually reinforcing role to play.

While the Sex Discrimination Act will continue to be the primary framework for addressing sexual harassment within a human rights context, each of the schemes offer specific and differing benefits to victims.

The Commission has therefore closely considered the coverage, clarity and comprehensiveness of current protections, as well as how coordination and consistency between the regulatory schemes can be improved.

In developing a new regulatory model, the Commission has identified the benefits of each scheme, how to maximise and improve existing legislative frameworks and how to leverage the expertise of existing regulators. Key to this is the establishment of stronger obligations under the Sex Discrimination Act.

At the same time, the Commission considers the Fair Work system and WHS laws both provide existing frameworks and enforcement mechanisms for workplace matters to be considered holistically. This is particularly important as sexual harassment may be only one aspect of a broader workplace complaint. Both frameworks are therefore well suited to enforce stronger compliance obligations on employers with respect to workplace sexual harassment, in conjunction with stronger obligations under the Sex Discrimination Act. Importantly, the recommendations in this report contemplate that these schemes would draw upon the understanding and definition of sexual harassment established under the Sex Discrimination Act.

In summary, through the package of recommendations in this report, the Commission considers its proposed new model will establish a strong regulatory foundation to drive better prevention by all employers, and provide more effective options for responding to sexual harassment, with the aim of ensuring safer, respectful and more productive Australian workplaces.

(b) Workplace Sexual Harassment Council

A key feature of the proposed new regulatory model is the establishment of a Workplace Sexual Harassment Council (Council).

The Sex Discrimination Commissioner would chair the Council to be established and funded by the Australian Government. In addition to the Sex Discrimination Commissioner, the Council's core membership would comprise representatives from the Fair Work Ombudsman, the Fair Work Commission, Safe Work Australia, the Heads of Workplace Safety Authorities, the Heads of Workers' Compensation Authorities and the Australian Council of Human Rights Authorities.

The Council would also include associate members to provide expertise and advice on specific issues or areas of work relating to sexual harassment. Associate members would include representatives across government, non-government, and independent organisations, including employer and union representatives.

The Commission would provide a key leadership, advisory and educative role in the Council to ensure that sexual harassment continues to be understood within a human rights framework.

The Council would provide a coordinated mechanism for the existing policy and regulatory bodies with responsibility for sexual harassment to work collaboratively together. Importantly, by enabling cross-sector collaboration it would drive the effectiveness and efficiency of government operations. This will ultimately improve employer prevention and support an effective tailored response for workers and employers.

The Council would be responsible for ensuring improved coordination, consistency and clarity under the new model, in order to simplify the process for victims and employers, while ensuring that the new model avoids duplication, ambiguity and undue burden on victims and employers. A further role of the Council would be to provide high level-advice and strategic insight to the Australian Government on issues relating to sexual harassment in the workplace.

Consistent with the multifaceted and whole-of-community response outlined in this report, the Council would also draw upon the experience and expertise of other key stakeholders where necessary, for example, through working groups or sub-committees.

As part of its advisory and educative role, the Commission would be responsible for developing guidance, programs and other outputs recommended by the Council, in conjunction with other relevant bodies, as appropriate.

RECOMMENDATION 14:

The Workplace Sexual Harassment Council, supported by a permanent secretariat, be established immediately and funded by the Australian Government. Its objective is to improve coordination, consistency and clarity across the key legal and regulatory frameworks, to improve prevention and response to sexual harassment.

The Council is to be chaired by the Sex Discrimination Commissioner and its core membership include representatives from:

- **the Fair Work Commission and Fair Work Ombudsman**
- **Safe Work Australia and the Heads of Workplace Safety Authorities**
- **the Heads of Workers' Compensation Authorities**
- **the Australian Council of Human Rights Authorities.**

The Council will also include associate members to provide expertise and advice on specific issues or areas of work relating to sexual harassment. Associate members include representatives across government, non-government, and independent organisations, including employer and union representatives.

5.3 International human rights obligations

> [V]iolence and harassment in the world of work constitutes a violation of human rights enunciated in relevant international instruments such as the Universal Declaration of Human Rights.[3]

Australia's domestic legal framework with respect to workplace sexual harassment must be understood in the context of Australia's broader international obligations to prevent sexual harassment and other forms of gender-based violence and discrimination.

Australia has ratified, and has therefore voluntarily agreed to be bound by, a number of international treaties that recognise fundamental human rights relevant to workplace sexual harassment, including the right to:

- live and work free from violence and harassment[4]
- freedom from discrimination[5]
- security of person[6]
- work[7]
- just and favourable conditions of work.[8]

The Sex Discrimination Act was enacted to give effect to Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW),[9] and to several other international instruments.[10] Additionally, under the *Australian Human Rights Commission Act 1986* (Cth) (Australian Human Rights Commission Act) the Commission has specific functions in relation to 'human rights', including inquiring into complaints alleging that an act or practice done by or on behalf of the Commonwealth is inconsistent with, or contrary to, any human right.[11] The definition of 'human rights' includes those rights recognised in the *International Covenant on Civil and Political Rights* (ICCPR), and the *Convention on the Rights of the Child* (CRC), among others.[12]

The Commission also has functions relating to equal opportunity in employment, which give effect to Australia's obligations under the *International Labour Organization Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation* (ILO 111).[13]

The Beijing Declaration and Platform for Action, adopted in September 1995 by 189 countries including Australia, is the defining global framework for the achievement of gender equality and women's rights.

Recognising that sexual harassment is a form of violence against women, it calls for governments, employers, trade unions, community and youth organisations and non-governmental organisations to 'develop programmes and procedures to eliminate sexual harassment and other forms of violence against women in all educational institutions, workplaces and elsewhere'.[14]

More recently, Australia has joined with 193 countries to sign onto the 2030 Agenda for Sustainable Development, which comprises 17 Sustainable Development Goals (SDGs) and 169 related targets to be achieved by 2030.[15] Goal 5 is directed to achieving gender equality and empowering all women and girls, recognising that to empower women requires addressing structural issues such as unfair social norms and attitudes, as well as developing progressive legal frameworks that promote equality between women and men.

The Commission, as an 'A Status' National Human Rights Institution under the United Nations Paris Principles,[16] contributes to the realisation of the SDGs through its core functions including education, awareness raising and inquiring into and conciliating complaints of unlawful discrimination and harassment, including sexual harassment, and breaches of human rights. It is through these core functions that the Commission has undertaken this Inquiry.

At the international level, there has been a growing awareness of, as well as urgent calls for action to effectively address violence and harassment in the world of work.[17]

On 21 June 2019, the International Labour Conference adopted a new Convention and accompanying Recommendation Concerning the Elimination of Violence and Harassment in the World of Work (ILO Convention 190).[18] Australia voted in favour of the ILO adopting the ILO Convention 190 and accompanying Recommendation. ILO Convention 190 provides for a broader definition of violence and harassment, which includes physical assault as well as psychological and sexual behaviours. Importantly, ILO Convention 190 includes gender-based violence in the definition of 'violence and harassment', acknowledging that gender-based violence and harassment disproportionately affects women and girls.[19]

Article 3 of ILO Convention 190 provides the following on the meaning of the 'world of work':

> This Convention applies to violence and harassment in the world of work occurring in the course of, linked with or arising out of work:
>
> (a) in the workplace, including public and private places where they are a place of work;
>
> (b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;
>
> (c) during work-related trips, travel, training, events or social activities;
>
> (d) through work-related communications, including those enabled by information and communication technologies;
>
> (e) in employer-provided accommodation; and
>
> (f) when commuting to and from work.[20]

ILO Convention 190 broadly defines 'worker' and 'workplace' to capture the full range of traditional and non-traditional work arrangements and relationships, as well as the different workplace settings in which violence and harassment can be experienced.[21]

Further, ILO Convention 190 encourages States to place a positive duty on employers to prevent violence and harassment in the workplace. It obligates States to adopt laws requiring employers to take steps, commensurate with their degree of control, to prevent violence and harassment in the world of work, including identifying hazards and assessing the risks of violence and harassment (with the participation of workers and their representatives) and taking measures to prevent and control them.[22]

The Commission received a number of submissions to the Inquiry that broadly supported Australia ratifying ILO Convention 190 subject to viewing the final text.[23] The Australian Institute of Employment Rights stated that:

> The Convention represents a broad-based approach to preventing gender-based violence and harassment at work, requires States to identify high risk sectors, occupations and work arrangements with respect to violence and harassment at work, and to implement targeted measures to effectively address such workers.[24]

ILO Convention 190's acknowledgement that gender-based violence and harassment at work cannot be adequately addressed without a broader focus on understanding the underlying drivers of this behaviour—sexism and gender-based inequality—is consistent with the key findings of this Inquiry regarding the systemic drivers of workplace sexual harassment (see, Section 3.4, 'Cultural and systemic drivers of sexual harassment in the workplace'). Further, and if the Australian Government decides to ratify ILO Convention 190, the broader definitions of 'worker' and 'workplace', as well as a greater focus on positive duties for employers and a greater focus on workplace risk, may address a number of gaps in the existing definitions and coverage in the Sex Discrimination Act, identified through consultations and submissions, and discussed below.

The Commission welcomes Australia voting in favour of the ILO adopting ILO Convention 190 and the accompanying Recommendation.

If ratified, the Commission understands that ILO Convention 190 will be subject to public consultation through the Parliament of Australia's Joint Standing Committee on Treaties' National Interest Analysis process. As part of this process, the Australian Government should consider how the underlying framework, principles and definitions of ILO Convention 190 can be reflected in the federal anti-discrimination, employment and WHS legislative and policy frameworks.

The Commission's view

The Commission supports the approach of ILO Convention 190 and considers the regulatory model recommended in this report is consistent with ILO Convention 190 and its accompanying Recommendation.

The Commission also welcomes the consultation and analysis process the Australian Government is currently undertaking, which will include states, territories and ILO social partners.

RECOMMENDATION 15:

The Australian Government ratify ILO Convention 190.

5.4 The Sex Discrimination Act and state and territory anti-discrimination frameworks

> Australia's current regulatory framework fails to incentivise employers to create harassment-free workplaces. Instead, our laws place the burden of addressing harassment almost entirely on the individual.[25]

(a) Overview

As stated above, laws prohibiting sexual harassment exist at the federal level and at each state and territory level in Australia.[26] At the federal level, sexual harassment is prohibited in the Sex Discrimination Act. States and territories laws also prohibit sexual harassment. These laws operate concurrently.[27] Where an unlawful act of sexual harassment has occurred under federal law and under a state or territory law, a person may choose to pursue action in either jurisdiction, but not both.[28]

There are some variations across definitions, coverage and procedural matters. For example, state and territory anti-discrimination laws contain different definitions of sexual harassment to the Sex Discrimination Act, which adds to the complexity for employers and workers. The state and territory schemes have benefits, including their capacity to provide tailored education and services in response to particular issues in their jurisdictions.

However, these differences in definitions and complaints processes decrease the accessibility of the legislative regime for ordinary Australians.[29]

The adequacy of the existing federal anti-discrimination legal framework and the Commission's complaints process is discussed in greater detail below.

This analysis is informed by the Inquiry consultations and submissions, as well as previous reviews of the Sex Discrimination Act, including:

- the 2008 Senate Inquiry, *Effectiveness of the Sex Discrimination Act (1984) (Cth) in eliminating discrimination and promoting gender equality* (2008 Senate Inquiry)[30]
- the Attorney-General's Department 2011 *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (2011 AGD Consultation)[31]
- the Senate Inquiry, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2012 Senate Inquiry).[32]

The Commission is also currently conducting a major project, *Free and Equal: An Australian conversation on human rights* (National Conversation).[33] The purpose of the National Conversation is to develop a framework that will guide government action and community partnerships to fully realise human rights and advance equality in Australia. The project will report in mid-2020.

(b) Objects of the Sex Discrimination Act

Throughout this Inquiry, the Commission heard that gender inequality is a key driver of workplace sexual harassment. Section 3 of the Sex Discrimination Act sets out the objects of the Act, which include:

> (a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments; [...]
>
> (c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
>
> (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

As noted above, while the Sex Discrimination Act was enacted to give effect to Australia's international human rights obligations,[34] the Commission has previously identified that the Sex Discrimination Act has not fully implemented all obligations under CEDAW, nor other relevant international legal obligations.[35]

The submission from the Australian Discrimination Law Experts Group (ADLEG) recommended amending the Sex Discrimination Act to explicitly state in the objects clause the purpose of achieving substantive equality [between men and women].[36] Their submission argued that amending the objects clause would help ensure the Act is underpinned by a comprehensive understanding of the drivers of gender inequality and gender-based discrimination, and would be consistent with international commentary.[37]

The Commission's view

The Commission agrees that a comprehensive understanding of equality should underpin the Sex Discrimination Act and that explicitly stating this as an object of the legislation can assist in clarifying its underlying purposes and foundational principles, and provide guidance to both the community and the courts.

Accordingly, the Commission recommends amending the Sex Discrimination Act to state in the objects clause 'to achieve substantive equality between men and women.'

(c) Sexual harassment—definitions and coverage under the Sex Discrimination Act

(i) Elements of the definition

The sexual harassment provisions are contained in Part II Division 3 of the Sex Discrimination Act. Section 28A of the Sex Discrimination Act defines sexual harassment as follows:

> **Section 28A Meaning of sexual harassment**
>
> (1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if:
>
> (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
>
> (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
>
> in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated [...]
>
> (2) In this section:
>
> ***conduct of a sexual nature*** includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

The Sex Discrimination Act then goes on to proscribe sexual harassment in various areas of public life, including employment and partnerships,[38] qualifying bodies,[39] educational institutions,[40] the provision of goods, services or facilities,[41] accommodation,[42] buying or selling land,[43] clubs,[44] and the administration of Commonwealth laws and programs.[45]

In essence, to establish sexual harassment under section 28A the following elements must be met:

- conduct of a sexual nature
- the conduct must be unwelcome
- the conduct must occur 'in relation to' the person harassed
- a reasonable person would anticipate the possibility that the person harassed would be offended, humiliated or intimidated.

Conduct of a sexual nature

Section 28A requires that the alleged conduct be of a 'sexual' nature. The terms 'sexual advance' and 'request for sexual favours' contained in section 28A(1)(a) are not defined. In practice, cases are rarely brought under this section, possibly because the terms are narrow and refer to specific behaviours which are outdated.[46] Most cases are brought under section 28A(1)(b) which extends the circumstances of sexual harassment beyond the scope of section 28A(1)(a) to other conduct of a sexual nature.

Section 28A(2) provides a broad and non-exhaustive definition of 'conduct of a sexual nature' and the term has similarly been interpreted broadly by the courts.[47] Section 28A has therefore allowed judges and other decision-makers to interpret that sexual conduct can manifest in different ways—physically, verbally or in writing; as different types of behaviours.[48] Indeed, few cases have turned on whether the alleged conduct by the respondent fell within the statutory definition of sexual harassment.[49]

In its submission, the Law Council of Australia provided an instructive list of behaviours that have been found to constitute sexual conduct:[50]

- staring or leering
- whistling
- displaying or sending sexually explicit material, images,[51] objects[52] or toys
- sexually suggestive questions, comments or jokes[53]
- questions about a person's sexual activities[54]
- comments about a person's body[55]
- invitations to start a relationship[56]
- invitations with sexual implications, such as invitations to attend a private residence[57] or to sit as a model[58]
- propositions for sex[59]
- touching, hugging or kissing.[60]

Certain conduct may on its own not amount to conduct of a sexual nature. However, it may do so if it forms part of a broader pattern of inappropriate sexual conduct.

For example, in *Shiels v James,*[61] Raphael FM found that incidents relating to the flicking of elastic bands at the applicant were of a sexual nature as they formed part of a broader pattern of sexual conduct.[62] The Court has also accepted that a one-off incident can amount to sexual harassment, as well as ongoing behaviour.[63]

Unwelcome conduct

To establish sexual harassment under section 28A of the Sex Discrimination Act the alleged conduct or sexual advance must be 'unwelcome'. The courts have generally applied a subjective test when determining whether the conduct was unwelcome, from the perspective of the person receiving the conduct.[64]

In *Aldridge v Booth*,[65] Spender J held that 'unwelcome conduct' required that the conduct was not solicited or invited by the employee, and that the employee regarded the conduct as undesirable or offensive. Subsequent cases have applied this test.[66] The intention of the perpetrator, or what the perpetrator anticipated or otherwise perceived would be the reaction of the person harassed, is not relevant.[67]

In relation to the person harassed

Under section 28A(1) of the Sex Discrimination Act, it is necessary for the unwelcome conduct of a sexual nature to occur 'in relation to' the person harassed. In *Carter v Linuki Pty Ltd t/as Aussie Hire & Anor*,[68] the Tribunal provided a useful explanation of the term 'in relation to':

> The term 'in relation to' is intended to identify a nexus between the conduct of a sexual nature and the person who complains of harassment. Its effect is to exclude from the definition of sexual harassment conduct which occurs independently of the person who complains of harassment.[69]

If a nexus between the unwelcome conduct of a sexual nature and the complainant cannot be established then the conduct will not amount to sexual harassment under the Sex Discrimination Act. However, conduct not directed towards the complainant may still be 'in relation to' that person if 'a hostile or demeaning atmosphere becomes a feature of the workplace environment'.[70] This is discussed further in Section 5.4(c)(iv) below.

The 'reasonable person' test

Under section 28A(1) of the Sex Discrimination Act a person sexually harasses another if the person engages in unwelcome conduct of a sexual nature in relation to the person harassed 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.

In 2011, amendments were made to the definition of sexual harassment in the Sex Discrimination Act to include anticipating the 'possibility' that the person harassed would be offended.

This amendment set a lower threshold than the previous test which required complainants to establish that 'a reasonable person, having regard to the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated'.

Determining whether a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated entails an objective test. The inclusion in section 28A(1A) of a non-exhaustive indicative list of circumstances to take into account when a court makes this assessment is intended to ensure that all relevant circumstances are considered when applying the objective element to the context in which the conduct in question occurred.

Section 28A(1A) provides:

> (1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not Chlimited to, the following:
>
> (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
>
> (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
>
> (c) any disability of the person harassed;
>
> (d) any other relevant circumstance.

These circumstances may help to explain why an individual victim felt that the conduct was unwelcome and inappropriate. However, an academic review of case law found that most cases are not decided upon the application of the reasonable person test:

> Once unwelcome sexual behaviour is found to have occurred, the issue of reasonableness is rarely in dispute and decision makers appear to have little difficulty in finding that in all the circumstances, a reasonable person would have anticipated that the complainant would be offended, humiliated or intimidated by the conduct.[71]

(ii) Simplifying the definition of sexual harassment and acknowledging the gendered nature of violence

The Commission received several submissions supporting a simplified or reformed definition of sexual harassment.[72] For example, the Law Council of Australia suggested that a simpler definition would increase the accessibility of the law for all Australians, as it would make the messaging of what is and is not sexual harassment easier to understand and communicate.[73]

The Women Lawyers Association of NSW submitted that the definition of sexual harassment in the Sex Discrimination Act is confusing and there is a gap between what people think is sexual harassment in a legal sense and the range of behaviours that are experienced.[74]

The Victorian Trades Hall Council argued that the existing definition is too narrow to encompass the kind of gendered violence that their research found women experience in workplaces.[75]

Other specific recommendations to amend the existing definition included:

- providing more guidance as to what is meant by conduct of a sexual nature in the Sex Discrimination Act and in any guidance note or example set out in the Act, for example, by listing the common behaviours set out in the Commission's report, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (2018 National Survey).[76]
- modifying the definition so that sexual harassment occurs when a complainant can establish that the conduct was of a sexual nature and unwelcome, and creating a new defence, where it can be established that the conduct occurred in circumstances where both the respondent had no actual intent to offend, humiliate and intimidate, and a reasonable person would not have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.[77]

- situating the understanding of sexual harassment within a broader definition of gendered violence.[78]

Conversely, the Commission also heard that the Sex Discrimination Act should retain the current definition of sexual harassment. One stakeholder argued that the definition is appropriate, generally well-understood, and is capable of practical translation to a variety of scenarios and circumstances and covering a broad spectrum of behaviours.[79]

The Commission's view

The Commission agrees that, on balance, while there may be some low awareness of what behaviour constitutes sexual harassment, the definition in the Sex Discrimination Act is simple, clear and can generally be applied to a broad range of situations and behaviours.

The Commission will continue to ensure that education and guidance materials address some of the concerns raised about the definition by stakeholders, and incorporate practical examples of the types of behaviours that constitute sexual harassment.

(iii) Sex-based harassment and sex discrimination

Conduct which falls short of sexual harassment may nevertheless constitute sex discrimination if it amounts to less favourable treatment on the basis of sex.

In *Hill v Water Resources Commission*,[80] for example, the complainant complained of 'repeated acts of gender-based harassment at the workplace where she was part of a predominantly male workforce.'[81] The NSW Equal Opportunity Tribunal commented that this was 'perhaps better described as "sexist" harassment, than sexual harassment',[82] although it clearly involved both—the receipt of offensive, sex-oriented material over a long period of time as well as unwelcome comments and a range of conduct found to be calculated to make female employees feel uncomfortable and unwelcome. The Tribunal found the conduct amounted to less favourable treatment on the ground of sex because a comparable man would not have been severely harassed.[83]

In *Cooke v Plauen Holdings Pty Ltd*,[84] the applicant complained of the behaviour of her supervisor. This was found not to constitute sexual harassment. Driver FM found that the harassing behaviour did, however, amount to sex discrimination:

> I find that Mr Ong subjected Ms Cooke to a detriment by reason of her sex in the course of his supervision of her. Mr Ong's supervision of Ms Cooke was more objectionable and more vexing than it would have been if she had been a man.[85]

Throughout the Inquiry, the Commission heard that sex-based harassment and sexual harassment often occurred together.

ADLEG recommended amending the Sex Discrimination Act to include harassment on the grounds of sex within the definition of sexual harassment. ADLEG submitted that making a complaint of sex discrimination (as opposed to sexual harassment) requires meeting the separate, and generally more onerous, test of unlawful direct or indirect sex discrimination.[86]

ADLEG also raised concern that sex-based harassment has not received the same level of public or legal attention as sexual harassment and therefore does not have the same level of policy infrastructure or legal precedents in place to encourage workers and employers to recognise these behaviours as potentially unlawful sex discrimination.[87]

The Commission's view

As a matter of practice, a significant number of complaints that the Commission accepts under the Sex Discrimination Act in the area of employment are assessed as amounting to sexual harassment and/or sex discrimination. If a person alleges that they are being harassed because of their sex, but the conduct complained of does not amount to 'conduct of a sexual nature' then the complaint may be assessed and accepted as one alleging sex discrimination. Case law supports that complaints can be raised as a matter of sexual harassment, sex discrimination or both.[88]

However, the Commission also acknowledges that this case law may not be readily understood by the community more broadly. Therefore, to provide clarity and certainty to the law, which ultimately supports access to justice, the Commission recommends that sex-based harassment be expressly prohibited under the Sex Discrimination Act. One way this could be achieved is to incorporate a prohibition on sex-based harassment into either the sex discrimination or sexual harassment provisions within the Sex Discrimination Act.

(iv) Hostile environments

ADLEG recommended that the definition of sexual harassment in the Sex Discrimination Act should include 'creating an intimidating, hostile, humiliating or offensive environment for the person harassed.'[89]

A similar recommendation was made by the Australian Council of Trade Unions (ACTU) in the context of recommending a new definition of sexual harassment in the Fair Work Act.[90]

The Commission also heard that the existence of a sexually permeated, hostile environment was not routinely recognised by individuals and organisations as sexual harassment.[91]

In certain circumstances, sexual harassment may occur where a work environment or culture is sexually charged or hostile, even if the conduct is not directed at a particular person.[92]

In a sexually hostile workplace, one sex is made to feel uncomfortable or excluded by the workplace environment. Factors that point to a sexually hostile workplace may include the display of obscene or pornographic materials, general sexual banter, or innuendo and offensive jokes.

Conduct that creates an intimidating, hostile, humiliating or offensive environment for a person may also be captured through the existing sex discrimination provisions in the Sex Discrimination Act, constituting discrimination on the ground of sex.[93] The case study below illustrating a hostile work environment is an early decision by the Western Australia Equal Opportunity Tribunal.

Case study:

Horne v Press Clough Joint Venture[94]

Two women were employed as trade assistants for a company constructing an offshore platform. They were the only women working on a site of over 600 men. Their duties involved cleaning offices and rooms in which soft core pornographic posters of semi-naked women were displayed. Although they would have preferred the posters not to be there, they felt they had to tolerate such things in a male-dominated environment.

On one occasion, the women were cleaning an office where there was a prominently displayed poster of a naked woman with her genitals exposed. After seeing this poster, they complained. From that time on, the women were vilified and abused. The posters displayed in their workplace became more explicit, degrading and hard core.

The women received no support or assistance from management or their union despite being frightened by the inherently threatening nature of the pornography and the victimisation to which they were subjected. Rather, they were advised that their attitude made them unpopular on the site and were warned not to be troublemakers.

Their situation became increasingly unbearable. They were aware that the male toilets contained grossly offensive graffiti about them. One of them was also terrorised at the site Christmas party and had to lock herself into a storeroom for her own safety.

Both women left their jobs and sought counselling as a result of the treatment they received. The employer and union were subsequently held liable in legal proceedings and were required to pay a total of $92,000 in damages.

The Commission notes that while earlier tribunal decisions recognised sexually hostile work environments, there is limited judicial authority on this issue.

The Commission examined the definition of sexual harassment in overseas jurisdictions. For example:

- In the United Kingdom (UK), the *Equality Act 2010* (UK) defines sexual harassment as 'unwanted conduct of a sexual nature' which has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.[95]
- The Council of the European Union defines sexual harassment as involving sexualised forms of unwanted or unwelcome behaviour or conduct, which has the 'purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.'[96]

The Commission's view

While it has been traditionally accepted that a sexually hostile work environment could constitute unlawful sex discrimination under the Sex Discrimination Act, the Commission considers that there is merit in clarifying the law.

The Commission recommends that the Sex Discrimination Act be amended to ensure that creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

The Commission is of the view that this amendment will provide clarity and certainty to the law and assist in setting clear boundaries in the workplace for what is and is not acceptable. One way this could be achieved is to incorporate a prohibition on creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex into either the sex discrimination or sexual harassment provisions within the Sex Discrimination Act.

The Commission also considers that this issue can be addressed through better education and guidance materials for workplaces, including good practice sexual harassment and discrimination workplace policies, procedures and practices for employers. Further discussion of best practice measures for employers is in Section 6, 'Preventing and responding to sexual harassment in the workplace'.

(v) Sexual harassment and the use of technology and online platforms

As discussed in Section 3.3, 'Nature of sexual harassment in the workplace', the Commission heard about the use of technology and online platforms to perpetrate sexual harassment.

A number of submissions to the Commission recommended amending the definition of 'conduct of a sexual nature' to ensure that it captures modern ways of communication through online platforms and other technology.[97]

The current definition of sexual harassment already captures sexual harassment behaviour through the use of technology. The *Acts Interpretation Act 1901* (Cth) explicitly states that references to 'writing' should be interpreted as including 'any mode of representing or reproducing words, figures, drawing or symbols in a visible form'.[98] Courts have also held that the following behaviour constituted sexual conduct, for the purpose of the definition of sexual harassment:

- coarse jokes and sexually explicit images sent by text message[99]
- sending of emails and text messages requesting a sexual relationship.[100]

However, stakeholders told the Commission that including technology in the definition of sexual harassment would provide greater clarity to the public and recognise the common use of technology in our daily lives.[101]

Maurice Blackburn submitted that legislative reform is required to criminalise 'particularly nefarious behaviours', and provide the relevant police and regulatory services with the necessary resources to successfully prosecute people engaging in sexual harassment through online platforms.[102]

The submission argued that for reforms to have the required deterrent effect, all those who cause, enable or expose people to online sexual harassment should be held to account, including employers and social media platforms, as well as those who generate and distribute the abusive material.

While broadly supportive of legislative amendment, the Law Council of Australia cautioned against drafting any reference to technology too narrowly, as sexual harassment manifests in a myriad of behaviours, and technology advances rapidly.[103] Regulation of online sexual and sex-based harassment, is discussed in further detail in Section 5.9(d) below.

The Commission's view

The Commission agrees that there is value in clarifying for the Australian community that the definition of sexual harassment in the Sex Discrimination Act covers online sexual harassment and the use of technology, social media and other online platforms to perpetrate sexual harassment in the workplace. This would provide greater clarity to the public and raise awareness of the various ways in which workplace sexual harassment can be perpetrated.

The Commission considers that this could be done effectively through guidance rather than legislative amendment material and the development and publication of other educational resources.

(vi) Intersectional discrimination and sexual harassment

Intersectional discrimination occurs when an individual is discriminated against on the basis of more than one protected attribute. The Committee on the Elimination of Discrimination Against Women has recognised intersectionality in the following way:

> The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.[104]

In *Djokic v Sinclair & Central Meat Export Co Pty Ltd*,[105] Sir Ronald Wilson recognised the 'intertwined elements of racial and sex discrimination, including allegations of sexual harassment'.

Intersectional discrimination is not currently expressly protected under the Sex Discrimination Act. However, the introduction of section 28A(1A) discussed above allows the court to consider how the protected attributes of an individual impacts on their experience of sexual harassment.

The Commission heard that the current law fails to adequately recognise and deal with the way in which individuals may experience complex forms of discrimination:

> The failure of anti-discrimination law to address this type of discrimination has meant that the law has not been utilised by the most disadvantaged people in our community—that is, people experiencing complex forms of discrimination.[106]

ADLEG submitted that, while section 28A(1A) lists the circumstances to be taken into account for the purpose of the objective test, and on its face appears capable of recognising intersectional aspects of sexual harassment, they are generally overlooked.[107]

Kingsford Legal Centre, Redfern Legal Centre, Women's Legal Service NSW and the National Association of Community Legal Centres provided the following case study in their joint submission.

Stacy's story[108]

Stacy is a young Chinese woman who was sexually harassed by a colleague when working in a kitchen. Stacy was on a working holiday visa. The colleague made a number of inappropriate sexual comments to Stacy, and frequently followed her into the cool room at work where he would grope her breasts and bottom. When Stacy complained to the manager, he said, 'I thought you Chinese girls liked being treated like this'.

Stacy came to a CLC for advice. [The CLC] advised her that as intersectional discrimination is not expressly recognised in Australian law, she would have to claim sexual harassment and race discrimination as two separate grounds.

The National Association of Community Legal Centres also raised the broader point of enabling a complaint of discrimination or harassment to be brought on the basis of the intersection of two or more attributes, rather than having to bring a complaint under two separate grounds (for example, sex discrimination and race discrimination).[109] The Law Council of Australia recommended, in the context of a consolidated anti-discrimination law framework, that the definition of discrimination be amended to include intersectional discrimination.[110]

The Commission's view

While, in practice, the Commission regularly accepts complaints that raise a number of grounds of discrimination, it also supports the idea of better intersectional coverage in Australia's federal discrimination laws. The best mechanism for achieving this is presently the subject of consideration in the Commission's National Conversation.

The Commission supports the ADLEG's recommendation for greater education and training more broadly for decision-makers on intersectional factors and the differential impact of sexual harassment on specific groups of people. In Section 5.9 below, the Commission makes recommendations to ensure better education for judicial officers and tribunal members to improve understanding of the complex gendered and intersectional nature of sexual harassment.

(vii) Workplace and workplace participant

Section 28B(1)–(5) of the Sex Discrimination Act prohibits sexual harassment in various employment relationships, regardless of where the harassment occurs geographically—inside or outside the workplace. What is relevant is that the particular employment relationship be established.

Section 28B(6) on the other hand prohibits sexual harassment between 'workplace participants' occurring at 'a workplace' of 'either or both' of these persons. Section 28B is set out below:

> **Section 28B Employment, partnership etc.**
>
> (1) It is unlawful for a person to sexually harass:
>
> (a) an employee of the person; or
> (b) a person who is seeking to become an employee of the person.
>
> (2) It is unlawful for an employee to sexually harass a fellow employee or a person who is seeking employment with the same employer.
>
> (3) It is unlawful for a person to sexually harass:
>
> (a) a commission agent or contract worker of the person; or
> (b) a person who is seeking to become a commission agent or contract worker of the person.
>
> (4) It is unlawful for a commission agent or contract worker to sexually harass a fellow commission agent or fellow contract worker.
>
> (5) It is unlawful for a partner in a partnership to sexually harass another partner, or a person who is seeking to become a partner, in the same partnership.
>
> (6) It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons.
>
> (7) In this section:
>
> ***place*** includes a ship, aircraft or vehicle.
>
> ***workplace*** means a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.
>
> ***workplace participant*** means any of the following:
>
> (a) an employer or employee;
> (b) a commission agent or contract worker;
> (c) a partner in a partnership.

The term 'workplace' has been given a broad interpretation by the courts and has been found to include:[111]

- a pub attended to continue a discussion begun at the principal workplace[112]
- a motel bedroom where the employer provided the accommodation[113]
- a motel suite where the employee was convinced the trip was a work trip[114]
- a street, taxi and office used to travel and attend to clients.[115]

Case study:

Ewin v Vergara (No.3)[116]

Ms Ewin was employed as an accountant at an organisation and Mr Vergara was a contract worker, who worked as an accountant for the same organisation.

Mr Vergara was an employee of a recruitment and labour hire firm and was made available to perform work for the organisation pursuant to a contract between that labour hire firm and the organisation.

Ms Ewin's sexual harassment and assault claims occurred both in the office and at or following work functions.

The Court found that that the definition of 'workplace' in the Sex Discrimination Act was cast in wide terms, and that the conduct the subject of the complaint fell within the definition of 'workplace':

A 'workplace' is not confined to the place of work of the participants but extends to a place at which the participants work or otherwise carry out functions in connection with being a workplace participant.

...

This wide approach recognises that work or work based functions are commonly undertaken in a wide range of places (including on various means of transport) beyond the principal or ordinary place or places of work of workplace participants from a common workforce. Such places would commonly include the premises of clients, suppliers, associated businesses, conference halls and other venues where work functions are held and in transportation vehicles during work related travel.[117]

The Commission consistently heard from individuals and organisations that the definition of workplace and workplace participant should be expanded, to ensure that everyone in Australian workplaces has an enforceable legal right to be protected from workplace sexual harassment—including workers that are paid, unpaid, volunteers and those who are self-employed.[118]

Stakeholders were particularly concerned about the gap in legal protections for volunteers, given their vulnerability in the workplace due to the power differential between paid workers and volunteers.[119] A respondent to a 2018 survey on 'Volunteering and sexual harassment in the workplace' by Volunteering Australia and Justice Connect said:

> It's concerning as a volunteer that if I were to be in a situation where sexual harassment occurs that I would have no legal recourse. I only volunteer in places that cover volunteers with insurance. But as there is no legal structure for volunteer[s] experiencing sexual harassment I cannot be sure I will be protected if it were to occur. This makes me second guess volunteering as a safe place to be.[120]

People who are unpaid workplace participants, such as volunteers, interns or students, and people who are self-employed workplace participants are not expressly covered by the employment provisions in the Sex Discrimination Act. This is also an area of inconsistency across state and territory anti-discrimination legislation, with only some jurisdictions providing protections from sexual harassment for unpaid workers.[121]

Several submissions and consultations also raised the gap in protections for barristers and other workers who are self-employed.[122] For example, the NSW Bar Association's contribution to the Law Council of Australia's submission explained that:

> With a few exceptions, barristers are self-employed and sole practitioners … Barristers at the private Bar in New South Wales are not permitted to be employees. They do not work in law firms and they are not permitted to form any business association or partnership. They are not permitted to employ another legal practitioner. However, barristers may work together… A barrister generally receives her or his work by way of a referral from a solicitor…
>
> Given the nature of barristers' work, industrial and discrimination laws, including the [Sex Discrimination Act], have limited operation and application to them.[123]

The Law Council of Australia's submission included the following example provided by a female barrister:

> I was hit on quite aggressively by a number of male barristers … And that in and of itself doesn't really say anything about the kind of work that you get, but it does sort of say something about how you are considered fair game. Like that, things that happen at the Bar that wouldn't happen in any other work environment. That kind of happens all the time.[124]

This issue was considered in the 2008 Senate Inquiry, which recommended that the Sex Discrimination Act be amended to address this gap in coverage of workers. This is also consistent with the Commission's recommendation to the 2011 AGD Consultation.[125]

Several submissions to the Commission suggested that the sexual harassment protections should be directed to the circumstances where the conduct takes place, rather than being limited to the employment status of the persons involved.[126]

The Commission also heard that some workers, such as those working in retail and hospitality, are vulnerable to sexual harassment by customers or clients.[127] Experiences of sexual harassment by customers and clients is discussed in more detail in Section 3.7, 'Workplace settings where sexual harassment occurs'.

The Sex Discrimination Act makes it unlawful to sexually harass another person in the course of seeking, or receiving, goods, services or facilities.[128] The Sex Discrimination Act also makes it unlawful for a person to sexually harass another person in the course of providing, or offering to provide, goods, services or facilities to that other person.[129]

This provides a level of protection to workers who are sexually harassed by customers or clients in the course of providing goods and services. However, employers are not vicariously liable for the conduct of their customers or clients.

Depending on the circumstances, an employer may be found liable for sex discrimination if they treated an employee or contract worker less favourably than they would have treated someone of the opposite sex by failing to protect them from harassment.[130]

Case study:

Smith v Sandalwood Motel[131]

A motel owner was found to have discriminated against two women he engaged to perform as singers in his motel.

The Western Australian Equal Opportunity Tribunal found that the motel owner did nothing to prevent the women being subjected to sexualised and offensive behaviour by bar patrons 'in an atmosphere close to violence'.

The Tribunal found that the motel owner's neglect meant that the women were subjected to less favourable treatment than a male contractor would have received.

The Commission's view

The Commission is of the view that every worker, whether paid, unpaid or self-employed, should have access to legal protections from workplace sexual harassment, no matter who sexually harasses them in the course of their work, as well as access to adequate remedies.

In Australia, the definition of worker under the model WHS laws is deliberately broad and intended to capture any person who carries out work in any capacity for a person conducting a business or undertaking.[132]

Looking to international labour standards, as noted above, ILO Convention 190 encourages States to adopt a broad definition of 'worker' and a broad scope with the concept of the 'world of work'. ILO Convention 190

> protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer.[133]

Similarly, the Commission considers that the definition of 'workplace participant' in the Sex Discrimination Act should be amended to ensure that all workers are adequately protected from sexual harassment. Such a change would address the existing gaps in coverage for volunteers, unpaid workers, self-employed persons and persons working in shared workspaces, as well as ensuring protections for those workers that are engaged in non-traditional work arrangements and relationships, consistent with the international framework.

This should continue to be understood in conjunction with the protections relating to goods and services, which in practice provide protections to workers who are sexually harassed by customers in the course of providing goods and services.

The Commission would develop guidance material to accompany any legislative change to increase public awareness of the new law.

(viii) Exclusion of state public servants

Currently, state-based public servants are not able to make a complaint of workplace sexual harassment under the Sex Discrimination Act, and must instead rely on state-based anti-discrimination legislation.[134] This is inconsistent with the Racial Discrimination Act, the Disability Discrimination Act and the Age Discrimination Act, which apply to state and territory governments and instrumentalities.

In a 1992 review of the exemptions in the Sex Discrimination Act, the Commission examined the exclusion of state and territory public servants.[135] It pointed to the historical reasons for the exemption, namely, the concept of States' rights under a Federation and the fact that the Commonwealth was late to legislate in relation to sexual harassment.[136] Ultimately, the report recommended removing the exemption and promoting a national standard that would cover all Australians.[137]

A number of stakeholders in this Inquiry also recommended removing the exclusion of state and territory public servants from the Sex Discrimination Act.[138]

The Commission's view

The Commission is not aware of any current or continuing policy basis for the exclusion of state and territory public servants from coverage under the Sex Discrimination Act, and recommends that the current exclusion be removed.

(ix) Sexual harassment in public life

The Commission received several submissions that suggested amending the Sex Discrimination Act to include a general prohibition against sexual harassment in any area of public life.[139] Given the prevalence of workplace sexual harassment, and the complex, varied and changing nature of modern work, this could help address some of the gaps in coverage and technical complexities created by the requirements under the existing provisions, discussed above.

This issue has been considered in the 2008 Senate Inquiry, the 2011 AGD Consultation and the 2012 Senate Inquiry. The 2008 Senate Inquiry recommended amending the Sex Discrimination Act to include a general prohibition against sex discrimination and sexual harassment in any area of public life. Similarly, the 2012 Senate Inquiry recommended that the Draft Bill provide that discrimination is unlawful in connection with any area of public life.

The Commission's submissions to those reviews recommended further consideration of the merits of legislative amendment to cover sexual harassment, as well as discrimination on the basis of all protected attributes in all areas of public life, for simplicity and improved consistency with state and territory discrimination laws. As an example, the *Anti-Discrimination Act 1991* (Qld) makes sexual harassment unlawful in all areas of public life in Queensland.[140]

The Commission's view

The coverage of existing federal anti-discrimination legislation more broadly, including sexual harassment, is currently the subject of consultation as part of the Commission's National Conversation. The Commission considers that this process provides an appropriate forum to consider the merits of expanding existing anti-discrimination legislation to all areas of public life and has therefore not made recommendations on the issue as part of this Inquiry.

However, the Commission considers the expansion of the sexual harassment provisions to all areas of public life should be considered as part of the Commission's three-year review following the release of this report (as required by the Inquiry Terms of Reference), in light of the National Conversation and the impact of other recommendations outlined in this report.

RECOMMENDATION 16:

Amend the Sex Discrimination Act to ensure:

a. **the objects include 'to achieve substantive equality between women and men'**
b. **sex-based harassment is expressly prohibited**
c. **creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited**
d. **the definition of 'workplace participant' and 'workplace' covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed**
e. **the current exemption of state public servants is removed.**

(d) Positive duties and the role of the Commission

(i) A positive duty for employers

The Sex Discrimination Act does not currently impose positive duties to require employers to take steps to prevent sexual harassment.

The Sex Discrimination Act provides that an employer will be vicariously liable for the sexual harassment by an employee or agent, where the sexual harassment occurred 'in connection with' the employee's employment or agent's duties. An employer is able to raise the defence that it 'took all reasonable steps to prevent' the alleged sexual harassment.[141] The operation of the Sex Discrimination Act's vicarious liability provisions is discussed below (Section 5.4(f)).

To assist small, medium and large employers to understand and satisfy the legal test of showing they took 'all reasonable steps' to prevent sexual harassment, the Commission has produced guidance for employers on measures they can take to help stop sexual harassment and respond appropriately if it occurs in their workplace.[142]

However, the current legislative framework remains largely remedial in nature because the unlawful discrimination provisions only arise once a complaint has been made. This places significant responsibility on individual complainants and means that employer practices are often only externally scrutinised after an allegation of sexual harassment has been made.

As discussed in Section 5.6 below, the model WHS laws also establish positive WHS duties on duty holders requiring the elimination or minimisation of risks arising from work, including sexual harassment.

(ii) Support for a positive duty

While the Sex Discrimination Act aims to eliminate sexual harassment and promote gender equality, stakeholders told the Commission that existing laws do not place sufficient obligations on employers to prevent sexual harassment, and that the vicarious liability provisions rely on a complaint being made to the Commission.

The Commission heard significant support for the introduction of a freestanding positive duty that would require employers to take proactive measures to prevent sex discrimination and sexual harassment in the workplace.[143] For example, submissions from individuals argued:

> [I]t is critical that new approaches are taken to preventing [sexual harassment] complaints from occurring, with a greater focus on proactive preventative action rather than turning a blind eye and waiting for and responding to complaints.[144]

> I write to place my support behind … a *positive obligation* [to] be imposed on employers to take all reasonable steps to deal appropriately with allegations of sexual harassment and avoid its presence in the workplace.[145]

Several organisations supported the adoption of a positive duty modelled on the *Equal Opportunity Act 2010* (Vic) (Victorian Equal Opportunity Act), discussed below.[146] Others supported broader positive duties to eliminate sexual harassment, to respond to allegations of sexual harassment and to report sexual harassment statistics and claims, either internally or externally.[147]

A positive duty prioritises the protection of workers from discrimination, victimisation and sexual harassment. It places responsibility with employers to effect this, taking into account a number of factors to be weighed in relation to what is 'reasonable and proportionate' in the circumstances.

Case study:

Victorian Equal Opportunity Act[148]

The Victorian Equal Opportunity Act places a positive duty on employers to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible, in their workplaces.

In determining whether a measure is reasonable and proportionate the following factors must be considered:

(a) the size of the person's business or operations
(b) the nature and circumstances of the person's business or operations
(c) the person's resources
(d) the person's business and operational priorities
(e) the practicability and the cost of the measures.

Examples listed in the Victorian Equal Opportunity Act

(i) A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.

(ii) A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

Victorian Equal Opportunity and Human Rights Commission powers in conducting such an investigation

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) can investigate a suspected contravention of the positive duty that is serious in nature, relates to a class or group of persons and cannot reasonably be expected to be resolved by dispute resolution or at Victorian Civil and Administrative Tribunal (VCAT), in circumstances where the investigation would advance the objectives of the Victorian Equal Opportunity Act.[149]

VEOHRC can conduct an investigation in any manner it thinks fit. The Victorian Equal Opportunity Act allows VEOHRC to:

- ask for information (and can apply to VCAT to compel a party to provide the relevant information)
- take, copy and retain possession of documents for the purpose of the investigation
- apply to VCAT to compel a person to attend VEOHRC to answer questions
- protect the privacy and/or identity of any persons who provide evidence of information to VEOHRC as part of the investigation
- continue an investigation even where there are related court or tribunal proceedings connected with the subject matter of the investigation.

Individuals cannot make a complaint about a contravention of the positive duty to VEOHRC, nor can they bring a direct action to VCAT.

Outcomes

The Victorian Equal Opportunity Act states that VEOHRC can take any action it thinks fit after conducting an investigation. This could include:

- entering into an agreement with a person about action required to comply with the Victorian Equal Opportunity Act (an agreement may be registered with VCAT and can be enforced as an order of VCAT)
- referring a matter to VCAT
- producing a report on the investigation to the Attorney-General or to the Parliament.

Additional obligations on public authorities under the Victorian Charter of Human Rights and Responsibilities

In addition to the positive duty to eliminate sexual harassment, discrimination and victimisation, under the *Charter of Human Rights and Responsibilities Act* 2006 (Vic), public authorities (who are also employers) are required to act consistently with certain enumerated human rights, including the right to equality. This right requires public authorities to provide every individual with protection from discrimination and to promote respectful workplaces that do not tolerate sexual harassment.[150]

An example of VEOHRC's investigation power is the recent investigation into potentially unlawful discrimination against persons with a mental health condition in the travel insurance industry. This investigation was prompted by a 2015 case in which VCAT found that the insurer, QBE, had unlawfully discriminated against Ms Ingram, a teenager, based on her mental health condition. The investigation found that, among other things, three major travel insurers (Allianz, Suncorp and World Nomads Group) 'failed to establish that they took sufficient steps to meet their positive duty under the [Victorian] Equal Opportunity Act to eliminate discrimination as far as possible.'[151]

The Victorian Equal Opportunity Act also provides that an employer can be held vicariously liable under the Act when an employee or agent engages in sexual harassment during their employment or when acting on the organisation's behalf. An employer will not be held liable if they can prove that they took reasonable precautions to prevent the behaviour.[152]

The guidelines produced by VEOHRC, *Sexual Harassment—Complying with the Victorian Equal Opportunity Act* in 2014 (VEOHRC guidelines) note that both the positive duty and the defence to vicarious liability require employers to be 'proactive' in addressing the causes of sexual harassment.

The question of whether an employer is vicariously liable for the actions of its employees only arises after sexual harassment has already taken place and an individual complaint has been made. The positive duty applies to employers all the time and does not rely on an individual complaint to be made. The VEOHRC guidelines emphasise that taking proactive steps will help to ensure that organisations can meet the positive duty, prevent and address sexual harassment in the workplace and defend any future vicarious liability claims.[153]

The Law Council of Australia also argued that positive duties were needed. The submission noted that the high rate of sexual harassment reflected in the 2018 National Survey, and low rate of reporting, often reflected the low confidence victims had in the response of their employer and in the likelihood of sanctions attaching to harassers.[154] The Law Council submitted that this suggested the existing provisions needed to be supplemented by heavier measures.[155]

In recommending the introduction of a positive duty to eliminate, respond to and report sexual harassment, the Law Council of Australia submitted that a positive duty would not create undue regulatory burden.[156]

This is because employers already have responsibilities to ensure they are not held vicariously liable for sexual harassment under the Sex Discrimination Act, as well as proactive duties under Australia's WHS laws:

> The positive duties suggested here would not significantly increase the burden of the existing responsibilities or proactive duties already faced by employers, agents and other duty holders, but would strengthen them in regard to sexual harassment and provide duty holders with clarification as to best practice.[157]

There are also examples of positive duties in international jurisdictions.

Case study:

Equality Act 2010 (UK) public sector equality duty[158]

The *Equality Act 2010* (UK) contains a general duty to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation and to advance equality of opportunity and good relations between different groups. This general duty applies to key public authorities and to private bodies carrying out a public function. The general duty is supported by specific duties set out in regulations.[159]

General equality duty

Authorities are required to publish information demonstrating their compliance with the equality duty, and to set themselves specific, measurable equality objectives.

Specific equality duties

The specific duties for England[160] require listed public authorities[161] to publish:

- annual information to demonstrate its compliance with the general equality duty[162]
- specific and measurable objectives to further any of the aims of the general equality duty, at least every four years.

Role of the regulator

The UK Equality and Human Rights Commission (EHRC) is responsible for regulating the public sector equality duty. The EHRC uses a range of strategies to ensure compliance with the duty, including providing advice and information, as well as promoting the duty. However, it also has statutory powers to take legal action, including the power to issue a compliance notice if it believes an organisation has failed to comply, to apply to the courts for an order requiring compliance with the equality duty and to use judicial review to challenge decisions by public authorities under the equality duty.[163]

In 2018, the UK House of Commons Women and Equalities Committee Inquiry into sexual harassment in the workplace (UK Inquiry) found that while public sector employers were broadly aware of their duties, they often had very limited information about the scale of sexual harassment in their own organisation:

> It should be expected that the Public Sector Equality Duty would help make public sector employers exemplars for good practice. Despite this, we found that specific actions to tackle sexual harassment in the workplace were thin on the ground, although more general initiatives on workplace conduct and ethics might be in place.[164]

The UK Inquiry therefore recommended the introduction of a mandatory duty on employers to protect workers from harassment and victimisation in the workplace, supported by a statutory code of practice on sexual harassment and harassment at work which sets out what employers need to do to meet the duty. Breach of the duty should be an unlawful act enforceable by the EHRC and carrying substantial financial penalties.[165]

In particular, the UK Inquiry recommended that bodies bound by the duty conduct risk assessments for sexual harassment in the workplace, put in place an action plan to mitigate those risks, including detail on how cases will be investigated and include guidance on penalties for perpetrators.[166]

(iii) Enforcement powers to support a positive duty

VEOHRC told the Commission that, while it already uses the existing positive duty provisions to affect broad cultural reform, enhanced enforceability mechanisms would allow it to achieve greater systemic change and help alleviate the burden on individuals. VEOHRC's submission made a number of targeted recommendations to strengthen the enforceability of the positive duty in the Victorian Equal Opportunity Act, and recommended similar amendments for the federal, state and territory anti-discrimination laws.[167]

Specifically, VEOHRC recommended that to complement the positive duty, there should be powers to:

- undertake own-motion public inquiries
- investigate any serious matter that indicates a possible contravention of the Victorian Equal Opportunity Act (without the need for a reasonable expectation that the matter cannot be resolved by dispute resolution or VCAT, and with the introduction of a 'reasonable expectation' that the matter relates to a class or group of persons)
- compel attendance, information and documents for the purposes of an investigation or public inquiry (without the need for an order from VCAT)

- seek enforceable undertakings
- issue compliance notices as potential outcomes of an investigation or a public inquiry.[168]

VEOHRC's submission underscores that, while having a positive duty is important, for it to be most effective it must be accompanied by powers of enforcement. Other submissions also recommended a range of enforcement powers to complement the positive duty, including those listed above, as well as financial or civil penalties for failing to comply with or breaching the positive duty.[169]

(iv) Previous consideration of a positive duty

The Commission has recommended consideration of positive duties in its submissions to previous government inquiries and consultation processes.[170]

In its submission to the 2008 Senate Inquiry, the Commission indicated its support for a positive duty provision in the Sex Discrimination Act to take appropriate reasonable steps to eliminate discrimination and promote gender equality. The Commission noted that further consultation was required to identify the way in which a positive duty should be defined and applied.[171] The Commission argued that a positive duty would improve the effectiveness of the Sex Discrimination Act in supporting systemic change to achieve gender equality, and would be consistent with Australia's obligations under CEDAW.[172]

The 2008 Senate Inquiry considered the UK positive duties as a useful model which could be adopted and applied.[173] It recommended further consideration of the introduction of a positive duty in the Sex Discrimination Act for public sector organisations, employers, educational institutions and other service providers, to eliminate sex discrimination and sexual harassment, and promote gender equality.[174]

The Commission's submission to the 2011 AGD Consultation recommended that the Australian Government discuss with the Commission resourcing implications of possible models for positive duties.[175]

The 2012 Senate Inquiry also explored a positive duty on the public and private sector to promote equality and eliminate unlawful discrimination. The Committee noted that such an amendment would bring the Commonwealth anti-discrimination law into line with best practice under comparative international jurisdictions and current domestic law, and would ensure that a focus on preventing discrimination in the first place, rather than punishing misconduct, would go some way towards addressing systemic discrimination.[176]

(v) Concerns raised about the introduction of a positive duty

The Commission acknowledges the concerns raised in both previous reviews and the current Inquiry that the introduction of positive duties would place additional regulatory burden on duty holders and may therefore not achieve their aims.[177] For example, the Australian Chamber of Commerce and Industry (ACCI), in its submission to the 2008 Senate Inquiry, expressed concern about imposing a positive duty on the private sector to eliminate discrimination and promote equality, noting that it may be difficult for employers to know exactly what their legal obligations to implement positive duties are and how to comply with them.[178]

ACCI also submitted to the Commission in this Inquiry that the existing duty on employers to take all reasonable steps to prevent sexual harassment in the workplace, as a defence to vicarious liability, coupled with the business case for preventing sexual harassment, are sufficient incentives for employers to take robust action to prevent workplace sexual harassment. Instead, ACCI supported better education and awareness of existing legal obligations, as well as greater support for small and medium sized businesses.[179]

The ACTU raised concerns about the inclusion of a positive duty in the Sex Discrimination Act being duplicative of the WHS positive duty, and the vicarious liability framework (in the Sex Discrimination Act) not being the appropriate framework for a positive duty which is designed to operate on an organisational and systemic level.

The ACTU's comments also indicated a concern that the proposed framing of the positive duty did not appropriately take into account the impact of sexual harassment on an employee. However, some decisions have acknowledged that vicarious liability (which forms the basis for the positive duty model recommended) does require consideration of the circumstances of particular employees in assessing the kinds of steps that it would be reasonable for an employer to take. For example, in *Hopper v Mt Isa Mines Ltd*,[180] the Queensland Anti-Discrimination Tribunal found that nothing had been done to prepare the work area in the mine for the company's first female apprentice.[181] There was no education of the male workforce to change entrenched attitudes and ensure that she would not be subject to harassment because she was female. Policies were not communicated effectively to employees. In these circumstances, the defence of reasonable steps under s 133(2) of the *Anti-Discrimination Act 1991* (Qld) was not available.

Similarly, in *Shiels v James*, Raphael FM found that the applicant's position as the only woman on a building site meant that she could have expected direct and proactive steps to be taken to protect her interests, particularly in the communication of the company's anti-discrimination policy.[182]

The Commission's view

As the 2018 National Survey shows, rates of sexual harassment are actually increasing under the current framework, while rates of reporting have decreased.[183] This may suggest that the present Sex Discrimination Act is not providing an effective framework for employers to prevent sexual harassment. The survey findings are supported by submissions and consultations, which demonstrate that many individuals do not have confidence in the existing systems and complaint-handling processes to deliver an effective response to the incident or complaint.

The key benefit of a positive duty is that it shifts the burden from individuals making complaints to employers taking proactive and preventative action. As the positive duty is an ongoing duty, it shifts the emphasis from a complaints-based model to one where employers must continuously assess and evaluate whether they are meeting the requirements of the duty.

This would provide employers with a greater incentive to take proactive and preventative measures to comply with the duty and would significantly improve the effectiveness of the Sex Discrimination Act to contribute to broader systemic and cultural change. In this sense, it promotes accountability and can assist in encouraging a continuous improvement model for employers in how they address sexual harassment.

The Commission recommends that a positive duty requiring employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible, be introduced into the Sex Discrimination Act. This recognises sexual harassment as a form of sex discrimination and that workplace sexual harassment often exists within a wider environment of sex discrimination. A positive duty would also bring the Sex Discrimination Act into line with best practice approaches under comparative international jurisdictions and other Australian jurisdictions.

As Australian employers already have responsibilities to prevent workplace sexual harassment to ensure they are not held vicariously liable under the Sex Discrimination Act, as well as positive duties under WHS laws, the Commission's view is that this would not create a substantially new or increased burden for employers.

Rather, it would encourage better practice on the part of employers to meet their obligations, while reducing the costs to workplaces of sexual harassment. It would also allow sexual harassment to be addressed more holistically by recognising sexual harassment as a form of sex discrimination, which is driven and perpetuated by broader social, cultural and workplace factors.

Human rights frameworks and WHS frameworks have different foundations and advantages. The positive duty under WHS laws and its role in achieving greater compliance under the WHS framework, is discussed in Section 5.6 below.

In essence, the WHS positive duty, as it relates to sexual harassment, is focused on psychological health broadly and frames sexual harassment as a safety risk and hazard. The Sex Discrimination Act positive duty would have a more specific and targeted focus on sexual harassment, sex discrimination and victimisation, and would importantly operate within a human rights framework that takes into account the systemic and structural drivers and impacts of sexual harassment.

Further, while the positive duty under the WHS framework applies equally to physical and psychological harms, WHS schemes have historically focused on physical harms. As discussed below in Section 5.6, and in Section 6, 'Preventing and responding to sexual harassment in the workplace', this has been reflected in the approach of employers and WHS regulators, where psychological risks and hazards have been given less focus than physical risks and hazards.

Even less attention is given to sexual harassment as a subset of psychological health.

While it will take time for all WHS regulators to develop a detailed understanding of the dynamics and drivers of sexual harassment, the Commission already has the expertise to oversee a positive duty under the Sex Discrimination Act. This is particularly important given not only the prevalence of sexual harassment, but also the significant under-reporting of sexual harassment, outlined throughout this report.

Ultimately, with these differing but complementary approaches, the two positive duties would work in a mutually reinforcing way.

The Commission would also assist employers to comply with the positive duty by providing information and support, including:

- promoting awareness about the law and issuing guidance materials on the steps required to comply with the positive duty
- providing education and training support to employers on the law and best practice measures to comply with the positive duty.

The Commission considers that an enforceable positive duty would help to ensure employers engage with their legal obligations. It would also provide both a collaborative and enforceable mechanism for employers to work with the Commission and engage in the Commission's processes in a full and meaningful way and to effect change. While the Commission sees merit in all employers being subject to a positive duty, consideration may be given to whether micro-businesses should be exempt.

In determining whether a measure is reasonable and proportionate, the factors that must be considered could draw on the positive duty under the Victorian Equal Opportunity Act, as well as all other relevant facts and circumstances, which may include systemic issues within that industry or workplace. The impact on both employers and workers should be considered when assessing each of these factors. Similarly, the Commission recognises that a positive duty, in combination with implementation of Recommendation 16(e) above, 'the exemption of state public servants is removed', will require consultation among all Australian governments to consider potential impacts across the jurisdictions.

The Commission considers that it should also be given responsibility for assessing compliance with the positive duty and for enforcement, and the necessary powers to fulfil this role. The introduction of these compliance and enforcement powers will need to be accompanied by additional funding.

RECOMMENDATION 17:

The Sex Discrimination Act be amended to introduce a positive duty for all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:

a. the size of the person's business or operations

b. the nature and circumstances of the person's business or operations

c. the person's resources

d. the person's business and operational priorities

e. the practicability and the cost of the measures

f. all other relevant facts and circumstances.

RECOMMENDATION 18:

The Commission be given the function of assessing compliance with the positive duty, and for enforcement. This may include providing the Commission with the power to:

a. undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply

b. enter into agreements/ enforceable undertakings with the organisation

c. apply to the Court for an order requiring compliance with the duty.

(e) Own-motion investigations

(i) The Commission's existing functions and powers

The Commission's existing functions and powers are set out in the Australian Human Rights Commission Act. These include:

- investigating and conciliating complaints of unlawful discrimination or breaches of human rights
- holding inquiries into acts or practices of the Commonwealth that may be inconsistent with human rights, and making recommendations to address breaches of human rights
- holding inquiries into workplace discrimination (including systemic discrimination) and making recommendations
- developing human rights education programs and resources for schools, workplaces and the community
- with leave of the court, intervening in court cases that involve human rights principles
- providing advice and submissions to parliaments and governments to develop laws, policies and programs consistent with existing national laws and international human rights agreements
- undertaking and coordinating research into human rights and discrimination issues.[184]

Section 11(1)(f) gives the Commission power to inquire into 'acts or practices' that may be contrary to human rights, when 'it appears to the Commission desirable to do so.'[185] 'Act' or 'practice' is defined as acts done or practices engaged in:

- by or on behalf of the Commonwealth or an authority of the Commonwealth
- under a Commonwealth enactment

- wholly within a Territory (not the ACT or the Northern Territory)
- partly within a Territory, to the extent to which the act or practice was done within the Territory.[186]

The Commission has a similar inquiry function at section 31(b) of the Australian Human Rights Commission Act to inquire into any act or practice (including a systemic practice) that may constitute discrimination, when 'it appears to the Commission desirable to do so.'[187] This function extends to acts or practices by or on behalf of a State or an authority of a State, within a State, or under State laws.[188] The definition of 'discrimination' is taken from the *ILO Convention concerning Discrimination in Respect of Employment or Occupation* and is therefore limited to workplace discrimination.

The Commission has powers to require the giving of information, the production of documents, and the examination of witnesses, with penalties applying for non-compliance, when conducting an inquiry under section 11(1)(f).[189] However, these powers are not available to the Commission when conducting an inquiry into conduct done by or on behalf of a State or an authority of a State, within a State, or under State laws, that may amount to discrimination under section 31(b).[190]

The Commission may report to the Minister at the conclusion of these inquiry processes and must include in any report the recommendations it has made. However, no enforcement mechanism is available, and neither the Minister nor the party who engaged in the act or practice is required to act on the Commission's recommendations.

(ii) Options for reform

A significant number of submissions to the Commission recommended giving greater powers to the Sex Discrimination Commissioner to conduct own-motion investigations, for example, based on anonymous reports of sexual harassment, or where the Commissioner believes there has been a breach of the Sex Discrimination Act, and accompanying enforcement powers.[191]

The Commission has previously recommended various models of own-motion investigations and accompanying enforcement powers.[192]

Case study:

Own-motion investigations under the Victorian Equal Opportunity Act[193]

VEOHRC may conduct an investigation into any matter relating to the operation of the Victorian Equal Opportunity Act, in the circumstances set out in section 127.

Example: An organisation has a policy that indirectly discriminates against persons with a particular attribute. [VEOHRC] has received several calls complaining about this policy and the policy has received media attention. Although some claims that the policy is discriminatory have been settled on an individual basis, the policy has not been changed. [VEOHRC] may decide that, in these circumstances, an investigation could help identify and eliminate a systemic cause of discrimination.

The Commission's view

The Commission considers that it should be provided with a broad inquiry function to inquire into issues of systemic unlawful discrimination, including systemic sexual harassment. The definition of unlawful discrimination includes any conduct that is unlawful under the federal discrimination laws. This inquiry power, consistent with the Commission's powers under section 11(1)(f) of the Australian Human Rights Commission Act, should be accompanied by enhanced enforcement powers to enable the Commission to require the giving of information, the production of documents, and the examination of witnesses, with penalties applying for non-compliance, when conducting such an inquiry.

These reforms will enable the Commission to inquire into a wide range of issues of systemic unlawful discrimination. The Commission's own-motion inquiries should not be limited to acts or practices of the Commonwealth, or under Commonwealth laws, or be confined to ILO workplace discrimination matters. The Commission recognises that a broad inquiry or own-motion power to inquire into conduct done by or on behalf of a State or an authority of a State, will require consultation among all Australian governments to consider potential impacts across the jurisdictions.

RECOMMENDATION 19:

Amend the Australian Human Rights Commission Act to provide the Commission with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment. Unlawful discrimination includes any conduct that is unlawful under the federal discrimination laws. The Commission should be given powers to require:

a. the giving of information

b. the production of documents

c. the examination of witnesses

with penalties applying for non-compliance, when conducting such an inquiry.

(f) Vicarious liability

The Sex Discrimination Act provides that an employer is vicariously liable for sexual harassment perpetrated by an employee or agent.[194] An employer will only be vicariously liable where a victim makes a complaint of sexual harassment that is found to have occurred 'in connection with' the employee's employment or agent's duties. An employer will not be vicariously liable if they can prove they 'took all reasonable steps to prevent' the alleged sexual harassment.[195]

(i) Meaning of 'all reasonable steps'

While the Sex Discrimination Act does not define what constitutes 'all reasonable steps', this has been extensively considered in case law. A number of factors will be taken into account by the courts to determine if 'all reasonable steps' were taken:

- whether some proactive steps were taken prior to the act of discrimination[196]
- the size of the employer, and the prevention measures taken relative to the particular circumstances of the employer[197]
- it is not necessary for a respondent to be aware of an incident of harassment for vicarious liability to apply.[198]

In *Aleksovski v AAA Pty Ltd,*[199] Raphael J said that 'all reasonable steps' is generally taken to mean that the employer is required to have a clear sexual harassment policy, that is in written form and communicated to all members of the workforce, and to provide ongoing education on sexual harassment to all staff.[200]

The courts have found that large corporations will be expected to do more than small businesses in order to be held to have acted reasonably.[201] However, even in small businesses the courts have found that employers must have 'done something active to prevent the acts complained of'[202] to make out the defence, although this has not necessarily required a written sexual harassment policy.

The Commission's current guidelines for employers acknowledge that while what constitutes 'reasonable steps' may vary depending upon the size, structure and resources of a particular workplace, all employers should adopt a number of essential preventative measures, including:

- creating a healthy and safe work environment based on respect
- developing and implementing a sexual harassment policy
- providing or facilitating education and training on sexual harassment.[203]

(ii) Nexus to the employment or agency

The applicant bears the onus of proof in establishing that there is a relationship of employment or agency and that the alleged act of discrimination occurred 'in connection with' the employment of an employee or the duties of an agent.[204] However, an employer who seeks to rely on the defence bears the onus of proof of establishing that they took all reasonable steps to prevent the alleged acts taking place.[205]

The courts have interpreted the phrase 'in connection with' expansively, including covering sexual harassment of an employee by another employee while off-duty in staff accommodation quarters,[206] at accommodation attended by employees while attending a work-related conference,[207] and sexual assault that occurred in a home, after a work event.[208]

The sexual harassment in employment provisions in the Sex Discrimination Act do not explicitly cover employees or contract workers if they are sexually harassed by customers or a client. However, as discussed above, the employment provisions in section 28B operate in conjunction with the goods, services and facilities provision in 28G which may extend coverage in the circumstances. Further, depending on the circumstances, an employer may be found vicariously liable for sex discrimination if they treat an employee or contract worker less favourably by failing to protect them from harassment by a customer or client than they would have treated someone of the opposite sex.[209]

As discussed in Section 3.7, 'Workplace settings where sexual harassment occurs', the Commission heard from many workers about their experiences of sexual harassment by clients, customers and patients, and the prevalence and heightened risk of experiencing harassment in particular industries, such as retail and hospitality.[210]

Stakeholders recommended that the existing vicarious liability provisions should be extended to ensure that employers can be held vicariously liable for failing to prevent sexual harassment from clients, customers and other third parties.[211]

The Commission's view

Noting the recommendation above to expand the existing definitions of 'workplace participant' and 'workplace', the Commission considers the vicarious liability provisions would continue to align with those expanded definitions. This should also be understood in light of the Commission's recommendation to introduce a positive duty into the Sex Discrimination Act, which will enhance the proactive and preventive measures employers undertake. The Commission also notes that, under the Victorian Equal Opportunity Act, the vicarious liability provisions were retained even after the introduction of a positive duty on employers.

As part of its recommendation for a positive duty, the Sex Discrimination Act will review and update its guidance materials, including on the concept of 'reasonable steps' and the application of vicarious liability provisions to different persons in different contexts.

The Commission also recommends that coverage under the Sex Discrimination Act relating to sexual harassment by clients and customers should be considered as part of the Commission's three-year review following the release of this report (as required by the Inquiry Terms of Reference), in light of the impact of other recommendations in this report.

(g) Aiding or permitting an unlawful act

Section 105 of the Sex Discrimination Act deems the conduct of a person who 'causes, instructs, induces, aids or permits' another person to do an unlawful act of discrimination to have engaged in that same conduct. Section 105 therefore imposes a form of ancillary, or accessory, liability in relation to sex discrimination.

Issues have arisen in a number of cases as to whether 'permitting' requires knowledge on the part of the 'permitter'. In *Howard v Northern Territory*,[212] Sir Ronald Wilson held:

> In my opinion, [section] 105 requires a degree of knowledge or at least wilful blindness or recklessness in the face of the known circumstances in order to attract the operation of the section. The knowledge does not have to go so far as to constitute knowledge of the unlawfulness of the proposed conduct but it must extend to an awareness of, or wilful blindness to, the circumstances which could produce a result, namely discrimination, which the Act declares to be unlawful.[213]

It can be observed that this approach does not necessarily require actual knowledge of the unlawfulness of the acts in question, but does require some actual or constructive knowledge of the surrounding circumstances of the respondent.

In *Elliott v Nanda,*[214] Moore J held that the Commonwealth Employment Service (CES) had permitted discrimination to take place in a doctor's surgery as the number of complaints of sexual harassment from that workplace should have alerted the CES to the distinct possibility that any young female sent to work for the doctor was at risk of sexual harassment and discrimination of the basis of sex.[215]

Section 105 currently only applies to Division 1 or 2 of Part II, and therefore does not apply to sexual harassment, which is set out in Division 3 (unless the conduct also amounts to discrimination) or victimisation.[216]

Some submissions to the Commission also noted this gap in coverage, with one organisation suggesting there appeared to be no sound policy basis to exclude sexual harassment from the coverage of this section.[217] This approach also differs from the Fair Work Act, where the accessory liability provisions apply to all civil remedy provision contraventions.[218]

The Commission's view

The Commission agrees that there is no apparent policy basis for excluding sexual harassment from the coverage of section 105. The exclusion further reinforces the lack of responsibility and accountability for preventing unlawful sexual harassment.

Extending the coverage of section 105 of the Sex Discrimination Act to sexual harassment is also consistent with comparable provisions in the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act)[219] and the *Age Discrimination Act 2004* (Cth) (Age Discrimination Act),[220] which apply to discrimination and harassment.

RECOMMENDATION 20:

Amend section 105 of the Sex Discrimination Act to ensure that it applies to sexual harassment.

(h) Improving protections against victimisation

As discussed in Section 3.8, 'Impacts of sexual harassment in the workplace', and Section 6, 'Preventing and responding to sexual harassment in the workplace', the Commission heard that victimisation is a common experience for victims who raised complaints, and fears of victimisation prevented others raising complaints. For an effective system, it is essential that victimisation is prohibited and there are effective means to enforce the laws.

(i) Overview of the law

People who experience sexual harassment and bystanders, such as witnesses, can be subject to victimisation. Victimisation involves retaliatory action, or the threat of such action, against a person because they made a complaint of sexual harassment or because they took action in support of a complaint.

Examples of victimisation may include:

- an employee being moved to a position with lesser responsibilities while his or her complaint is being considered
- an employee being denied the opportunity of a promotion after unsuccessfully lodging a sexual harassment complaint against his or her supervisors
- an employee receiving a negative reference from his or her former employer because she or he made a complaint of sexual harassment.[221]

The Sex Discrimination Act makes it unlawful for a person to victimise another person. Section 94(2) states that it is an act of victimisation where a person subjects, or threatens to subject, another person to any detriment on certain grounds, including that the other person:

> (a) has made, or proposes to make, a complaint under this Act or the *Australian Human Rights Commission Act 1986*; or [...]
>
> (f) has reasonably asserted, or proposes to assert, any rights of the person or the rights of any other person under this Act or the *Australian Human Rights Commission Act 1986*; or
>
> (g) has made an allegation that a person has done an act that is unlawful by reason of a provision of Part II.

These provisions ensure that the protection against victimisation extends beyond complaints made to the Commission and also covers internal workplace complaints processes. A complaint of victimisation can be made to the Commission in absence of a separate sexual harassment complaint.

(ii) Jurisdiction of the court

Cases prior to 2011 have held that victimisation provisions in the relevant federal unlawful discrimination acts may give rise to civil and/or criminal proceedings.[222] This is because the definition of 'unlawful discrimination' in section 3 of the Australian Human Rights Commission Act—which gives rise to a right to make a complaint to the Commission—specifically includes conduct that constitutes an offence of victimisation, including under section 94 of the Sex Discrimination Act.[223]

Section 46PO of the Australian Human Rights Commission Act provides that if a complaint is terminated by the Commission, an affected person may make an application to the Federal Court or the Federal Circuit Court about the same, or substantially the same, alleged unlawful discrimination.

However, three cases since 2011 have cast doubt on whether either the Federal Circuit Court or the Federal Court has jurisdiction to hear an application of unlawful discrimination under the Australian Human Rights Commission Act, where the alleged unlawful discrimination is an act of victimisation brought as a civil action.[224] This legal uncertainty arises principally from the fact that the victimisation provisions in the relevant federal discrimination laws, including the Sex Discrimination Act, are set out as criminal offences. Further discussion on this issue is detailed in the Commission's Federal Discrimination Law publication.[225]

Several submissions to the Commission noted the current uncertainty regarding the Federal Court and the Federal Circuit Court's jurisdiction to hear an application for an act of victimisation under the Sex Discrimination Act, as a civil claim brought under the Australian Human Rights Commission Act.[226] These submissions recommended that this uncertainty be clarified.

The Commission's view

The Commission agrees that legislative amendment is necessary to clarify that the Federal Court and the Federal Circuit Court have jurisdiction to hear an application under the Sex Discrimination Act alleging victimisation as a civil cause of action.

RECOMMENDATION 21:

Amend the Australian Human Rights Commission Act to make explicit that any conduct that is an offence under section 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination.

(iii) Protection for bystanders

Several submissions to the Commission also suggested that the existing victimisation provisions should explicitly extend to persons who act as bystanders and persons who provide assistance, support and advocacy to the person making a complaint, as well as those involved in handling the complaint.[227]

As noted above, the existing victimisation provisions in the Sex Discrimination Act do extend beyond the complainant to also protect bystanders who raise concerns or make a complaint about the alleged sexual harassment.

Case study:

Victimisation of a bystander from *Ending Workplace Sexual Harassment: A Resource for Small, Medium and Large Employers*[228]

The complainant worked as a consultant with the respondent company. He alleged he was victimised because the respondent company terminated his contract after he raised allegations of sexual harassment on behalf of his colleague. The respondents denied victimisation. The respondents claimed the complainant's contract was terminated because of loss of confidence in his abilities to perform his role. The complaint was resolved with an agreement that the respondents pay the complainant $7,500 and provide him with a statement of regret.

The Commission will, in consultation with the Workplace Sexual Harassment Council, ensure that any future education and guidance materials for employers and workers clearly communicate the breadth of the current protections for bystanders under the Sex Discrimination Act.

(iv) Whistleblowing legislation

The recently commenced *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) amended the whistleblower protections in the *Corporations Act 2001* (Cth) so that a single, improved whistleblower protection regime covers the corporate, financial and credit sectors. The reforms aimed to bring whistleblower protections in the private sector more in line with those in the public sector. These reforms do not address all of the recommendations made by the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.[229]

The Law Council of Australia indicated that, while it supports the existing victimisation provisions in the Sex Discrimination Act, it supports broader reform and consolidation of Australia's whistleblowing laws to increase public understanding and their accessibility:

> The Law Council of Australia favours whistleblowing laws to be uniform in structure and operation, applying across all contexts and sectors and administered by a single regulatory body that could then pass disclosures to the relevant regulatory body responsible for investigations into the misconduct disclosed. The Law Council considers that there may be value for whistleblowing provisions to be located in the one piece of legislation to ensure that uniformity is established and maintained. Replicating provisions across various pieces of legislation may increase the possibility for amendments across a suite of legislation with the potential to hinder the objective of uniformity.[230]

Similarly, Unions NSW supported extending the recently amended whistleblower protections[231] to people who have experienced sexual harassment, to provide greater protection for sexual harassment disclosures in the private and public sectors, allow for anonymous disclosures, and expanded options for availability of redress and access to compensation.[232]

The Commission's view

Broader reform to whistleblowing legislation is beyond the scope of this Inquiry. However, the Commission considers there is value in having consistency in victimisation protections for the reasons outlined above in the Law Council's submission, particularly across state, territory and federal anti-discrimination legislation. The Commission is supportive of further consideration of the merits of developing uniform federal whistleblowing protections, including ensuring that sexual harassment complaints are explicitly included as protected disclosures.

(i) Australian Human Rights Commission complaints process

(i) Overview

Part IIB of the Australian Human Rights Commission Act sets out the complaints process under federal discrimination legislation. A person may make a written complaint to the Commission alleging unlawful discrimination,[233] which includes sexual harassment complaints.[234] On 13 April 2017, amendments to the Australian Human Rights Commission Act came into effect, which introduced changes to the way in which complaints of unlawful discrimination are defined and handled by the Commission.

Section 46P of the Australian Human Rights Commission Act sets out the requirements for lodging a valid complaint of unlawful discrimination with the Commission. These requirements are that the complaint:

- must be in writing
- is lodged by a person aggrieved by alleged unlawful discrimination or by a person on behalf of one or more other people aggrieved by the alleged unlawful discrimination
- alleges acts, omissions or practices and it must be reasonably arguable that the alleged acts, omissions or practices are unlawful discrimination
- must set out, as fully as practicable, the details of the alleged acts, omissions or practices.

Section 46PF of the Australian Human Rights Commission Act provides that the President[235] must undertake an initial assessment to consider whether the complaint should be terminated under the grounds set out in section 46PH of the Australian Human Rights Commission Act. If the President does not terminate the complaint, the Commission will inquire into it to see whether it can be resolved through conciliation.

Conciliation usually takes place in a face-to-face meeting or in a meeting over the telephone, and in some cases, complaints may be resolved through an exchange of letters and conversations with the conciliator. Where complaints are resolved through conciliation, outcomes can include an apology, reinstatement to a job, compensation for lost wages, changes to a policy or developing and promoting anti-discrimination policies.[236]

(ii) Timeframe as a termination ground of an accepted complaint

Under the Australian Human Rights Commission Act, the President of the Commission has legal responsibility for the handling of complaints.[237]

There is no specific timeframe in which a complaint must be lodged with the Commission. However, since 13 April 2017, the President has had the discretion to terminate a complaint if it was lodged more than six months after the alleged unlawful discrimination took place.[238] This change only applies to acts or practices that take place after 13 April 2017. Before 13 April 2017, the President had the discretion to terminate a complaint that was lodged more than 12 months after the alleged unlawful discrimination occurred.

The President may have regard to the following factors in deciding whether to exercise her discretion in this regard, including:

- length of delay
- reasons for the delay
- prejudice to respondent or complainant
- whether other remedies have been sought and/or achieved in relation to the subject matter of the claim
- whether steps were taken to try to resolve the matter internally or through criminal proceedings
- the arguable merits of the claim
- whether the complainant was and/or is legally represented
- adverse health and family circumstances
- any other specific factors relevant in an individual case.

When a matter is terminated under section 46PH(1)(b), an application can only be made to the Federal Court of Australia or Federal Circuit Court of Australia if the court concerned grants leave for the applicant to do so.[239] An application to the relevant court must be filed within 60 days of the date of issue of the termination notice.[240]

However, there is no requirement to seek leave of the court concerned when the complaint is terminated on the ground that:

- the subject matter of the complaint involves an issue of public importance that should be considered by the courts,[241] or
- there is no reasonable prospect of the matter being settled by conciliation.[242]

The Commission received a large number of submissions that supported extending the time period before which the President of the Commission can terminate a complaint.[243] Support for the extended timeframes ranged from 12 months to six years, with some submissions supporting abolishing the timeframe altogether. These submissions argued that the current six-month timeframe fails to recognise the complex reasons for an applicant's delay in making a complaint immediately after an alleged incident of sexual harassment, which can include the impact of the harassment on their mental state, fear of victimisation, lack of awareness of their legal rights, or where they are awaiting the outcome of an internal workplace investigation.[244]

The Commission also heard that complainants are often reluctant to report an incident of sexual harassment while they are still employed.[245] For some complainants, the knowledge that their claim may be rejected because it is outside the time limit is enough to prevent them from making a claim at all.[246] The following case study was provided by Victoria Legal Aid in its submission.

Penny's story[247]

I worked as a retail assistant at a clothing store. I was sexually assaulted by my manager after work hours. He also sent me text messages containing sexual comments that were quite controlling and confronting.

I complained, and my employer investigated the conduct. I felt that at the time I was not supported as I had to tell the story a few times to different people …

They came back with a decision that there wasn't enough evidence to support my complaint, but they would relocate him … I told them that they haven't provided me with a safe workplace and I put in a letter of resignation as I could no longer work here.

The way that management handled the situation highlighted that the workplace did not have the framework to handle complaints as I felt dehumanised from the investigation process and it turned me off wanting to pursue legal matters further. It was all too much, even living at that point was a struggle …

If there wasn't a timeframe on sexual harassment complaints, I would probably do something about it now. At the time I was trying to make sense of what happened. I felt a lot of shame and guilt.

The Commission's view

The Commission agrees that the current six-month timeframe is inadequate and fails to recognise the complex reasons for an applicant's delay in making a sexual harassment complaint immediately following an alleged incident. However, the Commission is concerned that significantly increasing the timeframe is likely to have a negative impact on the Commission's ability to undertake a fair inquiry into the matter and conduct an effective conciliation. For example, it may be difficult to seek information from people about a matter that occurred many years ago, and it may be difficult to locate and/or contact individuals and witnesses involved in the matter.

The Commission considers that at a minimum, the President's discretion to terminate a complaint should be restored to the previous timeframe, which means it would not arise unless it has been more than 12 months since the alleged unlawful discrimination took place.

However, in light of the strong feedback received from stakeholders through the course of this Inquiry, the Commission recommends that the timeframe be extended to two years, to address the above concerns regarding the complex reasons for the delay in bringing a sexual harassment complaint.

The timeframe for the President's discretion to terminate a complaint should also be considered as part of the Commission's three-year review following the release of this report (as required by the Inquiry Terms of Reference).

The Commission will also ensure that education and guidance materials developed for employers and employees, in consultation with the Workplace Sexual Harassment Council, include information that the termination ground is discretionary and explaining the factors that are taken into account in making this decision.

RECOMMENDATION 22:

Amend the Australian Human Rights Commission Act so that the President's discretion to terminate a complaint under the Sex Discrimination Act on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination took place.

(iii) Efficiency and effectiveness of the complaint-handling service

The complaints process for Australia's federal discrimination laws is intended to be efficient, informal and low cost for both complainants and respondents.[248] The Commission's conciliation model is an alternative dispute resolution mechanism for parties to complaints—that is, an 'alternative' to more formal determination of the dispute by a court or tribunal.

The Commission has adopted the Australian National Alternative Dispute Resolution Advisory Council definition of statutory conciliation:

> [a] process in which the parties to a dispute which has resulted in a complaint under statute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted and may make suggestions for terms of settlement, give expert advice on likely settlement terms and may actively encourage the participants to reach an agreement which accords with the requirements of that statute.[249]

However, the Commission heard criticisms that its own complaint-handling process and those of state and territory human rights and anti-discrimination agencies were often slow.[250] One worker told the Commission that:

> [Y]ou lodge a complaint, maybe it's two to three months … if you're lucky, you get into conciliation then there's wait two or three weeks … to work out whether or not that complaint is going to close. And then at state-base level you lodge at [a tribunal] and then it takes a really long time. Then you get a directions hearing … [T]hat's a year, that's somebody's year that's gone by and that's keeping somebody in a traumatised emotional framework … [It] can actually exacerbate people's trauma.[251]

The Commission heard that these delays could heighten the stress felt by individuals and risk difficulties in reaching a settlement, further discouraging people from pursuing a complaint.[252] Victoria Legal Aid told the Commission that:

> This delay prolongs the dispute as well as the stress associated with the dispute. This is particularly concerning for complainants who remain employed in the workplace where the harassment occurred and wish to maintain harmonious working relationships and retain their employment.[253]

Many submissions broadly recommended increased funding to federal, state and territory anti-discrimination commissions to ensure they are properly resourced to undertake their functions effectively, to reduce delays in the handling and finalisation of complaints, and to enhance existing dispute resolution services.[254]

Some submissions recommended setting specific timeframes for finalising complaints or for scheduling mediation conferences, and for the Commission to exercise its powers to require respondents to attend the conciliation conference.[255]

In 2018–19, the average time from receipt to finalisation of a complaint in the Commission was approximately 4.3 months.[256] Of the 2,202 complaints finalised by the Commission in 2018–19:

- 36% were finalised within three months
- 77% were finalised within six months
- 93% were finalised within nine months
- 98% were finalised within 12 months.[257]

The Commission also seeks feedback from participants about the conciliation process, through a survey. In 2018–19, it found that:

- 94% of surveyed parties to complaints reported that they were satisfied with the service provided
- 74% rated the service as 'very good' or 'excellent'.[258]

In recognition of the negative impact on prospects for resolution and additional stress that delays may cause for complainants and respondents to complaints, in 2019 the Commission's investigation and conciliation service commenced a trial of an 'early set down' (ESD) complaint-handling model.

This involves appropriate complaints being chosen for a process that expedites or 'fast tracks' a matter from allocation to notification to conciliation. While the parties are provided with an opportunity to provide further information prior to conciliation, the focus from notification onwards is to progress the matter to conciliation within a prescribed timeframe.

Early feedback has indicated strong support for the ESD model from all participants and it is anticipated that the trial will continue into 2020.

The Commission's view

The Commission's complaint-handling processes are all contained in the Australian Human Rights Commission Act and apply equally to complaints made under the Age Discrimination Act, Disability Discrimination Act and *Racial Discrimination Act 1975* (Cth) as well as the Sex Discrimination Act. This means the Commission receives complaints that vary significantly with respect to their subject matter, and the capacity and vulnerability of parties, which may affect the appropriate timeframes for response. This underscores the need for the Commission to maintain flexibility in its complaint-handling processes.

The voluntary nature of conciliation is foundational to its success and can in itself be empowering.[259] For this reason, the Commission's power to compel parties to attend a conciliation conference is rarely used.

The Commission considers that providing parties with the choice of participating in a conciliation process allows parties to share responsibility for the process and decision-making regarding any resolution, and overall results in a more effective conciliation process.

The Commission's view is that the current combination of inquiry and conciliation functions and a small number of prescribed process requirements is central to its ability to provide a flexible and appropriate service, considering the range of subject matter and types of disputes that are brought to the Commission.

If the fast track ESD model continues to gain positive feedback and demonstrate results, it will become an established complaint-handling procedure within the 2019–20 financial year.

(iv) Electing to bypass the Commission's conciliation process

Several stakeholders submitted that individuals should be able to elect to bypass the Commission's conciliation process, and instead progress straight to court.[260] This decision would be made, for example, based on the attitude of the employer in responding to the conciliation and the length of time to have a conciliation conference scheduled.[261]

The Commission's view

The Commission reiterates its concerns previously submitted to the 2011 AGD Consultation about introducing a provision to enable direct access to court. Such a provision risks increasing the court's workload, which may delay access to justice. The current scheme, by providing for access to the court after an administrative complaint process, encourages parties to utilise more informal and less expensive avenues for dispute resolution in the first instance.

The Commission considers that the administrative inquiry and conciliation process provides an important opportunity for complainants, who are often unrepresented and may not have the same resources as an employer, to obtain information about the law as it applies to the issues they are raising and reflect on the possible merit of their complaint before commencing often lengthy and costly litigation.

While generalist court-based alternative dispute resolution services are available to litigants, it is the Commission's view that its conciliation process offers a more accessible, specialist and informal service in relation to the often-complex area of human rights and anti-discrimination law. In 2018–19, the Commission conducted approximately 1,396 conciliation processes of which 1,010 complaints (72%) were resolved. This represents successful dispute resolution for more than 2,020 people and organisations involved in complaints before the Commission. Data provided to the Commission indicates that in 2018–19, only 2% of finalised complaints proceeded to court.

(v) Bringing a representative and/or collective claim to the Commission and to court

A complaint may be lodged with the Commission by a person aggrieved by the alleged unlawful discrimination or on that person's behalf by another person or trade union.

Standing to lodge a complaint under the Sex Discrimination Act, and subsequently, to commence proceedings in the Federal Court or Federal Circuit Court, derives from the Australian Human Rights Commission Act. This allows the standing provisions to be consistent across all of the federal discrimination acts. A representative complaint is a complaint lodged on behalf of at least one person who is not a complainant. The Australian Human Rights Commission Act allows a representative complaint to be made to the Commission in the following circumstances:[262]

- the class members have complaints against the same person, and
- all the complaints are in respect of, or arise out of, the same, similar or related circumstances, and
- all the complaints give rise to a substantial common issue of law or fact.

However, standing provisions to commence proceedings in the federal courts are limited to an 'affected person' which is defined as a person on whose behalf the complaint was lodged with the Commission.[263] This means that the ability to take court proceedings under federal discrimination law is currently more constrained than the ability to bring complaints to the Commission. It prevents public-interest-based organisations from bringing an action in the courts—even if they have pursued the complaint in the Commission first.

Although there are provisions to bring a representative complaint to the Federal Court[264] (not the Federal Circuit Court), these provisions are technical and complex, and different to the requirements under the Australian Human Rights Commission Act.

Some submissions supported amending the Australian Human Rights Commission Act to ensure that unions and other representative groups are able to bring a representative action to the Federal Court or Federal Circuit Court.[265] However, concerns have also been raised about the impact of litigation funding on representative claims.[266]

Previous inquiries have also recommended that representative bodies such as advocacy groups, human rights organisations and trade unions should be able to bring actions in the federal courts.[267] This may assist in cases of systemic discrimination, which are more difficult to raise through an individual complaint. The United Nations Office of the High Commissioner for Human Rights has also recognised that:

> [d]urable and sustainable social change comes from civic organization motivated by principles of non-discrimination, participation, accountability and respect for human dignity. Every day in every part of the world, civil society actors—non-governmental organisations, community-based organisations, faith-based groups, unions, grassroots and social movements, to name but a few—contribute to the advancement of human rights.[268]

In its submission to the 2012 Senate Inquiry, the Commission recommended reform of the provisions regarding standing to provide consistency between:

- who may bring complaints to the Commission and who may commence court proceedings
- standing in federal discrimination law matters (in brief, only persons affected by discrimination) and in general law matters (in brief any person or body with a sufficient interest in the matter).[269]

The Commission's view

The Commission recognises that engaging with the complexities of the court system can be difficult and costly for complainants and representative actions can allow genuine cases that previously may not have proceeded past the conciliation stage, and particularly those that have a public interest element, to be heard in court.[270]

The Commission reiterates its previous view,[271] that there are sound public policy reasons to enable appropriate organisations with a legitimate interest in a particular subject-matter to commence and pursue discrimination proceedings, particularly where the claim involves a systemic problem that affects a wide class of persons. It also considers that attention should be given to simplifying standing requirements, and providing for consistent standing rules in Commonwealth discrimination law matters in bringing complaints to the Commission and to the courts.

RECOMMENDATION 23:

Amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

(vi) Conciliator capacity and training

The Commission is an impartial third party during the conciliation process. The Commission's role is to assist the parties to discuss the issues that gave rise to the dispute, consider different options to resolve the complaint and where appropriate provide information about possible terms of settlement. The Commission provides parties with a significant amount of information about the investigation and conciliation process and about the law that may apply to the subject matter of the complaint. Much of this information is publicly available through the Complaints tab on the Commission's website.[272]

A majority of the Commission's conciliators are nationally accredited mediators and all the Commission's conciliators receive comprehensive statutory investigation and conciliation training.

The Commission heard in consultations about the varied experiences of individuals through the conciliation process at the Commission and state and territory human rights and anti-discrimination agencies. The 2015 Kingsford Legal Centre report *Having My Voice Heard: Fair practice in discrimination conciliation* (Kingsford Legal Centre report), surveyed lawyers who reflected positively on the conciliation process:

> I've found the [AHRC] is engaged, supportive and successful in terms of good outcomes. The engagement shows itself before you even get in the room. The conciliators are proactive to ensure parties respond to the complaint and provide requested documents. They know the law. They're happy to shuttle between rooms all day and encourage parties in a sensible way to move towards a reasonable resolution. We know they have their KPIs, but it seems they're more merit driven, there in good faith to resolve the matter.[273]

Kingsford Legal Centre, Redfern Legal Centre, Women's Legal Service NSW and the National Association of Community Legal Centres provided the following case study in their joint submission.

Maxine and Mara's story[274]

Maxine and Mara were employed as customer service assistants in a retail store. Maxine and Mara were both in Australia on working holiday visas. Maxine and Mara's boss began sexually harassing them when they commenced employment. Maxine and Mara lodged sexual harassment complaints with the Anti-Discrimination Board (ADB), who referred them to a Community Legal Centre (CLC) for advice.

> The CLC agreed to represent Maxine and Mara at conciliation. Both Maxine and Mara were due to return to their home countries shortly after lodging the complaint. The CLC contacted the ADB requesting an expedited conciliation conference. The ADB conciliator was extremely helpful and proactive, contacting both sides to propose conciliation dates and organising an interpreter. The conciliator provided flexibility in holding a joint conciliation conference for Maxine and Mara as this was their preferred option. The conciliation conference was held within two weeks of the request for an expedited conference being made. Settlement was reached at the conference.

The Commission received several submissions noting that the conduct of conciliators and the conciliation conference in sexual harassment matters can vary significantly, both between and within jurisdictions.[275] Victoria Legal Aid told the Commission that:

> The process often turns heavily on the individual style of the mediator or conciliator. In particular, some mediators will be engaged with the issues and informed of the relevant legislative provisions, whilst others will take a hands-off approach and allow the process to be driven by the legal representatives. Inconsistencies in these processes makes it difficult for us to prepare clients for what to expect and can compound their distress. In many cases, clients will feel pressured to resolve their claim on terms that do not meet their interests.[276]

The Kingsford Legal Centre report, which researched the experience of vulnerable clients in discrimination conciliations at the NSW Anti-Discrimination Board, the Commission and the Fair Work Commission, found that a conciliation that is not run well can have a re-traumatising effect on the victim of sexual harassment. It also found that conciliation processes which do not adopt reflective practices, particularly where vulnerable clients are involved, can compound the already damaging effects of discrimination.[277]

> We are happy to advise clients to take a matter to [the Australian Human Rights Commission] … it is the most reliable jurisdiction in terms of consistency and it allows parties time to fully discuss issues in more detail.[278]

The Kingsford Legal Centre report acknowledged that the Commission usually provides a conciliation agenda to the parties prior to the conference. This assists legal representatives to both advise their clients on the process and prepare for the conciliation conference. The report recommended that a basic framework for conciliation procedures should be provided to the parties and any representatives prior to conciliation, similar to the conciliation agenda provided by the Commission to parties.[279] This recommendation was also supported by Victoria Legal Aid.

The Commission's view

The Commission provides and is committed to a flexible complaint resolution process that extends beyond a single model of alternative dispute resolution. The Commission's complaint resolution process, which is best classified as a hybrid alternative dispute resolution model, can span the traditional facilitative model of mediation and the more advisory aspects of statutory conciliation.

Feedback from the conciliation process is that high-quality conciliation can be a constructive and educative process, including for employers. The Commission considers it can play an important role in establishing best practice approaches for conciliation and complaints handling, by developing and providing resources and guidance in conjunction with the Workplace Sexual Harassment Council.

(vii) Settlement agreements

Several submissions to the Commission discussed the potential for settlement agreements to be used to facilitate broader change in workplaces and to encourage employers to implement systemic measures to prevent and address sexual harassment.[280] For example, stakeholders suggested amending the standard form of settlement agreements used by the Commission to include terms aimed at preventing and addressing any future harassment, to prompt complainants to consider seeking such outcomes and normalise these requests, while ultimately leaving the final terms of any agreement to the parties' discretion.[281]

The Commission's guidance for conciliation and expected outcomes notes that outcomes of conciliation conferences will vary depending on the nature of the complaint. However, settlement agreements can include an apology, reinstatement to a job, compensation for lost wages, changes to a policy or putting in place anti-discrimination policies. The Commission's 2018–19 annual report notes that 30% of conciliation agreements included 'terms that benefit the community'.[282]

The Commission also publishes a Conciliation Register (discussed below), which includes examples of conciliation outcomes and in particular, where an employer has agreed to implement broader policy outcomes such as training for staff and better internal complaints processes.

Further discussion on settlement agreements, including the role of confidentiality clauses, is in Section 5.8(a) below.

(viii) Conciliation register

The Commission's Conciliation Register provides summaries of a selection of complaints that have been resolved through the Commission's conciliation process. This information is provided as a guide, to assist people involved in complaints to prepare for conciliation.

To ensure that the Commission can adequately maintain the privacy of each party to the complaint, the complaints summarised in the Conciliation Register are de-identified, and are generally published after a certain amount of time has passed (for example, not less than one year). In some instances, complaints outcomes cannot be published as they cannot be sufficiently de-identified to maintain privacy.

The Commission received several submissions recommending the collection and publication of uniform, de-identified data on sexual harassment complaints across all anti-discrimination bodies, including information on settlement outcomes, which should be coordinated through a centralised database. Some stakeholders noted that the Commission's current information on settlement outcomes is out of date and detrimentally impacts on the ability of individuals to effectively evaluate their rights and make informed choices during negotiations.[283]

As discussed in Section 3.2, 'Prevalence of sexual harassment in the workplace', complaints data collected by anti-discrimination agencies can also provide an important source of information to assist governments, employers, community organisations and researchers to build the evidence base for best practice prevention and response to sexual harassment.

The Commission's view

It is important to maintain flexibility in the overall complaint-handling process and conciliation outcomes achieved through that process. This is so parties can tailor settlement agreements to address their specific needs and interests. Settlement agreements regularly include terms where respondents have agreed to implement systemic measures to prevent and address sexual harassment. As the Commission heard, this can be especially important for victims, who often raise a complaint of sexual harassment in the hope of preventing the behaviour from happening again, to themselves or to others in their workplace.

The Commission heard that most regulatory agencies (aside from anti-discrimination agencies) currently do not systematically collect, monitor or report on sexual harassment-related data.

In Section 3.2, the Commission considers this issue and recommends that effective systems for data collection and reporting on measures, performance and progress for sexual harassment metrics will be critical to the success of the redeveloped regulatory model, and this data collection will contribute to long-term planning and policy development by governments to address workplace sexual harassment.

(j) Damages and cost protections

(i) Powers of the court to award certain types of damages

If the court is satisfied that there has been unlawful discrimination by any respondent, the court may make an order requiring a respondent to pay damages 'by way of compensation' for any loss or damage suffered 'because of' the conduct of the respondent.[284]

In *Richardson v Oracle*,[285] the Full Court of the Federal Court set a new benchmark for compensation awarded to victims of sexual harassment, holding that the previous range of general damages awards in sex discrimination and sexual harassment cases was out of step with community standards.[286] The decision in *Oracle* has given greater guidance to courts, suggesting that courts should have regard to the prevailing community standards of behaviour to determine the appropriate amount of compensation.[287] The court can also award aggravated damages, and does so in sexual harassment matters.

For example, in the recent matter of *Hill v Hughes* the court awarded the complainant $120,000 in general damages and a further $50,000 in aggravated damages.[288] Although currently under appeal this decision acknowledges that there is now a greater acceptance and an understanding of the pernicious nature of sexual harassment. In this matter, the judge accepted that the decision of *Oracle* should be used to inform the manner of the assessment of damages.[289]

Exemplary damages may be awarded by the courts to punish a respondent in circumstances where there is an intentional element to the harm caused. There has been some uncertainty as to whether exemplary damages may be awarded in discrimination cases, as exemplary damages are more punitive than compensatory in character.[290]

However, in *Wotton and Others v Queensland and Another (No 5)*,[291] Mortimer J considered previous case law and held that the Federal Court had no power to award exemplary damages under the Australian Human Rights Commission Act. While acknowledging the list of remedies under s 46PO(4) of the Australian Human Rights Commission Act is not exhaustive, Her Honour was of the view that Parliament's intention when enacting this clause was for a compensatory and remedial regime and 'not a regime designed to punish, or confer any deterrent or punitive functions on a court by its orders'.[292]

Some stakeholders submitted that the damages awarded in sexual harassment matters have historically been significantly lower than comparable jurisdictions in which an applicant suffers an illness as a result of unlawful conduct. [293]

For example, the ACTU submitted that, when compared to other jurisdictions such as defamation, the damages in workplace sexual harassment matters are still relatively low. The submission pointed to an example in 2015, where the Federal Court awarded former Treasurer Joe Hockey $200,000 in damages for hurt feelings arising from a poster headline and tweets reading 'Treasurer for sale'.[294] Both the ACTU and Maurice Blackburn called for courts to have greater powers to award damages under the Sex Discrimination Act.[295]

In November 2019, the Council of Attorneys-General Defamation Working Party (Review of the Model Defamation Provisions) released a consultation draft of amendments to the Australian Model Defamation Laws.(see Section 5.8(b) below for further detail).[296] These draft amendments clarify that clause 35 of the Model Laws operates as a cap on damages for non-economic loses in defamation claims ($250,000 adjusted for Consumer Price Index),[297] and that aggravated damages should be considered separately to general compensatory damages.[298]

The Commission's view

Following the clarification in *Wotton and Others v Queensland and Another (No 5),* the Commission will ensure that the court's existing powers are better explained in education and guidance materials. In Section 5.9 below, the Commission makes recommendations to ensure better education for judicial officers to improve the courts' broader understanding of the complex and gendered nature of sexual harassment and the harm it can cause to victims.

However, the Commission agrees that there is a need to monitor whether the development of the law, as it relates to damages in anti-discrimination and harassment matters, continues to reflect community perceptions and the evolving understanding of the harm caused by sexual harassment.

RECOMMENDATION 24:

The Australian Government conduct further research on damages in sexual harassment matters and whether this reflects contemporary understandings of the nature, drivers, harms and impacts of sexual harassment. This research should inform judicial education and training.

(ii) Cost protections

The Commission received several submissions recommending an amendment to the Australian Human Rights Commission Act to insert a costs protection provision, to provide that applicants and respondents should bear their own costs unless an exception applies—if the court is satisfied that the party instituted proceedings vexatiously or without reasonable cause.[299] Legal Aid NSW, Gordon Legal, Kingsford Legal Centre, Redfern Legal Centre, Employment Law Centre of WA, Women's Legal Service NSW and the National Association of Community Legal Centres submitted that the current costs regime, where costs follow the event, operates as a disincentive to pursuing sexual harassment matters under the Sex Discrimination Act.[300]

The 2008 Senate Inquiry acknowledged there were concerns that complainants may be deterred from pursuing legitimate claims in the courts because of the risk that they will be liable for the costs of the respondent.[301] The 2008 Senate Inquiry also acknowledged that there was existing provision for the Federal Court and the Federal Magistrates Court (as it then was) to make orders capping costs, and that a rule that each party would generally bear its own costs would have both advantages and disadvantages for complainants in that those who are successful would generally be left to pay their own legal fees. Ultimately, the 2008 Senate Inquiry recommended that the issues of legal costs would be better addressed through changes to allow for better enforcement of the Sex Discrimination Act.[302]

The Commission's view

The Commission acknowledges the concerns raised in submissions regarding the risk of cost orders acting as a disincentive to pursuing sexual harassment matters in the federal jurisdiction. The Commission is concerned about the negative impact on access to justice, particularly for vulnerable members of the community.

Accordingly, the Commission considers that the Australian Human Rights Commission Act be amended to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth). Such a provision should ensure costs may only be ordered against a party by the court if satisfied that the party instituted the proceedings vexatiously or without reasonable cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs.

RECOMMENDATION 25:

Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

(iii) Statutory cap on damages in some jurisdictions

Some submissions also recommended removing the statutory cap on damages for unlawful discrimination from those jurisdictions that impose them, to make this more consistent with federal anti-discrimination laws.[303] Statutory caps on damages exist in New South Wales,[304] Western Australia,[305] and the Northern Territory.[306]

Citing the decision in *Richardson v Oracle*, the Law Council of Australia acknowledged that higher damages provide an important normative statement on social attitudes toward non-tolerance and recognise the impact that sexual harassment can have on those individuals that are targeted.[307]

The Commission acknowledges that there may be historical reasons that explain the jurisdictional limits applied to tribunals in some states and territories.[308] However, it is not immediately clear whether there are particular policy justifications for imposing a cap on the amount of damages that can be awarded in discrimination matters in those jurisdictions.[309] The Commission acknowledges that other jurisdictions have not taken this approach, imposing no limit to the amount of damages that the relevant tribunal can award.

The Commission's view

The Commission recommends that the New South Wales, Western Australian and Northern Territory Governments review the appropriateness of the existing statutory cap on damages in their jurisdictions and consider removing them, to bring the legislation in line with the Sex Discrimination Act and other jurisdictions. This could be done as part of the broader consideration of achieving consistency between federal, state and territory sexual harassment legislation, to provide the greatest level of protection for individuals (see Section 5.4(k) below).

(k) Consistency with state and territory anti-discrimination legislation

There are a number of key differences in the operation of federal, state and territory anti-discrimination legislation as it relates to the prohibition of sexual harassment. Some key differences include:

- the *Anti-Discrimination Act 1991* (Qld) makes sexual harassment unlawful in all areas of public life in Queensland[310]
- the *Equal Opportunity Act 1984* (WA) maintains the requirement that a person must have suffered actual or believed disadvantage in order to satisfy the definition of sexual harassment[311]
- the *Equal Opportunity Act 1984* (WA), *Anti-Discrimination Act 1992* (NT) and the *Anti-Discrimination Act 1977* (NSW) include a statutory cap on damages[312]

- the Victorian Equal Opportunity Act places a positive duty on persons to eliminate sexual harassment[313]
- differences in the definition and coverage of 'workplace participant'.[314]

A comparative overview of the respective state and territory provisions is at Appendix 6.

There are also some differences in the powers and functions of state and territory commissions, compared with the Commission. For example, the ACT Human Rights Commission may investigate an act or service without the need for a person to make a complaint.[315] The issues about which a person can make a complaint are also broader under the ACT legislation—the ACT Human Rights Commission may consider an issue of public interest or public safety that relates to its functions, such as a complaint about a health practitioner or a veterinary practitioner, which may also be dealt with by commission-initiated consideration.[316] VEOHRC can also exercise a range of powers when conducting an investigation into any matter relating to the operation of the Victorian Equal Opportunity Act.[317]

The Commission received a number of submissions that supported harmonisation of sexual harassment provisions across jurisdictions, in a way that ensures best practice, clarity and consistency and provides the greatest level of protection.[318]

The Commission heard that varying definitions, coverage and different complaints processes meant that many individual complainants found the formal complaints process intimidating, complex and inaccessible.[319] Legal Aid NSW told the Commission:

> Clients come to Legal Aid NSW for advice about sexual harassment at a time when they are distressed and often fearful of losing their job. The [sexual harassment] provisions in the [Sex Discrimination Act] and [the NSW Anti-Discrimination Act] .... are broadly similar, but are not identical. Having to explain to our clients that in order to lodge a complaint they need to choose between two largely similar but slightly different legislative regimes adds to our clients' distress and confusion.[320]

Similarly, the Law Council of Australia noted:

> Such inconsistencies impact the accessibility of the legislative regime for ordinary Australians, and make a difficult area of the law even more difficult to justify, explain and message, thereby compromising access to justice as well as public awareness raising efforts.[321]

The Commission's view

The Commission agrees that there is merit in having consistency in sexual harassment (and sex discrimination) provisions across federal, state and territory anti-discrimination legislation. Achieving greater consistency in coverage, definitions, outcomes and in the complaints process would go some way to making the complaints process more accessible for individuals. For example, state and territory governments could consider greater harmonisation of sexual harassment legislation as part of any upcoming legislative reviews.

The Commission also received a number of submissions that supported harmonisation of federal anti-discrimination legislation more broadly, in the form of a consolidated Act, reflecting the highest level of protection that is currently afforded across relevant federal, state and territory anti-discrimination legislation.[322]

These issues are currently the subject of consultation as part of the National Conversation, including the forthcoming recommendations for an agenda for federal law reform to fully protect human rights and freedoms.[323]

RECOMMENDATION 26:

The Australian Government work with state and territory governments, through the Council of Australian Governments or another appropriate forum, to amend state and territory human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the Sex Discrimination Act, without limiting or reducing protections.

(l) Addressing historical complaints

> Thank you for hosting this National Inquiry. It's wonderful to have an outlet where I can express and give voice to my experience, but I'm not used to that, and have found it very hard to write and say what I need to. I have barely been able to scratch the surface of my experience, and the impact on me, in this small submission.[324]

The Commission's public consultation and submission process has given individuals a chance to tell their story and talk about their experiences. As discussed in Section 3.8, 'Impacts of sexual harassment in the workplace', the Commission heard about the numerous and layered short-and long-term impacts of workplace sexual harassment on victims, and the broader impacts this can have on co-workers, family and friends.

A recurring theme heard from individuals was that this was the first time they had ever told anyone about their experience—either outside of the workplace, or at all:

> There are so many of us who have never told these stories that build up over a career. [They are] like a heavy burden and affect all our interactions thereafter. Thanks for listening—you are the first.[325]

> The process lifted me temporarily out of a space that was drowning me in many ways. I felt validated and respected by the [Inquiry] process [which is] very rare in these competitive ruthless times.[326]

> My situation occurred 18 years ago. I'm writing this submission as I'm still affected by it and I'm looking for an opportunity to debrief my experience and if possible make a difference—ensuring situations like mine will be better addressed in the future.[327]

As well as this Inquiry, other significant inquiries, such as the Royal Commission into Institutional Responses to Child Sexual Abuse, have demonstrated that outside of any formal complaint-handling process, there is a healing power in having one's experience heard. More importantly, these inquiries have demonstrated that individual stories provide an understanding of what has happened in the past and present and can enable identification of future reforms so that such incidents and systemic wrongs are not repeated. The Commission also heard that employers found the process of hearing about individual experiences and the harms victims suffered as confronting, but also beneficial.

VEOHRC recommended that human rights and anti-discrimination agencies should offer restorative engagement pathways for sexual harassment complainants, where appropriate.[328] Restorative engagement is:

> a process by which an individual who has experienced workplace harm, such as sexual harassment or sex discrimination, is able to engage with the workplace [employer] to tell their story and have their experience acknowledged.[329]

VEOHRC's submission reflected on their arrangement with Victoria Police to establish a restorative engagement scheme to resolve complaints from its employees about sexual harassment (and sex discrimination):

> A restorative pathway offers opportunities for healing, is non-adversarial and is not evidence focused. It does not necessarily require a harasser to participate in the process but facilitates a formal response from the employer which may also result in internal disciplinary action against the harasser. It provides employers with a valuable opportunity to convey their commitment to changing their organisational culture and preventing the recurrence of harassment. As has happened in Victoria Police, it can also lead to improvements in the management of support services and internal complaint mechanisms.[330]

Another example of a restorative engagement approach was the Defence Abuse Response Taskforce set up in response to widespread allegations of sexual and other forms of abuse in the Australian Defence Force.[331]

Case study:

Defence Abuse Response Taskforce[332]

The Defence Abuse Response Taskforce (Taskforce) was set up for a time-limited period[333] to assist complainants who had suffered sexual abuse, physical abuse, sexual harassment and workplace harassment and bullying in Defence prior to 11 April 2011.

The 2016 *Defence Abuse Response Taskforce: Final Report* (Taskforce Report) explains that the Taskforce was victim-focused, and noted that the comments and feedback received were overwhelmingly positive.

My restorative engagement … was something that I could never have envisaged being able to achieve. It has been an integral part of my journey; I feel at peace knowing the military has heard my story …

I found it to be both emotionally and physically impossible to complete the initial paperwork by the due date. After months, all I could manage to achieve was my name on the top of the form. I would sit and cry for hours looking at the form, and relive the horrible feelings of the abuse … Ultimately with [the case officer's] help … and with his compassionate, never-ending understanding I went on to complete the form and for the first time in my life I shared my story with another person.

Senior Defence representatives also spoke about the positive impacts on them of participating in a restorative engagement conference, and how the program has made a substantial contribution to cultural change in Defence:

> It is not often that you are put in the position to make such a large impact on another life. It's a considerable responsibility, although when it goes well, it's extremely rewarding.
>
> [Participation] has changed the way I try to respond. I find myself paying more attention to the personal impact than the 'Defence position', & I put more effort into recognising this & expressing regret early where I can.

Key reflections from the Taskforce included that:

- it takes time before a person can be ready to talk about abuse
- it took great courage for complainants to come forward and tell their very personal stories to the Taskforce
- many complainants said the reason they made a complaint to the Taskforce was to help prevent members of Defence being abused in future and, in some cases, to help Defence become a better institution.

The Taskforce Report acknowledged that the database of information collected through the process could provide future researchers with useful insights (on a de-identified basis) into the nature and contributing causes of abuse.[334]

Subsequent to the conclusion of the Taskforce, this restorative engagement process was incorporated into the Defence Reparation Scheme in 2017, coordinated by the Office of the Commonwealth Ombudsman.

Case study:

Defence Restorative Engagement Program[335]

The Defence Restorative Engagement Program, situated within the office of the Commonwealth Ombudsman, provided an independent, external and impartial mechanism for people to report historical and contemporary serious abuse in the Australian Defence Force.

The program allowed an individual (the reportee) to tell their personal story of abuse to a senior representative from Defence, in a private, facilitated meeting (Restorative Engagement Conference). The conference also provided an opportunity for Defence to acknowledge and respond to the reportee's personal story of abuse.

The Commission's view

The Commission strongly considers that there is value in establishing a time limited two-year disclosure process for victims of historical workplace sexual harassment to speak to their experience and its impact.

The Commission, drawing on its expertise in undertaking significant human rights inquiries and trauma-informed approach to sexual harassment, is well placed to facilitate this type of process.

Such a process would create a safe space for individuals to be heard with respect and without judgment, with the principal purpose of listening to and documenting people's experiences. To support victims throughout this process, which raises risks of re-traumatisation, individuals will be connected with appropriate support services.

As a related and secondary purpose, the Commission will also use de-identified information and data to identify possible improvements to systems and processes, either within particular workplaces or industries, or targeted to broader systemic issues. In this sense, victims will be able to contribute to structural reform and change through telling their individual stories.

In establishing this process, the Commission will consider inclusion of a restorative engagement element, noting that this type of engagement will require additional safeguards and a detailed framework for operation.

RECOMMENDATION 27:

A disclosure process be established that enables victims of historical workplace sexual harassment matters to have their experience heard and documented with a view to promoting recovery. The Australian Government should fund the Commission to facilitate this process.

5.5 Fair Work system

> Under the Fair Work Act, as part of the review of the regime [we should] consider how we can encourage employers to be brave and take action, and perhaps have cover against unfair dismissal and adverse action claims, when they do want to change the culture and take those steps to dismiss an employee.[336]

(a) Overview

The Fair Work Act does not expressly prohibit sexual harassment. As discussed further below, it can be indirectly raised through a number of provisions:

- general protections against adverse action on the basis of a workplace right[337]
- general protections against adverse action on the basis of sex[338]
- the anti-bullying jurisdiction[339]
- unfair dismissal[340]
- unlawful termination on the ground of sex.[341]

The lack of an express prohibition was raised in consultations and submissions as a significant limitation that creates both ambiguities and gaps in how sexual harassment is handled under the Fair Work Act. Concerns were also raised that the unfair dismissal and unfair termination provisions created uncertainty for employers as to appropriate action in response to workplace sexual harassment.

However, the Commission heard strong support for reforming the Fair Work system to enable it to more robustly regulate sexual harassment. ADLEG raised the symbolic and practical importance of regulating sexual harassment through the national employment framework:

> As a significant proportion of all sexual harassment occurs at work, it is essential that there is a specific prohibition of sexual harassment in the national workplace relations laws and that there are viable options for preventing and remedying sexual harassment under such laws.[342]

The Commission has considered how best to strengthen the Fair Work system's handling of sexual harassment and ensure this strengthened role promotes coordination, consistency and clarity within the new regulatory model.

The Commission has made recommendations in relation to several key areas aimed at ensuring sexual harassment is clearly prohibited conduct under the Fair Work Act and understood as serious misconduct. In making recommendations, the Commission has been mindful to maintain the coherence of the Fair Work system, especially the statutory principles and structure of the legislation. In particular, the Fair Work Act regulates according to specific attributes and in relation to specific grounds, such as specific categories of discrimination.

(b) The Fair Work system

The Fair Work Act and the *Fair Work Regulations 2009* establish the Fair Work system, which is the national framework governing the relationship between employer and employee in Australia.[343] It regulates employment conditions through the National Employment Standards and the award and enterprise bargaining system.

There are two key regulatory bodies within the Fair Work system—the Fair Work Ombudsman and the Fair Work Commission.

The Fair Work Ombudsman enforces compliance with the Fair Work Act and related legislation, awards and registered agreements. It appoints Fair Work Inspectors who are empowered to investigate and enforce compliance with Australia's workplace laws and industrial instruments and has an own-motion power.[344] It also provides employers and employees advice and education on pay rates and workplace conditions.[345]

The Fair Work Commission is the national workplace relations tribunal. It is responsible for maintaining a safety net of minimum wages and employment conditions, as well as a range of other workplace functions and regulation.[346] Its powers and functions include dealing with unfair dismissal, anti-bullying, general protections and unlawful termination claims.[347]

While Australia's national workplace relations system covers the majority of Australian workplaces, some workplaces are covered by state workplace relations systems.[348]

While beyond the scope of this Inquiry, further consideration should be given as to whether the recommendations relating to the Fair Work system outlined in this report are introduced into state workplace relations systems to ensure consistency of coverage and protections.

(c) Sexual harassment—application of the Fair Work system

The Fair Work Act does not expressly prohibit sexual harassment. However, two key provisions may be applicable to a worker experiencing sexual harassment: the general protections provisions in Part 3-1 of the Fair Work Act and the anti-bullying provisions in Part 6-4B of the Fair Work Act.

(i) General protections provisions

The general protections provisions in Part 3-1 of the Fair Work Act provide workers with protections across several areas. Two general protection provisions are of most relevance to sexual harassment.

The first general protection is section 340, which prohibits a person taking adverse action against another person because they have a 'workplace right', or have or have not exercised or proposed to exercise a 'workplace right'.[349] A workplace right includes making a complaint or inquiry in relation to a workplace law. 'Workplace law' is defined broadly to include any law of the Commonwealth, state or a territory that regulates the relationships between employers and employees and would include anti-discrimination laws.[350]

The Fair Work Act describes a number of adverse actions.[351] An employer takes adverse action against an employee if the employer:

- dismisses the employee
- injures the employee in their employment
- alters the position of the employee to the employee's prejudice, or
- discriminates between the employee and other employees of the employer.[352]

The second general protection is contained in section 351, which is a protection against discrimination that prohibits an employer from taking adverse action against a person who is an employee or prospective employee because of a protected attribute, one of which is sex.[353]

Relevantly, the term discrimination, as used in section 351, is not expressly defined in the Fair Work Act. While the title of section 351 is 'Discrimination', the section prohibits adverse action on certain grounds, rather than dealing with 'discrimination' per se.

It is not clear whether sexual harassment is encompassed within the protected attribute of sex under the Fair Work Act. The *General Protections Benchbook* recognises that sexual harassment has been found to constitute sex discrimination and 'sexual harassment may constitute adverse action against a person by reasons of the person's sex'.[354]

The case law suggests that, in practice, the interpretation and application of section 351 to sexual harassment is more complex.[355] In *Wroughton v Catholic Education Office Diocese of Parramatta,* the Court noted that:

> [Section] 351(1) of the *Fair Work Act* does not itself employ the term 'discrimination'. Nor does [section] 351 contain any prohibition upon (in the present case) 'sex discrimination', including 'sexual harassment'. The prohibition in [section] 351(1) is a prohibition upon an employer taking 'adverse action against a person…'.[356]

However, the Court was ultimately not required to determine whether sexual harassment could constitute adverse action under section 351 because other elements of the claim could not be established.[357] Further, in *Morton v Commonwealth Scientific and Industrial Research Organisation (No 2*), the court rejected the submission that conduct that is sexual harassment under the Sex Discrimination Act is necessarily also adverse action under section 351 of the Fair Work Act.[358] However, this does not necessarily mean that sexual harassment cannot constitute adverse action, where the conduct concerned satisfies the definition of adverse action in section 342 of the Fair Work Act.

These cases suggest the courts interpret the term discrimination narrowly, according to its ordinary meaning and not in reference to anti-discrimination statutes.[359] Further, courts have required employees to prove that the employer intended to, or deliberately did, treat them less favourably. This narrow interpretation fails 'to encompass the complexities of workplace discrimination'.[360] In light of these complexities, section 351 does not clearly or specifically provide an enforceable right for victims of sexual harassment in the workplace.

There is an important distinction between section 351 and section 340. Section 351 protects a worker from adverse action due to the act of discrimination itself, including on the grounds of sex.

In contrast, section 340 protects a worker against adverse action arising from the exercise workplace right, which could include making a sexual harassment complaint, rather than the sexual harassment that may form the basis of the complaint.[361] It should also be noted that while section 340 applies broadly to 'persons', section 351 only applies to conduct between an employer and employee. Section 351 does not prohibit adverse action between broader groups of people within the workplace, such as conduct of an employee towards another employee.

For a victim to access the protection offered by section 351 in relation to sexual harassment, the Federal Court or Federal Circuit Court must be satisfied both that the sexual harassment amounted to adverse action—and that the adverse action was directed towards the victim *because of* their sex.[362]

ADLEG noted that this 'necessitates a comparative approach that relies on less favourable treatment based on an attribute; for example the sexualised way that women were treated would not have occurred to men.' They criticised this approach noting that it 'does not fit well' with the ways in which sexual harassment often arises in many workplaces 'where there is an unacceptable sexualisation of the workplace and its culture more broadly, which does not hinge on a specific gender differential'.[363]

The NSW Young Lawyers also raised concerns about the limitations of section 351, principally that section 351 applies only to action that is unlawful under an anti-discrimination law.[364] They argued this necessitates a highly complex interaction of multiple statutes, which contributes to the Fair Work Act 'being difficult to interpret, especially for employees and employers who are often not lawyers, yet must comply with the FWA on a day-to-day basis'.[365]

This is consistent with what the Commission heard in other submissions and consultations:

> [E]ach time I've spoken to Fair Work, they can't provide legal advice, they can't do this. They've been very good but there's no single point of entry into what the system is that's there to support you after you've been sexually harassed.[366]

> Where sexual harassment does occur in the workplace, the remedial mechanisms available to victims should be quick, simple and easy for the lay person to navigate. The various and sometimes overlapping jurisdictions in the anti-discrimination laws and the Fair Work Act may benefit from a review to ensure that this objective is being met.[367]

(ii) Options for reform

A key issue raised in a number of submissions was whether explicitly prohibiting sexual harassment under the Fair Work Act would strengthen the Fair Work system's handling of sexual harassment matters.

Many submissions from legal organisations, unions, community groups and non-government organisations argued strongly in favour of creating an explicit and standalone prohibition against sexual harassment within the Fair Work Act.[368]

The Commission also received a joint statement from over 100 organisations representing unions, researchers, peak bodies, health professionals and lawyers, titled, 'Power to Prevent: Urgent Actions Needed to End Sexual Harassment at Work'. One of their recommendations was 'access to fair, effective and efficient complaints processes, including a new right of action under the Fair Work Act'.[369]

Top End Women's Legal Service spoke to the power and impact of express prohibitions:

> In our experience, protections explicitly provided for in legislation are typically more 'powerful' in situations of employees raising concern with employers, as well as providing swifter, more streamlined recourse processes for the respective employee.[370]

As an alternative to a standalone provision, several legal bodies recommended amending the definition of adverse action to include sexual harassment.[371] This was proposed in various ways. ADLEG recommended prohibiting sexual harassment 'as a form of adverse action itself, without the need to identify it as a form of discrimination or as coming within the exercise of a workplace right'.[372]

The NSW Young Lawyers recommended amending the definition of adverse action to include sexual harassment to clearly bring sexual harassment into the Fair Work Act without the need to interact with anti-discrimination law.[373]

The Northern Territory Women Lawyer's Association recommended amending the general protections provisions in the Fair Work Act to explicitly include sexual harassment as a form of sex discrimination.[374] It also recommended amending the Fair Work Act 'to require Modern Awards and Enterprise Agreements to contain terms mandating positive steps to prevent sexual harassment, in the same way that they currently do for dispute settlement procedures, consultation and individual flexibility agreements.'[375] The Women's Electoral Lobby similarly recommended mandating such standard clauses in enterprise agreements.[376]

In contrast to these views, Australian Industry Group (Ai Group) contended that the Fair Work Act's general protections should be tightened to exclude sexual harassment claims, arguing that state and federal anti-discrimination legislation already regulates this area.[377]

Coverage

As section 351 applies only to the conduct of 'employers' and does not apply to the conduct of an employee towards another employee, the Law Council of Australia suggested section 351 could also be amended to apply whether adverse action is taken by an employer or employee.[378]

The need to ensure a broad and comprehensive approach to coverage was raised in other submissions as well, especially in relation to the terms 'employee', 'employer' and 'workplace'. For example, the Victorian Trades Hall Council recommended that the Fair Work Act redefine 'workplace' to the 'world of work', in line with ILO Convention 190 (see Section 5.3 above).[379]

In a joint submission, academics Anne Hewitt, Rosemary Owens, Andrew Stewart and Joanna Howe expressed concern that there is a significant gap in the existing coverage of federal protections against sexual harassment, including under the Fair Work Act. They emphasised the importance of accounting for non-traditional employment relationships with regulatory frameworks:

> We would strongly advocate that the federal prohibitions of sexual harassment be extended to cover all participants in the workplace, whether they are there as learners or workers, or on a paid or unpaid basis. Failure to do so compounds the vulnerability of already vulnerable individuals, including those seeking to gain a foothold on the employment ladder through unpaid work experience, and those learning in the workplace.[380]

Similarly, Volunteering Australia and Justice Connect expressed concern that unpaid workers do not have protections across a range of Commonwealth, State and Territory laws, including the Fair Work Act.'[381] They argued that:

> There can be no sound policy rationale for why payment of a worker should determine whether the person is protected from sexual harassment. Volunteers and other unpaid workers deserve the same legal protection as employees from sexual harassment in the workplace.[382]

The National Union of Workers also called for the definitions of the concepts of 'workers' and 'workplaces' to be broadened to account for insecure work and new employment models.[383]

Tanya's story[384]

Tanya was a volunteer lecturer for many years, across different universities. Tanya told the Commission in her submission that a fellow male lecturer began sending her lewd emails, while also offering her assistance with research or work resources. Tanya said that over three years, he constantly sent her sexually explicit images and made comments including that he had a 'box of condoms' ready for her, and suggested they get a hotel room to engage in 'group sex'. She also said that he put his hand up her skirt at a work lunch, and on another day offered to walk her to her car and then forcefully kissed her in the carpark.

Tanya told the Commission that when she finally reported the sexual harassment, both internally and to the police, she was dismissed from her volunteer role. When Tanya questioned the legality of this, she was told that she had no recourse because voluntary work was not 'work' under the law, that the male lecturer was not her 'colleague', and so this did not amount to an 'unfair dismissal' for the purposes of the law. Tanya said the harasser still works for the same organisation.

Representative and collective complaints

A lawyer or paid agent who is an employee or officer of a registered organisation, including a union or employer association, can represent a person before the Fair Work Commission without the need to seek the permission of the Fair Work Commission.[385]

In addition to an express prohibition of sexual harassment under the Fair Work Act, several unions argued that unions and other interested parties should have an effective capacity to bring representative complaints on behalf of a worker or workers.[386] They argued that effective enforcement mechanisms should 'reflect unions' roles as employee representatives.'[387]

The Commission also received support for union and representative complaints from non-union bodies. WEstjustice recommended allowing:

> [w]orkers, their representatives, unions and the [Fair Work Ombudsman] to bring a claim of sexual harassment under [the Fair Work] Act (where relevant, together with an action regarding other contraventions of the [Fair Work] Act such as underpayment of wages, contravention of awards or enterprise agreements and/or adverse action).[388]

The Women's Electoral Lobby also raised the issue of collective complaints and recommended that the Fair Work Act 'be amended to cover action on sexual harassment collectively and not just individually'.[389]

Enterprise agreements

An enterprise agreement sets out the terms and conditions of employment between an employee or group of employees and one or more employers.[390] Enterprise agreements can, and often do, include terms for addressing sexual harassment complaints.

The Commission heard that enterprise agreements can provide an opportunity for establishing systems and structures for dealing with sexual harassment at the individual and enterprise level.[391] The Commission also heard that it would be important for any terms relating to sexual harassment to be carefully drafted.[392] Importantly, section 50 of the Fair Work Act makes contravention of an enterprise agreement a civil penalty provision, which could provide added weight to the capacity of enterprise agreements to motivate employer action and compliance.[393]

The Commission's view

It is clear from the many submissions and consultations recommending reform that the current framework under Part 3-1 of the Fair Work Act does not provide the clarity and coverage needed for victims of sexual harassment in the workplace.

The lack of an express prohibition against sexual harassment within the Fair Work Act means that, in practice, sexual harassment matters are raised using provisions under Part 3-1 of the Fair Work Act that were not designed to address sexual harassment. They do not adequately address the nuanced and complex factors underpinning sexual harassment and do not provide a victim with appropriate redress.

The Commission considers there is merit in prohibiting sexual harassment in the Fair Work Act. While sexual harassment is a form of sex discrimination, the complexities of interpretation and case law mean section 351 has not been clearly interpreted this way.

The Commission received varying recommendations as to how to amend the Fair Work Act to include sexual harassment. The Commission acknowledges that there are a number of mechanisms for ensuring sexual harassment is explicitly and adequately covered by the Fair Work system. The Commission's focus is on ensuring sexual harassment is included through the most effective and efficient mechanism possible. The particular mechanism for explicitly prohibiting sexual harassment should be the subject of further consideration.

To promote coordination and consistency, any clarification in the Fair Work system should adopt the definition of sexual harassment in the Sex Discrimination Act.

The Commission is of the view that it is important that the Fair Work system keeps pace with changing work arrangements, including changes to the nature and characteristics of workers and workplaces. The new prohibition should therefore apply a broad definition of employee, employer and workplace.

The Commission also sees merit in using enterprise agreements to establish systems and structures for dealing with sexual harassment at the individual and enterprise level.

While acknowledging that some submissions called for amendments to the Fair Work Act to provide for representative and collective complaints, the Commission considers that this issue is a matter for the Australian Government and the Fair Work Commission to consider.

RECOMMENDATION 28:

The Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited.

(iii) Anti-bullying provisions

Part 6-4B of the Fair Work Act enables a worker who is at work in a constitutionally covered business and reasonably believes they have been bullied at work to apply for a Fair Work Commission order to stop the bullying (stop bullying order).

A worker is bullied at work if:

- a person or group of people repeatedly behave unreasonably towards the worker (or a group of workers of which the worker is a member), and
- the behaviour creates a risk to health and safety.[394]

The definition of worker for the purposes of a stop bullying order is wide. It has the same meaning as worker as in the model WHS Act and therefore includes contractors, trainees and volunteers.[395]

Unreasonable behaviour includes behaviour that is victimising, humiliating, intimidating or threatening. Whether a behaviour is unreasonable depends on whether a reasonable person might see the behaviour as unreasonable in the circumstances.[396] The fact the conduct must be both repeated and unreasonable establishes a high threshold for a stop bullying order.

The principal objective of the stop bullying order is to cease the bullying. It is therefore only available to a worker while they remain in an ongoing working relationship—not before they commence work or after they cease work.

The Fair Work Commission must start to deal with an application for a stop bullying order within 14 days of it being made.[397] A stop bullying order cannot include a requirement to pay a pecuniary amount.[398]

While sexual harassment will not necessarily constitute bullying, a stop bullying order may assist in stopping workplace sexual harassment where it is found to constitute part of a pattern of repeated unreasonable behaviour that creates a risk to health and safety.

Relevantly, any stop bullying order is also a workplace right for the purpose of the general protections in the Fair Work Act, which means that adverse action cannot be taken against a relevant person for making a stop order application or proposing to make such an application.[399]

Academics Rodney Worth and Joan Squelch have considered the limitations of the anti-bullying provisions.[400] They argued that a key challenge for applicants in bringing a successful application for a stop bullying order, especially for covert bullying, is providing evidence to substantiate and support their claims. This is compounded by the fact that applicants are generally self-represented and that the proceedings are adversarial in nature.

They argued these factors may limit the ability of the anti-bullying jurisdiction to achieve its restorative aim of facilitating the resumption of normal working relations after a stop bullying order process has occurred.[401]

The ACTU outlined a number of other limitations they perceived within the anti-bullying framework, including that the worker is required to not only show that there is a risk they will continue to be bullied at work, but that the bullying also exposes them to a chance of injury or loss.[402]

(iv) Options for reform

Notwithstanding these limitations, several submissions recommended either amending the current stop bullying jurisdiction to include sexual harassment or developing an order for stopping sexual harassment, comparable to the existing stop bullying order.[403]

The Women Lawyers Association of the ACT recommended introducing a regime in the Fair Work Act similar to the anti-bullying provisions allowing victims to seek orders 'compelling employers to take steps to stop sexual harassment, with civil penalties imposed if employers fail to take necessary action.'[404] JobWatch made the same recommendation and suggested that the order should principally apply to workers who feel they have been sexually harassed at work, in circumstances where there is a risk that this sexual harassment will continue.[405]

The NSW Teachers Federation and National Women's Working Centre both called for the introduction of stop sexual harassment orders.[406] The Commission also heard from individuals in submissions calling for a similar regime for sexual harassment based on the anti-bullying jurisdiction:

> These would not require any adverse judgement to be made of employers or staff and would merely serve to keep the complainant in safe employment while their complaint is processed … interim orders would go some way towards reducing the adversarial nature of sexual harassment complaints and offer the complainant and the employer an opportunity to minimise the harm that is caused by the bringing of the claim (as opposed to harm caused by the harassment the subject of the claim).[407]

> [T]he creation of mandatory obligations to investigate complaints of sexual harassment is not a big step, especially when one understands that a number of bullying allegations to the [Fair Work Commission] are really based in sexual harassment.[408]

The Commission's view

The Commission recognises the value of stop bullying orders as part of an early intervention approach where the ultimate aim of both the employee and employer is to restore the working relationship. One particular benefit is that the Fair Work Commission is required by the Fair Work Act to start to deal with an application within 14 days of it being made, providing prompt action for victims.

Fair Work Commission data shows that the case management approach it takes to stop bullying orders means that the majority of matters are resolved without the need for the Fair Work Commission to make an order. In the 2017–18 reporting period, 721 orders to stop the bullying were lodged with the Fair Work Commission.

700 applications were finalised, of which only 8% (53) were resolved by the Fair Work Commission issuing a decision or order.[409] This suggests the benefits of an intensive early intervention approach to resolving bullying matters, which could also apply to sexual harassment matters.

While sexual harassment may constitute bullying in some circumstances, the two types of behaviour can differ substantially in nature and experience. In the Commission's view, an explicit order for stopping sexual harassment should be developed.

Through the Inquiry, the Commission heard that victims want a broader range of options to stop sexual harassment, especially less adversarial options. The Commission also acknowledges that the differences between bullying and sexual harassment may mean some people are more sensitive to allegations about sexual harassment and therefore less amenable to engaging with a stop sexual harassment order. However, the Commission is ultimately of the view that a stop sexual harassment order, which would be designed to be less adversarial in nature and to encourage engagement, would provide victims and employers with an early intervention redress mechanism.

Importantly, this would work in conjunction with the explicit prohibition of sexual harassment under the Fair Work Act.

RECOMMENDATION 29:

Introduce a 'stop sexual harassment order' equivalent to the 'stop bullying order' into the Fair Work Act. This should be designed to facilitate the order's restorative aim.

(d) Unfair dismissal and serious misconduct

The Commission heard that the Fair Work Act's unfair dismissal and serious misconduct provisions have particular relevance to sexual harassment.

The Fair Work system provides remedies for employees who have been unfairly dismissed. The unfair dismissal provisions in the Fair Work Act may arise in relation to the dismissal of an alleged harasser or victim. An employee is protected from unfair dismissal if they are a national system employee who has completed the minimum period of employment (which is six months or one year where it is a small business),[410] and:

- they earn less than the high-income threshold[411]
- a modern award covers their employment, or
- an enterprise agreement applies to their employment.[412]

The Fair Work Act also protects non-national system employees from termination for a number of reasons, including sex and the filing of a complaint, or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.[413]

Some employers expressed concern that workers terminated for sexual harassment would be reinstated by the Fair Work Commission. As discussed in Section 6, 'Preventing and responding to sexual harassment in the workplace', uncertainty about what the unfair dismissal provisions require has resulted in some employers taking an overly legalistic approach to workplace investigations of sexual harassment complaints.

While the Fair Work Commission collects data on disputed dismissal applications lodged under the Fair Work Act, the Commission understands it does not specifically identify whether applications relate to allegations of sexual harassment, which means such data cannot be readily extracted.

A person is unfairly dismissed if the Fair Work Commission is satisfied that:

- the person has been dismissed
- the dismissal was harsh, unjust or unreasonable
- the dismissal was not a case of genuine redundancy, and
- if the person was employed by a small business, the dismissal was not consistent with the Small Business Fair Dismissal Code.[414]

The Small Business Code provides small business employers with a process to follow to ensure that the dismissal of an employee is fair.[415]

Section 387 of the Fair Work Act requires the Fair Work Commission to take into account a number of criteria when determining whether a dismissal was 'harsh, unjust or unreasonable'.[416] The Fair Work Commission has a wide discretion under section 387, which broadly covers issues of substantive fairness (including whether there was a valid reason for the dismissal relating to the person's capacity or conduct), procedural fairness factors (including whether they were given an opportunity to respond to any matters related to their capacity or conduct), and any other matters that the Fair Work Commission considers relevant.

Engaging in sexual harassment is generally considered to be a valid reason for dismissal.[417] In *Colin Ramon Reguero-Puente v City of Rockingham,* the Fair Work Commission held:

> In this day and age young women should not have to tell their older superiors that they do not want to be sent salacious texts during or after working hours, nor have comments of a sexual nature made about them, or be directed toward them in their workplace ...

> Despite Mr Reguero-Puente's assertion that he genuinely believed his conduct was at all times welcome and reciprocated, the text message histories he tendered reveals that he was aware that there are boundaries of acceptable behaviour and that he had overstepped those boundaries. More relevantly it confirms that as soon as they became aware of his conduct, Mr Reguero-Puente was informed by the City that his behaviour was inappropriate and that it must stop. Nevertheless, Mr Reguero-Puente continued to engage with much younger, more junior staff in an inappropriate manner.
>
> Consequently, I find that there was a valid reason for Mr Reguero-Puente's dismissal.[418]

However, sexual harassment will not be considered a valid reason in all cases. Ai Group used the case of *McDonald v TNT Australia*[419] to illustrate this point. In this case, the Fair Work Commission found that while the applicant had made comments with a sexual undertone, and on another occasion made comments that were 'inappropriate, clumsy and unnecessary', this did not represent 'serious and wilful misconduct or behaviour which was of a magnitude that it provided a valid reason for the termination of his employment'.[420]

Even though sexual harassment can be considered a valid reason for dismissal, a dismissal may still be found to be harsh, unjust or unreasonable based on the broad range of other factors the Fair Work Commission takes into account.[421]

Under the Fair Work Act, serious misconduct is conduct that is:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the employment contract; or
- conduct that causes serious and imminent risk to the health and safety of a person, or the reputation, viability or profitability of the employer's business.[422]

Serious misconduct includes an employee engaging in theft, fraud or assault in the course of their employment or being intoxicated at work.[423] Where serious misconduct is alleged, the test for a valid reason for dismissal is whether the reason was 'sound, defensible or well founded'.[424]

Generally, when dismissing an employee, an employer must give a minimum notice period, which ranges from one week to five weeks depending on the employee's length of service and age.[425] However, where a valid reason is established, and the reason is sufficiently serious to amount to serious misconduct, no notice is required.

Where an employee has been dismissed without notice (summary dismissal) for serious misconduct the Commission may find that, although there was a valid reason for the dismissal, the dismissal was harsh because summary dismissal was a disproportionate response.[426]

(i) Concerns raised about the operation of unfair dismissal laws

Some submissions argued that in attempting to balance the rights of the person who is a victim of sexual harassment and the procedural rights of the harasser, the Fair Work system gives disproportionate prominence to procedural considerations.[427]

ACCI raised several cases where the Fair Work Commission, while finding that the dismissal of an employee who engaged in sexual harassment was valid, nevertheless awarded damages to the employee because of procedural deficiencies.[428] They argued that 'employers are being sent signals that they cannot reliably act on absolutely clear and unambiguous sexual harassment, and that they cannot act where someone experiences harassment and complains about it.'[429]

Ai Group argued that the unfair dismissal laws in the Fair Work Act 'should be amended to ensure that workplaces and victims of sexual harassment are better protected. Current unfair dismissal provisions unduly favour procedural technicalities over the welfare of victims and safe workplaces.'[430]

The Australian Government Department of Jobs and Small Business also raised concerns about the Fair Work Act's unfair dismissal provisions. It argued that:

> If procedural considerations assume greater importance in the unfair dismissal context than the community expects, they may operate to undermine the objectives and effective enforcement of workplace sexual harassment policies and fail to deter inappropriate behaviour. The Department notes that other submissions to the Inquiry have also discussed this issue.[431]

Ai Group suggested that even in cases where sexual harassment related dismissals were upheld, the process could be time consuming, costly and emotionally draining for victims, perpetrators, employers, bystanders and others.[432] In *Mr Peter Angelakos v Coles Supermarkets Aust Pty Ltd T/A Coles Supermarkets*,[433] the Fair Work Commission upheld the employer's decision to dismiss an employee who had sexually harassed young female employees. However, the case involved victims who were 23, 17 and of school age, and the hearing was conducted over four days and involved 39 separate allegations and 17 witnesses.

From its engagement with the Australian Small Business and Family Enterprise Ombudsman, the Commission also heard that there is confusion among the small business community about their ability to terminate employment in the context of sexual harassment.

In August 2019, the Australian Small Business and Family Enterprise Ombudsman released the Review of the Small Business Fair Dismissal Code. The review found that the Code was complex, overly legalistic and not operating as it was intended, and recommended a suite of changes to help small business employers meet their obligations.[434]

The Commission also heard from victims who faced dismissal after making allegations of workplace sexual harassment:

> I put in a formal complaint to the Chairman of the Board of this company about my immediate supervisor, the Executive Director of this company, as he had been systematically sexually harassing me for many years. I was fired after I complained.[435]

As discussed above in Section 5.5(c), the Fair Work Act prohibits a person taking adverse action against another person because they have exercised or not exercised a 'workplace right'.[436] This may apply to a person who faces dismissal or who is dismissed because they raised a complaint about sexual harassment. The victimisation provisions under the Sex Discrimination Act may also provide an avenue of redress for a person who has been dismissed after making a sexual harassment complaint (see Section 5.4(h) above for further discussion on victimisation).

Reese's story[437]

Reese told the Commission in her submission that she had been employed at a technology company for less than two months when one of the male directors inappropriately rubbed her leg.

Reese said she discussed the incident with her supervisor, who was supportive. However, she was ultimately required to report to the company's internal Human Resources representative, who was dating the male director. Reese said she was told she was a 'liar' and the company dismissed her on the spot, citing that she did not pass her probation.

Reese did not know where to seek legal assistance because she could not afford the legal fees. When Reese went to subsequent job interviews and told them that she had been unfairly dismissed, she was not offered positions and felt she was being labelled as a 'problem employee'.

However, the figures from the Fair Work Commission's 2017–18 Annual Report show that only a small number of decisions in unfair dismissal matters were resolved by a decision of a Member of the Fair Work Commission.[438] Of the 13,595 unfair dismissal applications lodged in 2017–18, 79% of applications conciliated by staff (8,285) were resolved by the parties. Overall, 6% of unfair dismissal matters were finalised by a decision or order issued by a Fair Work Commission Member in 2017–18. Of those 779 matters, the dismissal was found to be harsh, unjust or unreasonable in 20% of cases.

That means that of the total unfair dismissal applications finalised in 2017–18, only 1% (159) were resolved by a decision of a Fair Work Commission Member finding that the dismissal was harsh, unjust or unreasonable. This figure is consistent with results from previous years.

However, there appears to be a misconception that unfair dismissal provisions prevent employers from dismissing employees who have engaged in sexual harassment. The Commission is concerned that this misconception is causing employers to be unnecessarily fearful and overly cautious about utilising the Fair Work Act's dismissal provisions for sexual harassment matters. Further, the Commission is particularly concerned that notwithstanding the need for fair process and natural justice to the alleged harasser, this misconception deters employer accountability and action.

This underscores the importance of guidance material for employers relating to unfair dismissal, which clearly outlines employers' options and rights relating to dismissal for cases involving sexual harassment.

Case study:

Luke Colwell v Sydney International Container Terminals Pty Limited[439]

In this case, an employee was dismissed by his employer on the basis of serious and wilful misconduct, for sending a pornographic video to 19 of his colleagues via the Facebook messenger app after work hours. The employee argued there was no valid reason for his dismissal because his conduct was not sufficiently connected to his employment. The Fair Work Commission found that this was a valid basis for dismissal and there was a sufficient nexus to the workplace, as the colleagues were his Facebook friends because of their professional relationships.

(ii) Options for reform

The Commission heard various recommendations for reform or clarification of the unfair dismissal framework. The Kingsford Legal Centre, Redfern Legal Centre, Women's Legal Services NSW and National Association of Community Legal Centres made a joint submission to the Commission endorsed by an additional 11 organisations.[440] They argued that:

> Sexual harassment should be specifically included in the definition of serious misconduct in the [Fair Work] regulations. This would enable employers to take strong disciplinary action against the perpetrators of sexual harassment in the workplace, and would have the potential to stop serial offenders from remaining employed and continuing to engage in unlawful conduct.[441]

Ai Group also argued that the *Fair Work Regulations 2009* should be amended to expressly include sexual harassment and associated unacceptable behaviour in the definition of 'serious misconduct' and proposed a draft amendment to the Commission.[442]

ACCI made a number of recommendations to amend the Fair Work Act unfair dismissal framework, which included that procedural errors alone, or the individual circumstances of the employee, should not be sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal.[443]

ACCI also recommended that the reinstatement provisions be amended. In particular, ACCI recommended that where an employer has taken disciplinary action against an employee for a 'breach of sexual harassment policies/laws' the Fair Work Commission should not have the power to reinstate the employee.[444] Currently section 390 of the Fair Work Act states that when considering a remedy for unfair dismissal, compensation should only be ordered if the Fair Work Commission is satisfied that reinstatement of the person is inappropriate and compensation is considered appropriate.[445]

More broadly, the Commission heard that any reform of unfair dismissal laws needs to be balanced and proportionate. The Law Council of Australia argued that any action to dismiss an individual for sexual harassment pursuant to the positive duty must take into account the ideas of 'valid reason' and 'opportunity to respond'.[446]

The Commission's view

The Commission acknowledges that the issues of unfair dismissal and serious misconduct are complex and contested. The Commission recognises the important policy intent of unfair dismissal laws, which is to prevent employers dismissing employees in an unfair manner without reason and process. The Commission has developed recommendations to clarify the unfair dismissal provisions in relation to sexual harassment that are consistent with that policy intent.

In recommending changes to the Fair Work system, the Commission has confined its focus to effectively preventing and responding to workplace sexual harassment. The Commission considers that amending the Fair Work Act to include sexual harassment as a valid reason for dismissal would help ensure that sexual harassment is understood as a valid reason for dismissal and is weighted appropriately against procedural and other factors. This includes ensuring that recommendations reflect that all forms of sexual harassment can amount to conduct warranting significant disciplinary consequences, up to and including dismissal. In making this recommendation, the Commission recognises that some cases have explicitly recognised sexual harassment as a 'valid reason' for dismissal. This recommendation aims to support consistency in decision-making.

The Commission also considers that the definition of serious misconduct should be amended to include sexual harassment. While this will not mean sexual harassment always constitutes serious misconduct, this legislative clarification will assist in ensuring that sexual harassment is understood as conduct that is potentially serious enough to be inconsistent with the continuation of the employment.

While noting the concerns raised about reinstatement, the Commission is of the view that there is not yet the evidence base to support this recommendation and understands that the Fair Work Commission already takes into account arguments from both parties when forming an opinion on whether reinstatement is appropriate.

Given the misconceptions around sexual harassment and unfair dismissal, the Commission strongly urges the development of additional guidance on how the unfair dismissal and serious misconduct provisions apply to sexual harassment. The development of this guidance should form part of the Workplace Sexual Harassment Council's work. The Australian Government should also consider updating guidance on dismissal relating to sexual harassment when implementing the recommendations of the Review of the Small Business Fair Dismissal Code.

The Commission also encourages the Fair Work Commission to recognise that being a victim of sexual harassment can affect an employee's performance and take this into account as a mitigating factor, when assessing performance in the context of dismissal and termination claims relating to poor performance.

RECOMMENDATION 30:

Amend section 387 of the Fair Work Act to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.

RECOMMENDATION 31:

Amend the definition of 'serious misconduct' in the Fair Work Regulations to include sexual harassment.

RECOMMENDATION 32:

Additional guidance material for all employers relating to unfair dismissal, which includes dismissal relating to sexual harassment, be developed by the Fair Work Commission in consultation with the Workplace Sexual Harassment Council.

(e) Fair Work Information Statement

Since January 2010, an employer must provide all new employees with a copy of the Fair Work Information Statement as soon as possible after they commence employment.[447] The Fair Work Information Statement provides basic information on matters that will affect their employment, including information on adverse action, discrimination or undue pressure. It does not explicitly mention sexual harassment.[448]

The Commission heard from several submissions that amending the Fair Work Information Statement to include information on sexual harassment could improve employees' understanding of sexual harassment and their access to redress mechanisms. Job-Watch argued that 'information about sexual harassment, including what it is and how to complain about it, should be outlined in the Fair Work Information Statement which must already be provided to all new employees upon starting a new job.'[449] Similarly, the Law Institute of Victoria also recommended including sexual harassment in the Fair Work Information Statement.[450]

The Commission's view

The Commission sees merit in amending the Fair Work Information Statement to include information about employees' protections and rights with respect to sexual harassment. This could leverage an existing mechanism to access employees at the beginning of their employment and inform them about their rights and conditions in a new job. This would be particularly important for young people, newly arrived migrant workers or others entering the workforce, who may have low awareness of workplace rights and are at greater risk of experiencing sexual harassment (see Section 3.5, 'People who experience sexual harassment in the workplace').

The objective underpinning recommendations to update the Fair Work Information Statement is increasing awareness about sexual harassment rights under the Fair Work system. The Commission agrees with this objective and that information about workers' rights relating to sexual harassment should be disseminated through multiple channels.

This information could also be included in other avenues for information or resources to be provided to groups of workers who may be at higher risk of experiencing sexual harassment, such as migrant workers on temporary visas. Further information about avenues and channels for distributing information to at-risk populations is discussed in Section 4, 'Prevention outside the workplace'.

RECOMMENDATION 33:

The Fair Work Ombudsman update its employee information and guidance relating to workplace rights under the Fair Work Act to include sexual harassment, such as amending the Fair Work Information Statement.

(f) Process and enforcement

Under the Fair Work Act, a court can order an employer who has breached a civil penalty provision, including the discrimination and workplace rights protections, to pay a penalty.[451] The Fair Work Ombudsman, individuals affected by contraventions of the general protections provisions and unions entitled to represent them, all have the power to seek pecuniary penalties against offending employers and any accessories.[452]

The strong regulatory powers and commensurate enforcement provisions within the Fair Work system provide a framework for sexual harassment within the workplace to be regulated and enforced.

The Fair Work Commission website outlines the process for resolving disputes about worker protections.[453] If a dispute involves a dismissal, the Fair Work Commission must first convene a private conference to attempt to settle the dismissal. Where the dispute is not settled after the conciliation conference, the dismissed employee can proceed to court or consent to an arbitration conference with the Fair Work Commission, if both parties agree.

Where an adverse action case does not involve dismissal, participation in a Fair Work Commission conference is voluntary and a person can instead elect to proceed directly to the Federal Court or Federal Circuit Court as a general protections court application.[454]

Generally, a person bears their own costs in relation to a matter before the Fair Work Commission.[455] The no-costs jurisdiction of the Fair Work Commission contrasts with the potential costs order available in a Federal Court claim under anti-discrimination law, and the Commission heard about the advantages of this in individual submissions:

> Many victims will wear out if they are faced with going to court and possibly incurring costs. The Fair Work Commission may be a better option provided it can make reasonable payments and protect victims better, including with non-traumatising settlement conditions.[456]

In her submission to the Commission, Dr Dominique Allen highlighted the benefits of the Fair Work system in comparison to the anti-discrimination framework. Her submission was based on her research on sexual harassment and anti-discrimination laws over the past 14 years and recent interviews she conducted with solicitors practising in anti-discrimination law in Victoria. She submitted:

> The solicitors I interviewed expressed a strong preference for using the Fair Work system, including those who represent respondents. The solicitors were very positive about the dispute resolution process the Fair Work Commission uses. They said the system's strengths are that conciliations were organised quickly, run by experts in employment matters, and the sessions were focused on reaching an outcome. The other benefit of the Fair Work system is that it is a no-costs jurisdiction.[457]

However, the Commission also heard concerns that Fair Work Commission conciliations could be 'transactional processes'. Clayton Utz Pro Bono argued:

> The Fair Work Commission's telephone conciliation process offers 'quick & dirty' resolutions, in that the conciliation takes place usually in under 60 minutes and tends to quickly become a transactional process—how much money does the complainant want, and how much is the respondent prepared to pay? It is about money. It is unlikely to be an appropriate forum to discuss the impact on the complainant of the sexual harassment or to seek policy changes and other practical outcomes.[458]

Springvale Monash Legal Service told the Commission that the particular impacts of sexual harassment may not be adequately recognised through the Fair Work system:

> [The Fair Work Commission requires] both parties to respond and participate in the conciliation. Sexual harassment complaints can be made in conjunction with broader complaints of bullying. When this occurs, the sexual harassment can be overlooked when remedies are being considered.[459]

(g) Equipping the Fair Work Commission and Fair Work Ombudsman

A key point raised in a number of submissions was how to empower and equip the Fair Work Ombudsman and Fair Work Commission to more effectively handle sexual harassment. Submissions generally referred to the need to ensure that the Fair Work Commission and Fair Work Ombudsman have:

- the regulatory powers to handle sexual harassment matters
- the necessary skills and expertise in sexual harassment, and more broadly gender inequality and gendered violence, to appropriately manage sexual harassment matters.

In support of the new cause of action, a number of submissions called for the Fair Work Commission to be given a broad range of powers, including the power to make orders to stop, conciliate, arbitrate and award compensation, in order to enforce a sexual harassment provision.[460]

Some submissions also spoke about improving the powers and regulatory approach of the Fair Work Ombudsman.[461] Currently, the Fair Work Ombudsman may take enforcement action where an investigation finds that the employer has or had discriminatory practices that are linked to adverse actions for employees or prospective employees. However, the absence of an express prohibition on sexual harassment in the Fair Work Act means that there is no specific function for investigation of such complaints by the Fair Work Ombudsman.

The Fair Work Ombudsman told the Commission it had taken 'strong action to enforce the general protections regime over a number of years'. However, it observed that an enforcement role in relation to sexual harassment would be inconsistent with its role 'as a labour inspectorate focused on resolving wage and entitlement issues'.[462]

The Fair Work Ombudsman noted it had no legislative powers or other means to 'deliver the kinds of therapeutic and protective outcomes' that victims of sexual harassment commonly sought, and that the prospect of a Fair Work Inspector conducting forensic investigations in a workplace and taking enforcement action, could intimidate victims and discourage them from seeking assistance.[463] The Fair Work Ombudsman also noted that it did not have the funding or staffing resources to absorb a new function for investigating or enforcing a prohibition on sexual harassment.[464]

The Fair Work Ombudsman advised that it referred requests for assistance from workers experiencing sexual harassment to other appropriate bodies (such as the Commission or state and territory human rights and anti-discrimination agencies, WHS agencies or the Fair Work Commission).[465]

The Commission agrees that while the Fair Work Ombudsman has an important educative role in increasing awareness about workplace rights, including in relation to workplace sexual harassment, its inspection and enforcement processes may not be well-suited to handling such matters. The Commission agrees that, through the Workplace Sexual Harassment Council, the Fair Work Ombudsman could work with other bodies on the Council to develop processes and procedures to support appropriate referrals of complaints it receives about suspected sexual harassment concerns.[466]

The Commission also heard that the understanding and approach to gender equality in the Fair Work system needs to be improved. The ACTU argued that the Fair Work Act should be amended to:

> give unequivocal recognition of the right to gender equality, and legislative direction that gender equality is to be promoted by the FWC in all its functions ...
>
> The [Fair Work] Act must equip the [Fair Work Commission] with broad discretion and powers to make any orders it sees fit to remedy gender inequality, and require the [Fair Work Commission] to be proactive in using these powers. These powers and functions should be exercised by a specialist Gender Equality Panel, supported by a properly resourced Gender Equality Research Unit.[467]

Other unions also recommended a Gender Equality panel.[468]

NOW Australia argued that 'if sexual harassment is explicitly regulated under the [Fair Work] Act, the Fair Work Commission and the Fair Work Ombudsman will require capacity building and education to understand the drivers and impacts of sexual harassment.'[469]

Women with Disabilities Victoria reiterated the importance of taking an intersectional gendered approach to regulatory policy, recommending that 'conciliators in sexual harassment disputes should receive extensive training in sexual harassment, including techniques in mitigating power imbalances, such as those around disability and gender, in conciliation processes.'[470]

The Commission's view

These recommendations point to the need to ensure the Fair Work Commission and Fair Work Ombudsman have an understanding of the nature, drivers and impacts of sexual harassment, to inform their work. This should include understanding that sexual harassment is driven by gender inequality and is a form of gender-based violence, and taking an intersectional approach.

The Commission's recommendation to establish a Workplace Sexual Harassment Council will assist the bodies with regulatory responsibility in developing the gender expertise and specialist skills regarding workplace sexual harassment to work effectively within the integrated system. It will be supported by the Commission's recommendations for enhanced education for judicial officers on the nature, drivers and impacts of sexual harassment (see Section 5.9).

RECOMMENDATION 34:

The Fair Work Ombudsman and Fair Work Commission, with guidance from the Workplace Sexual Harassment Council, ensure that their staff undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work. Statutory office holders in these jurisdictions should also be supported and encouraged to undertake this training and education.

5.6 Work health and safety

> I personally would like to see these kinds of discussions shift less from being [a human resources] issue and more of a safety issue. Particularly in the construction environment we talk about workplace safety all the time, and it's about safety in performing a task or an operation, or whatever. But it's not talked about in terms of personal safety.[471]

(a) Overview

The model WHS laws do not expressly prohibit sexual harassment. However, they already impose a positive duty on employers to prevent sexual harassment, as the broad duty to eliminate or manage hazards and risks to a worker's health includes psychological health and therefore sexual harassment.

To date, though, sexual harassment has not been adequately understood and treated as a health and safety hazard and risk in the workplace. There are currently no model WHS Regulations or model Codes of Practice focused primarily on psychological health to help guide employers and others on how to manage psychological risks or hazards.[472]

The Commission heard there are limitations and inconsistencies in how WHS regulatory agencies across the Commonwealth, states and territories handle sexual harassment.

Notwithstanding these criticisms, consultations and submissions also confirmed strong support that the WHS Framework could be enhanced to more robustly regulate sexual harassment and drive change towards safer, more productive and harassment-free workplaces.

Victoria Legal Aid argued that the WHS framework and WHS agencies are the most suited to driving the cultural and institutional change needed to address sexual harassment, as health and safety legislation already places a positive duty on employers to provide a safe workplace and agencies already have the existing powers necessary to enforce this:

> In our view the most important reform is for our regulatory system to stop treating sexual harassment as an individual workplace issue and treat it as a cultural, systemic, and health and safety issue.[473]

Similarly, the Australian Government Department of Jobs and Small Business highlighted the suitability of the WHS Framework to help ensure organisational change, arguing that:

> Looking at the issue of sexual harassment through the prism of WHS has the advantage of promoting behavioural change at an organisational level, by focusing on risk management and prevention'.[474]

The Commission's recommendations seek to clarify that the existing duty under the WHS laws includes sexual harassment, strengthen the way in which sexual harassment is handled under the WHS Framework and ensure its role promotes coordination, consistency and clarity within the new regulatory model. Importantly, these recommendations strengthen the WHS Framework rather than create new obligations.

In making recommendations, the Commission has been mindful to maintain the coherence of the Model WHS framework, especially the statutory principles and structure of the legislation, regulations and codes. This includes the approach of developing WHS Regulations, Codes of Practice and guidelines to support the objectives of the WHS laws, which relevantly include a definition of health that includes psychological health.

The Commission has also sought to maintain the outcomes-based approach of the WHS Framework, which allows organisations the flexibility to tailor their approach to safety to suit their circumstances.

(b) Model WHS laws

Established in 2011, the model WHS laws comprise the Model WHS Act, the Model WHS Regulations and 24 Model Codes of Practice.

The model WHS law framework has a three-tiered model based on the 'Robens model'.[475] This model recommends that duty holders be required to comply with:

1. General duties of care set out in a broad-based WHS statute. The Model WHS Act aims to provide a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.
2. More detailed standards laid down in regulations. The Model WHS Regulations set out detailed requirements that must be applied to specific work activities and hazards in order to meet WHS duties.
3. Codes of practice, which form the third and final tier of the WHS regulatory architecture. The Model Codes of Practice provide practical information on how the requirements of the model WHS laws may be met.[476]

These elements are supported by Safe Work Australia's *National compliance and enforcement policy,* which sets out principles for how WHS regulators monitor and enforce compliance within their jurisdiction.[477]

Each state, territory and the Commonwealth has its own regulatory body to administer the WHS laws in its jurisdiction.[478] Under the model WHS laws, regulators have a broad range of functions. These include monitoring and enforcing compliance with the Model WHS Act and Model WHS Regulations, as well as conducting and defending legal proceedings under the Model WHS Act.[479]

To date, all Australian jurisdictions except Victoria and Western Australia have implemented the model WHS laws. However, at the time of this report, Western Australia was part way through a process of developing modern WHS laws, based on the model WHS laws.[480]

(c) Regulatory approach of WHS Framework

The Model WHS framework broadly applies to all organisations regardless of their size or industry. It is outcomes-based and allows organisations the flexibility to tailor their approach to safety to suit their circumstances.[481] The Model WHS Act:

- establishes positive WHS duties on duty holders requiring the elimination or minimisation of risks arising from work
- provides for worker consultation, representation and participation relating to WHS matters
- enables compliance with and enforcement of the model WHS laws through the regulator, including penalties for breach of WHS duties
- provides for the making of WHS Regulations and Codes to support the objectives of the Model WHS Act.

Rather than impose responsibilities on an 'employer', the primary duty holder under the WHS framework is a 'person conducting a business or undertaking' (PCBU).[482] This broad concept extends beyond the traditional employer and employee relationship to include new and evolving work arrangements and risks.[483] The explanatory memorandum to the Model WHS Act states that the phrase 'business or undertaking' is intended to be read broadly and covers businesses or undertakings conducted by persons, including employers, principal contractors, head contractors, franchisors and the Crown.[484]

The primary duty of a PCBU is to identify, control and address hazards and risks, so far as is reasonably practicable, which may affect the physical and psychological health or safety of workers.

Section 18 of the Model WHS Act sets out the definition of reasonably practicable in relation to the duty to ensure health and safety, as well as the matters to be taken into account in determining what is reasonably practicable in the circumstances.

Section 18 of the Model Work Health and Safety Act: What is *reasonably practicable* in ensuring health and safety

In this Act, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

(a) the likelihood of the hazard or the risk concerned occurring; and
(b) the degree of harm that might result from the hazard or the risk; and
(c) what the person concerned knows, or ought reasonably to know, about
    (i) the hazard or the risk; and
    (ii) ways of eliminating or minimising the risk; and
(d) the availability and suitability of ways to eliminate or minimise the risk; and
(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

Safe Work Australia's *How to determine what is reasonably practicable to meet a health and safety duty* guide provides further guidance on the issue. It outlines that there are two steps to what is reasonably practicable:

> A duty holder must first consider *what can be done*—that is, what is possible in the circumstances for ensuring health and safety. They must then consider whether it is *reasonable in the circumstances* to do all that is possible.[485]

Safe Work Australia clarifies that what is 'reasonably practicable' is an objective test, which takes into account what the person ought reasonably to have known and what was reasonably foreseeable by someone in the position of the duty holder at the particular time.[486] It also clarifies that 'the standard is intended to be a very high one'.[487]

The guide also provides a four-step test for determining what is reasonably practicable:

1. Identifying the circumstances, hazards and risks.
2. Determine what you can do.
3. Determine what you are reasonably able to do.
4. Reviewing risk controls.[488]

The Model WHS framework also imposes due diligence duties on officers[489] and reasonable care duties on workers.[490]

An officer is someone who is appointed as a director or officer of a corporation, has influence over decisions that affect the business or undertaking, can instruct other officers or directors about the business or undertaking, or is a liquidator or trustee of the business or undertaking.[491]

If a PCBU has a duty or obligation under WHS legislation, an officer of the PCBU must exercise 'due diligence' to ensure that the PCBU complies with the duty or obligation.[492] The due diligence obligations relates to any duty or obligation that the PCBU may have under the WHS Act or WHS Regulations and is therefore extensive in scope.[493]

A worker is defined broadly to include contractors, apprentices, students gaining work experience and volunteers.[494] While the WHS Act aims to protect workers against harm to their health and safety, workers must also contribute to this aim. The WHS Framework therefore implies reciprocal duties on workers.[495]

The Model WHS framework also establishes health and safety representatives and health and safety committees. Both functions aim to give workers a voice in health and safety matters and involve workers through participation and consultation.[496] Health and safety representatives have a range of functions and powers, including in relation to investigations and inspections.[497] A health and safety representative is entitled to attend an initial course of training of up to five days and up to one day's refresher training each year, with the entitlement to the first refresher training commencing one year after the initial training.[498]

In this sense, the Model WHS framework is intended to apply to the workplace as a whole and is aimed at contributing to a workplace-wide social, cultural and systemic response to risks and hazards.

The Model WHS framework requires a PCBU to consult with workers and other duty holders on WHS issues. Where an issue or conflict arises that may cause physical or psychological harm to individuals in the workplace, reasonable efforts to achieve a timely, final and effective resolution must be made using any agreed issue resolution procedures or, where there are no agreed procedures, the default procedure prescribed by the Model WHS Regulations.[499]

The Model WHS Act gives the regulator a general power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.[500]

(d) Sexual harassment—application of the model WHS laws

While the Model WHS Act does not expressly prohibit sexual harassment, it already imposes a positive duty on employers to prevent sexual harassment, as it is a hazard and risk to a worker's psychological health.[501] Nevertheless, while the general duties in the model WHS laws relating to psychological hazards cover sexual harassment, there is no express definition of sexual harassment in the Model WHS Act.

There are no model WHS Regulations or model Codes focused primarily on psychological health or how to manage psychological risks or hazards, including sexual harassment.[502] However, sexual harassment is mentioned in guides produced by Safe Work Australia on workplace bullying and psychological health.

In its *Guide for preventing and responding to workplace bullying*, Safe Work Australia discusses both sexual harassment and bullying, noting that bullying requires that the behaviour is repeated and persistent.[503] For this reason, the guide says: 'unreasonable behaviour may involve unlawful discrimination or sexual harassment which, by itself, is not bullying'.[504] As sexual harassment, in isolation, does not necessarily amount to bullying, addressing sexual harassment through the prism of bullying is limited.

In 2018, Safe Work Australia released the national guide to *Work-related psychological health and safety: A systematic approach to meeting your duties.*[505] Issues covered include how to identify hazards to good mental health, how to assess the severity of risks, what steps to take to eliminate and minimise risks, how to intervene early and how to support recovery.[506] The guide mentions sexual harassment as a factor that can contribute to poor workplace relationships and as an area that requires clear administrative controls. It does not discuss the nature and nuances of sexual harassment, or the underlying causes of this behaviour in workplaces, in a detailed or issue-specific way.

In its submission, Safe Work Australia explained that the types of risk that should be 'identified, managed and controlled may include an organisational culture that tolerates or enables inappropriate behaviour such as sexualised comments or inappropriate physical contact'. Safe Work Australia noted that PCBUs should develop, consult on and implement a well-communicated sexual harassment policy.[507]

(e) Review of model WHS laws

In February 2019, the final report of an independent review by Marie Boland into the model WHS laws was released (Boland Review).[508] It contained 34 recommendations designed to enhance the WHS Framework. Of particular note is the report's finding that:

> The express reference to psychological health in the model WHS Act was overwhelmingly accepted, but there was a consistent view amongst those consulted that psychological health is neglected in the second and third tiers of the model WHS laws (that is, the model WHS Regulations and model Codes). To address this, I recommend the development of additional regulations on how to identify psychosocial risks in the workplace and the appropriate control measures to manage those risks.[509]

On 24 June 2019, Safe Work Australia released a Consultation Regulation Impact Statement seeking comments on the recommendations of the Boland Review.[510] Safe Work Australia has stated that it will use the information received through the consultation process to develop a Decision Regulation Impact Statement that will identify the options with the greatest net benefit, based on an analysis of the costs and benefits. The Decision Regulation Impact Statement will be provided to WHS ministers to assist them to decide whether the Boland Review's recommendations, or an alternative option, should be implemented and, if so, how.[511]

Under the terms of the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, only the Workplace Relations Ministers' Council can approve amendments to the model WHS laws.[512] The Commission notes that states and territories would need to enact their own legislation to adopt any new regulation in their jurisdiction.

(f) Engagement with WHS regulators

The Commission sought to engage with all Commonwealth, state and territory WHS regulators within the WHS Framework, both individually and together as part of the Heads of the Workplace Safety Authorities. The Heads of the Workplace Safety Authorities informed the Commission that it would not provide a joint a submission to the Inquiry, and that Heads of the Workplace Safety Authorities Members would provide any submissions they have through other government agencies in their jurisdiction or directly to the Commission.[513]

The only state and territory WHS regulator to make a formal submission to the Commission was WorkSafe WA. In its submission, WorkSafe WA outlined its process for handling sexual harassment matters:

> The Department's processes for managing matters where claims of sexual harassment are raised include referring complainants directly to the Equal Opportunity Commission (EOC). For circumstances where a caller is distressed or may require support and assistance, the process also includes referral to the Mental Health Emergency Referral Line.
>
> In Western Australia, the EOC has specific legislation to address complaints of sexual harassment matters. As a safety regulator, WorkSafe is not sufficiently resourced and does not have the expertise to adequately address sexual harassment matters. Therefore these matters are appropriate to remain in the jurisdictional control of the EOC.[514]

WHS regulatory agencies are adopting different approaches to sexual harassment. The Commission understands that some regulators ordinarily refer sexual harassment matters to human rights and anti-discrimination agencies, unless the presence or indication of a systemic issue means they may review the matter, while others may review the matter themselves, while also suggesting concurrent recourse through an anti-discrimination body.

WorkSafe Victoria is moving towards a more specialised approach to psychological health matters, including developing strategic approaches to the prevention of mental health injury and establishing specific teams responsible for handling psychological health matters. This includes a specialist psychosocial inspectorate that monitor and enforce compliance with the legislation.[515]

WorkSafe Victoria provided the Commission with information including an outline of their broader approach for recognising sexual harassment as a WHS issue, and a detailed procedure for processing sexual harassment matters.[516]

Other jurisdictions, including Workplace Health and Safety QLD, SafeWork NSW and SafeWork SA, have over recent years developed similar units or teams that focus specifically on psychological health, though the Commission understands these are in earlier stages of development than WorkSafe Victoria.

Some WHS agencies have recruited specialist inspectors to align with an industry need. For example, in 2018, the Victorian Government committed to establishing a dedicated WorkSafe Infrastructure Inspector Team, employing additional specialist inspectors, to align with the significant infrastructure projects underway in Victoria.[517] This provides a model for recruiting specialist inspectors for a specific need, which could also apply to sexual harassment matters.

The Boland Review expressed concern that the harmonisation objective of the model WHS laws was being eroded and made recommendations to support, restore and maintain harmonisation.[518] The Commission notes this concern and its implications for addressing sexual harassment, where WHS regulators are managing sexual harassment as a psychological hazard and risk to notably different degrees.

(g) Enforcement

Under the model WHS laws, there are three categories of offences for failure to comply with a health and safety duty, with Category 3 being the most serious.[519] The WHS Act also includes criminal offences for breach of health and safety duties, with different maximum penalties depending on the category of offence and whether the offender is an individual, officer or body corporate.[520]

Inspectors within WHS regulatory bodies have a broad range of enforcement tools under WHS law. These powers are comparatively stronger than the powers vested in anti-discrimination agencies. This includes the power of inspectors to:

- enter a workplace[521]
- inspect, examine and make inquiries at a workplace[522]
- require a person at the workplace to give the inspector reasonable help to exercise the inspector's power[523]
- seize items for use as evidence of an offence[524]
- issue an improvement notice requiring a contravention to be remedied or protected[525]
- issue a prohibition notice prohibiting an activity at a workplace from continuing or being carried out in a specific way.[526]

The regulator also has strong powers, including the power to apply for a court injunction and the power to take remedial action to make a workplace safe, if a person fails to take reasonable steps to comply with a prohibition notice.[527]

Notwithstanding these strong enforcement powers, prosecutions for breach of the duty relating to psychological health are rare, with Safe Work Australia telling the Commission that, as far as it is aware, no prosecutions have been brought for non-compliance with the model WHS laws in relation to sexual harassment.[528]

(h) Options for reform

A key issue raised in a number of submissions was whether explicitly addressing sexual harassment under the Model WHS Act, Model WHS Regulations and/or a Model Code of Practice would strengthen the Model WHS framework's handling of sexual harassment matters.

Many submissions argued that the WHS framework is not adequately addressing sexual harassment. Moreover, they argued that the WHS Framework is failing to understand the gravity and seriousness of sexual harassment.

The ACTU argued that 'while different regulators have varying degrees of expertise, on the whole discrimination and sexual harassment are not currently treated as serious WHS risks'.[529] ADLEG expressed a similar view, arguing that:

> Australian WHS agencies have shown remarkable blindness or reluctance to acknowledge harassment as a workplace hazard that warrants their attention. Unless and until WHS agencies acknowledge and address this gap, this whole system that is explicitly designed to protect workers from harm will continue to fail to protect workers from sexual harassment.[530]

NOW Australia expressed concern about 'the hands-off approach of WHS regulators', and that they currently lacked 'the capacity, expertise or desire to regulate sexual harassment effectively and sensitively',[531] while the Women's Electoral Lobby submitted that:

> In industrial and work health and safety jurisdictions, it has been noted that the regulators themselves don't appear to understand the nature and widespread impact of sexual harassment in the workplace. Regulators need to step up and get informed.[532]

The Community and Public Sector Union (State Public Services Federation Group) (CPSU) provided the following case study in its submission:

Maya's story[533]

Maya, a female employee in a government department, was sexually harassed by a senior employee. Following investigation, only one of her six allegations was established. The harasser was disciplined for the proven sexual harassment matter.

After some months, the harasser returned to the same workplace as Maya. Despite the support and advocacy of her union, Maya's employer was initially unwilling to perceive the circumstances as an occupational safety and health hazard, despite reports from multiple occupational psychiatrists attesting that Maya's adjustment disorder was wholly attributable to workplace factors.

Maya eventually lodged a workers' compensation claim, which was approved.

If Maya's employer had been more willing to recognise the circumstances following the sexual harassment as an ongoing occupational safety and health concern, they may have been able to make the appropriate adjustments to mitigate the risks and Maya may have avoided further exacerbation of her injury.

(i) A new regulation, code or guideline

The Boland Review recommended, as a matter of priority, amending 'the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks'.[534]

Continued work on the regulation is further supported by the many submissions the Commission received that recommended the creation of a new regulation, code or guidelines. Unions NSW argued that 'despite the existence of this [WHS] framework, and the obvious applicability of WHS legislation to sexual harassment, it is largely not utilised. This is likely due to the fact that there are no relevant regulations or codes of practice regarding sexual harassment'.[535]

Victoria Legal Aid recommended that the Model WHS framework be amended to:

> create an effective framework to prevent and address sexual harassment, and these amendments should be adopted by all jurisdictions that have adopted the model laws. Victoria and Western Australia should likewise incorporate any necessary amendments into their work health and safety laws to effectively prevent and address sexual harassment.[536]

The ACTU supported a new WHS Regulation and WHS Code of Practice and suggested this may assist in redressing the legacy imbalance whereby regulators were traditionally resourced and skilled to focus on physical and technical risks.[537]

Other unions also supported the development of a new code and argued this could encompass sexual and gender-based violence.[538]

The National Working Women's Centre called for 'guidance on the prevention of sexual harassment, the introduction of a code of practice and a regulatory response where sexual harassment occurs including the issuing of improvement notices and fines'.[539]

Other submissions focused on establishing clarity in WHS laws, especially the powers of WHS regulators. Maurice Blackburn argued that the role of WHS regulators should 'be made abundantly clear, via legislative reform' and recommended that WHS regulators 'be explicitly authorised to investigate and impose sanctions on employers who have breached their duty to provide safe and without risk workplaces, particularly in the context of sexual harassment.'[540]

The Northern Territory Women Lawyers Association reiterated the harmonisation objective of the WHS laws and recommended amending 'Federal, State and Territory [WHS] laws to explicitly state that sexual harassment and discrimination are safety issues that are covered by these laws, and that existing powers will be used to address sexual harassment.'[541]

The Commission also heard from individuals who called for sexual harassment to be treated as seriously as other WHS risks:

> Coming back [to] this idea of sexual harassment, or any sort of harassment being on a par with health and safety, in the ideal world, it would be part of your performance-based measures. It would be a KPI. It would be something that your performance is measured against.[542]

> I think of sexual harassment being a workplace health and safety issue because I believe that there are sometimes physical and quite often mental injuries attached to the action.[543]

> [Sexual harassment] is a real health and safety issue and we have to have a work health and safety response. We need a regulatory response that is not dependent on the complainant pushing this on her own. It just seems so unfair.[544]

Safe Work Australia has advised that Codes of Practice are generally used when the understanding and guidance on an issue is settled. In contrast, guidelines are appropriate when an issue is developing, and a degree of flexibility is still required. Safe Work Australia also noted that guidelines can be developed, and therefore implemented, more quickly than Codes of Practice.

More broadly, the Commission also heard from specialist WHS practitioners who encouraged the Commission to think of strengthening the principles that underpin the WHS Framework. For example, Workplace Safety Services recommended a multidisciplinary and cross-agency approach that bridges the disciplinary gap between WHS and human resources.[545]

In contrast, a small number of submissions argued against any additional WHS obligations or guidance being developed in relation to sexual harassment.

ACCI contended that the current system was robust and 'that any additional access to the safety jurisdiction that operates parallel to the current laws risks a wasteful and confusing duplication of resources that would confuse business, and detract from and delay employer actions in this area.'[546] Similarly, Ai Group submitted that it 'does not support additional WHS obligations on employers in respect of sexual harassment. Such additional obligations may conflict with federal employment laws, adding further to the complexity and confusion that already exists.[547]

(ii) Representative and collective complaints

Some stakeholders suggested there should be provision for collective or representative complaints to shift the emphasis and onus from individuals who experience sexual harassment to employers.

The ACTU recommended that unions should have the right to prosecute for breaches of WHS laws.[548] Unions NSW also recommended that unions be empowered to take prosecutions for a failure to meet WHS duties and claim a moiety (meaning portion) for costs to assist with the enforcement of WHS laws.[549] Maurice Blackburn also recommended that trade unions be 'granted the authority to prosecute for health and safety breaches reinstated where such rights have been removed'.[550]

Safe Work Australia highlighted to the Commission that this issue has been considered several times in the past, including by the Boland Review, which ultimately did not recommend any changes to the current system. Safe Work Australia also noted that the role of the health and safety representative in the WHS system provides a means for workers to raise a complaint in a representative way. Further, instead of allowing third-party prosecutions, the model WHS Act has a process that allows third parties to make a written request to the WHS regulator to bring a prosecution for a Category 1 or 2 offence.[551]

The Commission's view

The WHS regime creates duties to take reasonably practicable steps to prevent risks to worker health and safety, and this includes the risk of sexual harassment. While the Model WHS framework has the potential to adequately address sexual harassment, it is currently underutilised.

The lack of an express WHS Regulation, Code of Practice or guideline means that sexual harassment is not being addressed in a detailed, robust or systemic way. There is an urgent need to raise awareness that sexual harassment is a WHS issue.

There are also inconsistencies and gaps between the jurisdictions. Given the number of jurisdictions involved, the Commission's objective is to consolidate existing practices and create a consistent standard based upon best practice.

The Commission understands that WHS Ministers will consider the recommendations of the Boland Review following the completion of the Regulation Impact Statement process for the 2018 Review of the model WHS laws.

The Commission strongly supports the development of a WHS Regulation on psychological health and considers that this should be partnered with a Code of Practice or guideline that focuses specifically on sexual harassment. This would clarify the existing duty employers have under the Model WHS framework to identify, control and address, so far as is reasonably practicable, the risk and hazard of sexual harassment.

The key benefit of a positive duty is that it obliges employers to take a preventative and proactive approach to addressing sexual harassment. Clarifying and strengthening this obligation will be of fundamental importance to ensuring risks and hazards to psychological health, and especially sexual harassment, are managed as seriously as risks and hazards to physical health.

The Model WHS framework's requirement that a PCBU consult with workers and other duty holders on WHS issues also provides an opportunity for a PCBU to engage with workers on sexual harassment, which could include measures ranging from awareness raising, prevention efforts and redress procedures.

This Commission also wants to encourage a proactive and consistent approach to addressing sexual harassment by WHS regulators in all jurisdictions. As emphasised in the Boland Review, the harmonisation objective is an important principle of the model WHS laws.

While acknowledging that some submissions called for representative and collective complaints, the Commission considers that this issue is a matter for the Australian Government, Safe Work Australia and the regulatory bodies within the WHS system to consider.

RECOMMENDATION 35:

WHS ministers agree to amend the model WHS Regulation to deal with psychological health, as recommended by the Boland Review, and develop guidelines on sexual harassment with a view to informing the development of a Code of Practice on sexual harassment. Sexual harassment should be defined in accordance with the Sex Discrimination Act.

(i) Equipping WHS regulators

A number of submissions raised the issue of how best to empower and equip WHS regulators to more effectively handle sexual harassment. The key concern was that WHS regulators do not have the necessary skills and expertise in sexual harassment, and gendered violence or gender inequality more broadly, or in some cases, the resources to appropriately handle sexual harassment matters.

Academic Professor Lisa Heap contended that 'little attention has been given to sexual harassment and other forms of gendered violence as a health and safety issue.'[552] Professor Heap also argued that:

> Workplace health and safety regulators and their actors—including inspectorial staff and health and safety representatives—have limited capacity to identify gendered violence as a health and safety hazard and to address it as such.[553]

To improve the skills and expertise of WHS regulators in relation to sexual harassment, a number of submissions suggested specialist units or directorates, with suggestions ranging from specific sexual harassment units to gender violence units.[554] While acknowledging that regulators are 'chronically underfunded and understaffed', Maurice Blackburn encouraged 'the establishment of a properly funded discrete directorate within WHS regulators aimed at investigating risks to health and safety arising from sexual harassment'.[555]

ADLEG emphasised the importance of WHS regulators engaging collaboratively with the Commission. Its detailed recommendations on this point included compelling WHS regulators to engage with the Commission in developing expertise in identifying sexual harassment and sexual harassment risks in work.[556] Similarly, NOW Australia advocated that 'human rights regulators have the existing expertise to support capacity building and education for WHS regulators.'[557]

The Commission's view

These recommendations point to the need to ensure WHS regulators have education and training on the nature, drivers and impacts of sexual harassment, to inform their work. This should include understanding that sexual harassment is driven by gender inequality and is a form of gender-based violence, and taking an intersectional approach. As noted above, the establishment of the Workplace Sexual Harassment Council and the leadership, advisory and educative role of the Commission will assist the bodies to develop this expertise and skills.

The Commission also agrees that there are good reasons to consider establishing specialist units. However, governance, structural and operational issues of this nature are matters for Safe Work Australia and individual regulators to consider.

RECOMMENDATION 36:

Safe Work Australia and WHS regulators, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work.

5.7 Workers' compensation

> We're increasingly seeing clients who have made a claim or are eligible to make a claim for worker's compensation, and that intersection as well is very complex, when trying to advise clients about that.[558]

(a) Overview

Workers can claim compensation for injury that has arisen out of, or in the course of, employment, including injury caused by workplace sexual harassment. There are 12 main workers' compensation systems in Australia.[559] Each of the eight Australian states and territories have developed their own workers' compensation schemes and there are four Commonwealth schemes.[560]

Workers' compensation is based on a no-fault principle, which means it applies without the need to prove the fault of another party.[561] All employers are required to have workers' compensation insurance, with only limited exemptions.

There must be a relationship between the injury and employment before the worker can claim workers' compensation. This is generally that the injury arose out of, or in the course of, employment. In most jurisdictions, there are additional requirements with respect to the relationship between the injury and the employment, such as that the employment was the significant contributing cause of injury.[562] Most workers' compensation laws do not cover claims for psychological injury related to reasonable administrative, management or employer action taken in a reasonable manner.[563]

Eligibility for workers' compensation and entitlements for psychological injury are influenced by the laws in each jurisdiction regarding:

- the definition of an eligible worker
- the definition of work-related psychological injury
- connection to employment.

A worker is generally eligible for workers' compensation if their employment is recognised as casual, part-time or full-time under an employment contract. Entitlements for self-employed and contract workers vary.[564] Compensation relating to sexual harassment is generally as a result of compensation for a psychological injury, which may include paid leave and medical expenses.

In addition to statutory schemes, a worker who is sexually harassed may also be able to bring a common law claim. However, with the introduction of statutory workers' compensation schemes, access to common law has been significantly restricted with some jurisdictions abolishing, modifying or restricting access to common law through threshold tests and damage amounts.[565] Generally, a worker is required to elect whether to pursue a statutory or common law claim. As a result, another difference between the federal, state and territory jurisdictions is whether election to pursue a common law claim is irrevocable.[566]

Given the differences between jurisdictions, and between the statutory and common laws schemes in each jurisdiction, the decision of which scheme to elect will depend on the circumstances of each case.

(b) Benefits of workers' compensation process

The no-fault principle of workers' compensation is a factor that has the potential to reduce trauma and harm to victims. As some academics have argued, in a no-fault system, 'the emphasis is on compensating victims for related expenses—without anyone having to enter the civil justice system and proving another party is liable for damages.'[567] Others have observed that 'no-fault compensation is based on the ethical principle of redistributive justice, sometimes also called reciprocity.'[568]

Other benefits of best practice workers' compensation schemes are that they can support an injured worker to be compensated fairly, to fully recover and to return to work.[569] In this sense, they can facilitate and provide opportunities for supported return to work.

The submission from the Australian Government Department of Small Jobs and Business outlined the benefits and services of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act), which has comparative provisions to other workers' compensation schemes:

> Rehabilitation under the SRC Act may include providing structured activities and services under a rehabilitation program to assist an injured employee to stay at, or return to, work and to maintain or improve their ability to undertake activities. Where an employee is undertaking, or has completed, a rehabilitation program, the SRC Act also provides that the relevant employer must take all reasonable steps to provide the employee with suitable employment or help finding suitable employment.[570]

(c) Concerns about the workers' compensation claims process

Notwithstanding these benefits, the Commission heard that victims could be discouraged from making a workers' compensation claim, due to the onerous, lengthy and often re-traumatising process.

The Commission also heard from victims that the workers' compensation claim process became a de facto investigation process, causing them further harm:

> I applied for WorkCover as I was really sick [with] major depression, PTSD [and] anxiety. WorkCover was rejected as he denied everything. It was less painful to die [than] live.[571]

> Workers' compensation as it stands is a corrupt system. It supports perpetrators and leaves victims for dead. The insurance complaint took into account untruthful statements from the CEO (the perpetrator) and staff who wrote statements as fearful for their jobs and never took a statement from me—yet declined the matter. The psychological injury continues well after the sexual assault injury dealing with the system.[572]

> [Seeking legal remedies] feels like it's made it worse, and certainly my GP and the psychologist said, 'Do you seriously want to go down the Workers Comp process? Just leave'… And I'm thinking, look, I've got a job I love, I've got a team I love, in a broken organisation since I found out, and I think that has been a lot of people's experience. It's easier to walk away and not speak up.[573]

> I then tried via Comcare and was successful. [The employer] appealed this via AAT, I won again, $15K, with 50% taken out in tax. I gained $8K for a four year dispute. Their ambition was clearly to break you through the exhaustion of a very long legal process.[574]

The Commission also heard that workers' compensation frameworks do not adequately incorporate a gendered lens. The Victorian Trades Hall Council recommended expanding workers' compensation so that it is more accessible to, and meets the needs of, workers who have been subjected to gendered violence.[575] In particular, they argued that the requirements of the workers' compensation schemes are too onerous for victims of gendered violence:

> Psychological injuries are defined differently under each scheme, and depends on the way it defines an eligible worker, and their connection to the harm. Successful claims for psychological injury due to sexual harassment understate the size of the problem and mean employers have no financial incentive to provide a workplace free of harm.[576]

The Victorian Trades Hall Council suggested amending the schemes to allow victims to more readily seek compensation for injuries, and ensure they have 'specialist gendered violence capacity to process claims and deliver support to injured workers.'[577]

The National Working Women's Centre expressed a similar view and recommended that workers' compensation agencies:

> develop a comprehensive and immediate support response framework to applications of compensation for injury arising from workplace sexual harassment. This should ensure that victims of harassment are resourced and supported to make effective applications for necessary medical interventions and compensation for lost wages and should be designed to minimise the risk of re-traumatisation or stressors in going through the claims process.[578]

The Commission also heard that some victims found their workers' compensation payments underestimated the impacts of sexual harassment and were insufficient to cover their ongoing medical expenses. This is discussed in Section 7, 'Support, advice and advocacy.

The Commission's view

The Commission agrees that aspects of workers' compensation schemes, especially the no-fault compensation principle and its capacity to facilitate supported return to work, have the potential to reduce the trauma and harm to victims.

However, the concerns raised in consultations and submissions suggest these potential benefits are not being consistently and fully realised. This highlights the importance of workers' compensation bodies having education and training on the nature, drivers and impacts of sexual harassment, to inform their work. This should include understanding that sexual harassment is driven by gender inequality and is a form of gender-based violence and taking an intersectional approach.

As noted above, the recommendation to establish the Workplace Sexual Harassment Council together with the leadership, advisory and educative role of the Commission, will assist the bodies to develop this expertise and skills. The Commission's recommendation for enhanced education and training for judicial officers and tribunal members will ensure this expertise and skills extend to workers' compensation tribunals.

Given the number of regulators within the system, the Commission encourages workers' compensation bodies in all jurisdictions to take a proactive and consistent approach to managing sexual harassment claims. More broadly, the Commission encourages workers' compensation bodies to ensure their processes do not re-traumatise victims and that compensation adequately reflects the harms and impacts of sexual harassment.

RECOMMENDATION 37:

Workers' compensation bodies, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work.

5.8 Non-disclosure agreements and defamation laws

> [O]bviously in some situations [NDAs] are very helpful to both sides and there's a role for them, but I think we've gotten to a stage where we are facilitating gross abuse. We all know that the most egregious cases and the repeat offenders are never going to see the light of day, and they're the ones that absolutely should see the light of day … Someone is paid to exit the organization, and this person stays on presenting a risk to all the other employees, and they don't know [but] the employer does. So I think that's a real conflict.[579]

(a) Non-disclosure agreements and confidentiality clauses

Non-disclosure agreements (NDAs) are also known as confidentiality agreements.

They are contracts that create legally enforceable obligations. Other types of contracts can also contain confidentiality clauses as a term of the contract.

NDAs or confidentiality clauses are often used in the settlement of sexual harassment cases, as well as other workplace matters. For example, parties will agree to keep the terms of the agreement confidential, except where disclosure is required by law and/or where disclosure is necessary to effect the terms of the agreement.

Settlement agreements in workplace sexual harassment matters also commonly include non-disparagement clauses, where parties agree not to discredit or criticise each other to any third party in relation to the subject matter of the settlement agreement (for example, the sexual harassment complaint).

This report uses the term 'NDA' to capture confidentiality agreements or clauses in the settlement of workplace sexual harassment matters.

The Commission heard from a range of stakeholders about the benefits of NDAs for both parties in the settlement of workplace sexual harassment matters, acknowledging that they remain a viable alternative to lengthy, adversarial and often public litigation.[580] These benefits include:

- providing complainants, employers, respondents and other parties involved, with privacy or anonymity to protect their reputation, professional standing or workplace wellbeing
- greater bargaining power for the complainant in negotiating a more favourable settlement or compensation payment
- providing the complainant with a better chance of reaching a settlement, and avoiding the uncertainty and financial and emotional costs associated with litigation
- providing incentive for the employer to settle a legal claim, rather than proceeding to litigation, which can be costly for both the complainant and employer
- providing a definitive resolution to the matter.

The National Association of Community Legal Centres told the Commission that:

> Many of our clients, particularly in rural, regional and remote areas or in small industries with limited employment opportunities, do not wish their sexual harassment complaint to be made public, due to fear about an adverse impact on future employment opportunities.[581]

However, the Commission also heard about a range of concerns about the use of NDAs in sexual harassment cases, including that they can contribute to a culture of silence, which disempowers victims, covers up unlawful conduct and facilitates repeat offending.[582]

The Commission was told that NDAs were used by some employers to protect against damage to their reputation and business, often at the expense of the victim's wellbeing, reinforcing imbalances of power in these cases.[583]

For example, Unions NSW submitted that:

> confidentiality clauses allow perpetrators to conceal and continue longstanding patterns of sexual misconduct, and prevent discussion of the accusations among complainants, co-workers and the public. This is especially true of cases involving the most serious abusers, as employers have a big incentive to settle the most egregious claims to avoid high damages and negative publicity.[584]

Similarly, the Law Council of Australia acknowledged the role of NDAs in the systemic nature of sexual harassment, submitting that treating confidentiality solely as a matter of bargaining between two parties ignores the interest of other parties who might be affected, as well as the broader public interest in the rule of law.[585]

(i) The Commission's request to employers for a limited waiver of confidentiality obligations

The Commission was interested to hear from individuals about their experience of entering into an NDA and its effect on them, as well as their experience of sexual harassment and associated complaint processes.

In November 2018, the Sex Discrimination Commissioner wrote to large employers asking them to issue a limited waiver of confidentiality obligations in NDAs to allow people to make a confidential submission to the National Inquiry.

The Commission shared this broader request to all employers through various communication channels, including traditional media, social media platforms and employer organisations.[586] Ultimately, only 39 organisations agreed to issue a limited waiver of confidentiality obligations. These employers were listed on the Commission's website.[587]

The Commission received a small number of submissions from people who indicated they were subject to an NDA. These individuals spoke about being 'silenced' and the negative impacts this had on their recovery. Some said they felt compelled to enter into confidentiality agreements, which increased the severity of their mental health impacts:

> A small payout and non-disclosure agreement (NDA) were arranged for me and I left three years ago. Since then I have continued to require ongoing mental health support for depression and anxiety … Because of the NDA, signed at a time I was highly distressed and vulnerable, I have no avenue for recourse or restitution.[588]

> In no way did I anticipate how difficult the implications of this would be. All the while going through this heinous process, I had no voice. I was silenced. I couldn't speak to friends.[589]

Another worker told the Commission they reported sexual harassment to their team manager and were immediately asked to sign a confidentiality agreement stating that if they spoke to anyone regarding their allegations, they would face disciplinary action.[590]

The Commission notes that some victims may not have been willing or too fearful to come forward to share their story in the absence of a waiver.

(ii) Options for reform

Submissions to the Commission made a number of recommendations for greater regulation of NDAs in workplace sexual harassment matters, to ensure such agreements are used fairly and ethically.[591] These included:

- ensuring that lawyers representing sexually harassed persons are clear that their client wants an NDA, and attempt to negotiate an NDA that provides as much benefit to their client as possible
- making NDAs unenforceable where they fail to meet certain mandatory standards, such as explicitly describing the rights that the complainant retains, notwithstanding the NDA, to report the respondent's behaviour to relevant bodies, including the Commission
- ensuring that disclosures, including those made under whistleblowing laws, to police, to a court or tribunal and to bodies such as the Commission, are protected and cannot be prohibited by confidentiality or non-disparagement clauses
- prohibiting confidentiality in settlement agreements in sexual harassment matters, unless the complainant requests it
- requiring that confidentiality clauses be drafted in plain English, have a clear explanation of what information cannot be disclosed, and expressly state what rights to disclosure both parties retain and what legal rights the confidentiality agreement cannot remove
- prohibiting the use of a confidentiality clause to suppress factual information in sexual harassment claims
- allowing both parties to request that the settlement amount remain confidential.

Victorian Women Lawyers submitted that, rather than attempting to ban the use of NDAs outright, consideration should be given to alternative means of protecting the public from repeat harassers. Specifically, it recommended introducing a mandatory de-identified reporting regime, which would impose obligations on public and private employers to report any sexual harassment complaints to an overarching body, such as the Commission.

The information collected could enable workplaces with an above average number of complaints to be identified, which may indicate an unaddressed cultural or management issue.[592] A similar recommendation was made by Harmers Lawyers, on the need for the Commission to maintain a confidential register of all settlement agreements involving sexual harassment in Australia, to detect repeat offenders.[593]

Other submissions to the Commission warned of the risks of restricting NDAs, noting that employers would be less likely to enter into settlement arrangements if confidentiality could not be preserved.[594] ACCI made a number of recommendations to provide both parties with additional safeguards in settlement agreements, rather than restricting the use of NDAs.[595] These included requiring that:

- all parties, prior to signing an NDA, be provided with a clear one-page information statement that sets out the law surrounding the signing of a confidentiality agreement, the limitations of the agreement and each parties' rights and responsibilities
- NDAs regarding sexual harassment are made only after all parties have been reminded of their rights to seek legal advice on the proposed NDA and have a reasonable period to do so
- NDAs be subject to a mandatory cooling-off period.[596]

As an example, settlement agreements made as part of the Commission's conciliation process often involve confidentiality and/or non-disparagement clauses. Where appropriate, the Commission encourages parties to seek legal advice prior to finalising a settlement agreement, and again where appropriate, will provide information on the availability of pro bono legal advice.

At the request of the parties, the Commission can also provide information and guidance with respect to conciliation agreements. In some cases, particularly for unrepresented complainants or respondents, the Commission may provide parties with a template conciliation agreement and information about optional clauses that are commonly included in settlement agreements such as confidentiality, mutual non-disparagement and release clauses. Whether parties use their own agreement/Deed or the Commission's template agreement to record conciliation outcomes, the terms of any agreement reached are negotiated between the parties to the complaint.

The recent #MeToo movement has generated criticism of the use of confidentiality clauses in sexual harassment matters, and there has been broader consideration of their use in jurisdictions outside Australia.[597]

For example, the UK House of Commons Women and Equalities Committee finalised its recent inquiry: *The use of non-disclosure agreements in discrimination cases*, delivered in June 2019 (UK NDA Inquiry).

The UK NDA Inquiry expressed concern that some allegations of sexual harassment are being 'dealt with' using settlement payments and agreements that prevent the employee from speaking about the alleged behaviour—even unlawful behaviour—without those allegations ever being investigated and without any sanctions for perpetrators.[598]

Consistent with what the Commission was told in consultations and submissions to this Inquiry, the UK NDA Inquiry heard that employers use NDAs to silence victims of abuse, with the victims often being unaware there may have been other complaints made against the same person.[599] The UK NDA Inquiry also heard that NDAs shielded repeat offenders by placing strict conditions on victims and therefore isolating them:[600]

> The majority of those who were able to give evidence about their experience of signing an NDA expressed grave concerns about how NDAs were used by employers. Many told us that they had not wanted to sign one but had felt they had no other option. We were struck by the fear, anger and raw emotion that witnesses expressed and still felt about their experience years—even decades—after signing an NDA. Only one individual we heard from said that settling with an NDA had brought a broadly positive outcome for them.
>
> We accept that evidence of personal experience can only ever be anecdotal and we have no way of establishing how representative the views and experiences we heard were. Nonetheless, we found these personal testimonies very powerful in highlighting some of the difficulties that can arise for, and continue to affect, individuals who sign an NDA.[601]

The UK NDA Inquiry made a number of targeted recommendations to better regulate the use of NDAs. Many of these recommendations are consistent with recommendations made in submissions to this Inquiry, including:

- requiring employers to provide a basic statement of service for any former employee
- considering how to stop the use of NDAs to cover up allegations of unlawful discrimination, while still protecting the rights of victims to be able to make the choice to move on with their lives
- clarifying the extent to which public interest disclosures regimes can provide protection to those who wish to raise concerns with regulators and other relevant authorities about workplace discrimination or harassment

- making it an offence for employers to propose a confidentiality clause designed or intended to prevent or limit the making of a protected disclosure or disclosure of a criminal offence
- ensuring that NDAs cannot prevent signatories from sharing information that may be helpful to a potential discrimination or harassment complaint or claim by another employee
- ensuring that clauses in settlement agreements are specific about what information cannot be shared and with whom, and contain clear, plain English explanations of the effect of clauses and their limits, for example in relation to whistleblowing.[602]

The UK Government responded to the Inquiry in July 2019. In summary, it committed to:

- legislating to ensure that a confidentiality clause cannot prevent an individual disclosing to the police, regulated health and care professionals or legal professionals
- legislating so that the limitations of a confidentiality clause are clear to those signing them
- legislating to improve independent legal advice available to an individual when signing a settlement agreement
- producing guidance on drafting requirements for confidentiality clauses. This included reference to the UK EHRC producing guidance to clarify the law relating to NDAs in cases of discrimination in employment and set out good practice in relation to their use (see below)[603]
- introducing new enforcement measures for confidentiality clauses that do not comply with legal requirements.[604]

In October 2019, the UK EHRC launched new guidelines on the use of NDAs in discrimination cases.[605] The EHRC outlined some dos and don'ts for employers, including:

- **don't** ever ask a worker to sign a confidentiality agreement as part of their employment contract which would prevent them from making discrimination claim against you in the future
- **don't** use a confidentiality agreement to prevent a worker from discussing a discriminatory incident that took place in their workplace unless, for example, the victim has requested confidentiality around their discriminatory experience
- **don't** ever use a confidentiality agreement to stop employees from whistleblowing, reporting criminal activity or disclosing other information as required by law

- **do** always give your worker time to read and fully understand the terms of a confidentiality agreement
- **do** always give your worker a copy of the confidentiality agreement
- **do** make sure the confidentiality agreement spells out the details of exactly what information is confidentiality
- **do** monitor the use of confidentiality agreements in your workplace.[606]

The Commission is also aware of recent legislative reforms in the United States (US) that address similar concerns. These include:

- California's restriction on provisions that prevent the disclosure of factual information in settlements involving claims of sexual assault, harassment or discrimination based on sex[607]
- New York State's reforms that permit confidentiality clauses only at the request of the victim[608]
- the introduction of the *Ending the Monopoly of Power Over Workplace Harassment Through Education and Reporting Act* (EMPOWER Act) into the US Congress.
    - This bill, while not passed at the time of this report, proposes to prohibit non-disparagement and non-disclosure clauses that cover workplace harassment as a condition of employment, promotion, compensation, benefit or change in employment status or contractual relationship.[609]

The Commission's view

The Commission has heard that the power imbalance between employers and workers in sexual harassment complaint processes has left workers believing they had no option but to sign an NDA. The Commission also heard that NDAs, and internal workplace confidentiality requirements more broadly, have often served to intimidate and silence victims, while concealing the behaviour of harassers, who have been able to move within industries and continue to engage in sexual harassment without adverse consequences.

At the same time, the Commission recognises that NDAs can have benefits for victims and other parties and should not be subject to a blanket ban. Ultimately, there is a clear need to address this issue to ensure the public interest benefits of NDAs are maximised, while also ensuring the risks and adverse consequences, especially to victims, are minimised.

Given the very nature of NDAs, there is little information available about their use. Further, as only 39 Australian employers agreed to a limited waiver to allow people to come forward to the Inquiry, the Commission received little information about the content of NDAs used in individual workplace sexual harassment matters in Australia. This includes the extent to which clauses prohibiting a person from reporting any potential criminal conduct to the police have been used in NDAs.

The Commission is of the view that better guidance is urgently needed on the use of NDAS in workplace sexual harassment matters, especially because of the risks that:

- they may rely on clauses that are contrary to public policy principles
- they may enable harassers to escape without appropriate penalty and also engage in further sexual harassment
- power imbalances or unfair bargaining processes have been used to the complainant's disadvantage.[610]

Measures to address the potential power imbalance between employers and workers could include:

- a model confidentiality clause or an information sheet to be provided to complainants
- requiring confidentiality clauses to be drafted in plain English, have a clear explanation of what information cannot be disclosed and expressly state what rights to disclosure both parties retain
- ensuring that disclosures, including those made under whistleblowing laws, to police, to a court or tribunal and to bodies such as the Commission are protected and cannot be prohibited by confidentiality or non-disparagement clauses
- the development of guidance on the use of NDAs.

RECOMMENDATION 38:

The Commission, in conjunction with the Workplace Sexual Harassment Council, develop a practice note or guideline that identifies best practice principles for the use of NDAs in workplace sexual harassment matters to inform the development of regulation on NDAs.

(b) Defamation laws

In consultations and submissions, the Commission heard that the manner in which Australia's defamation laws play out, are a contributing factor to discouraging sexual harassment victims from making complaints:

> I work with women on the ground and I'm telling you they are being sued and they are profoundly hurt. They're being sued for defamation. They're being silenced into an oblivion … they go to the media but the media won't report it because defamation laws and what could actually transpire. But we have a situation where women are profoundly hurt psychologically.[611]

The Commission notes that section 111 of the Sex Discrimination Act protects individuals who have made a submission or provided information or evidence to the Commission from civil actions, which would include defamation proceedings.

Consistent themes heard in consultations about why victims feared speaking up—that it would harm their reputations or careers, that they didn't want to affect the careers of others, because they would not be believed or that nothing would change—were more common where the victim or harasser held a high-profile position, and particularly where there was likely to be media scrutiny.

The Commission also acknowledges recent high-profile matters that involved women who had not made a formal complaint of sexual harassment, whose private complaints and allegations were aired by the media without their consent.[612] Those cases have the potential to intensify fears that if a complaint was reported in the media, a defamation case would in effect prosecute the sexual harassment complaint in an artificial legal context and make findings about the complainant's credibility—on a very public stage and without protections which may be available to a complainant pursuing a civil or criminal case.[613]

Several submissions to the Commission also highlighted Australia's restrictive defamation laws, which have been a prominent feature of the #MeToo movement, and have acted as a disincentive for individuals to make complaints.[614] As well as potentially silencing victims, the risks relating to defamation are also having a chilling effect on media coverage of this issue, and consequently, public discussion and scrutiny.

The media's role in shaping public insight into sexual harassment is discussed in Section 4.5(d), 'Media guidelines', including the need for standards or guidelines for the media on reporting of sexual harassment matters.

(i) The Model Defamation Laws

Defamation in Australia is regulated by both statute and the common law. The purpose of defamation law 'is to protect people's reputation and provide a dispute resolution framework to vindicate a defamed person's reputation'.[615]

Each state and territory in Australia has substantially uniform defamation law. The Model Defamation Provisions (Model Laws) were endorsed by the former Standing Committee of Attorneys-General in November 2004 and each state and territory enacted legislation to implement them (collectively referred to as the National Uniform Defamation Law).[616]

The Model Laws have recently been reviewed by the Council of Attorneys-General Defamation Working Party (Review of the Model Defamation Provisions) (CAG Review), to ensure they remain appropriate to achieving their intended objectives.[617] In November 2019, the CAG Review released the consultation draft of the *Model Defamation Amendment Provisions 2020* (Draft Defamation Amendments) (see below for further detail).

The Model Laws attempt to strike a balance between protecting individuals from reputational damage from defamatory publications, while also ensuring that freedom of expression is not unduly curtailed, and that information in the public interest is released.[618]

The objectives of the Model Laws include providing effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter, and to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.[619]

Defamation occurs whenever a defamatory meaning is communicated to a person other than the person being defamed, otherwise known as a 'third party'. Currently under the Model Laws, a person who has been defamed has one year in which to commence proceedings. For material on the internet, communication occurs whenever a third party downloads the material (for example, when an article is accessed or downloaded onto a person's computer).[620] This is known as the 'multiple publication rule' and means, for example, that the time period for an article downloaded on the internet commences whenever it is accessed or downloaded.[621]

An individual has a right of action for defamation; however, there are some restrictions on certain corporations.[622]

(ii) Current defences

As currently drafted the Model Laws set out a number of defences, including:

- contextual truth
- publication of public documents and fair summaries
- qualified privilege
- honest opinion
- triviality
- innocent dissemination and safe harbours.[623]

The qualified privilege defence recognises that in some circumstances a person has a legal, moral or social duty to communicate information to a recipient who has an interest in receiving it.[624] This would include, for example, making a complaint of workplace sexual harassment internally within the workplace or to an appropriate external regulatory body.

The qualified privilege defence may also be relevant to the publication of sexual harassment allegations by media outlets. The defence applies to the publication of material where:[625]

- the recipient (e.g. the reader) has an interest or apparent interest in having information on some subject
- the defendant (e.g. media outlet) published the material in the course of giving information on that subject to the recipient, and
- the conduct of the defendant in publishing that matter is reasonable in the circumstances.

The Model Laws provide a non-exhaustive list of factors which the court may take into account when assessing whether the defendant's conduct was reasonable in the context of the qualified privilege defence.[626] These include:

- the extent to which the matter published was in the public interest and/or relates to the performance of the public functions or activities of the plaintiff
- the seriousness of the defamatory imputations
- the extent to which the matter published distinguishes between suspicion, allegation and proven fact
- whether there was public interest in expeditious publishing
- whether reasonable steps were taken to publish both sides of a story, and
- the steps taken to verify the information in the published matter.[627]

However, since the introduction of the uniform scheme, the majority of defendants who successfully relied on this defence were not media organisations.[628]

Some legal experts have suggested that Australia's defamation laws do not adequately protect freedom of speech in cases of 'serious investigative journalism, where the subject of the reporting may not want a matter exposed.'[629]

The CAG Review noted that media stakeholders have raised concerns about the high threshold demanded by the test to assess whether the defendant's conduct was reasonable, which renders the qualified privilege defence of little use.[630] Stakeholder submissions to the CAG Review indicated support for the UK approach, which has a statutory defence of 'publication on a matter of public interest'.

A defendant must show that:

- the statement was on a matter of public interest, and
- that the defendant reasonably believed that publishing the particular statement was in the public interest.[631]

Similarly, Unions NSW in their submission to this Inquiry said they preferred the approach of the UK defamation laws and their application of the public interest defence for serious journalism.[632]

Unions NSW also highlighted recommendations in the 2018 report of the Senate Select Committee into the Future of Public Interest Journalism's Report, which noted that Australia's defamation laws play a significant part in curtailing the efforts of journalists to pursue public interest stories, especially due to the legal costs of defending defamation cases.[633]

In addition to qualified privilege, the defence of contextual truth was also raised. The Women Lawyers Association of NSW submitted that, to afford better protections to victims of sexual harassment who do not want material to be published about them, publishers should be required to 'procure permission from the alleged victim, prior to pleading the [defence of contextual truth]'.[634]

(iii) Draft Defamation Amendments

In November 2019 the CAG Review released the Draft Defamation Amendments, together with a Background Paper outlining the policy rationale for the proposed amendments.[635] The Draft Defamation Amendments include a number of amendments to the defences available under the Model Laws, together with measures encourage the resolution of matters prior to litigation.

The changes proposed to the Model Laws include:

- the introduction of a serious harm threshold which must be established by a plaintiff before a cause of action is established[636]
- the introduction of a 'single publication rule' which imposes a one-year limitation period from the date the materials is uploaded to the internet[637]
- making it mandatory to issue a concerns notice and clarifying the when a 'reasonable offer to make amends' will be operate as a defence[638]
- the introduction of a new 'public interest' defence[639]
- the introduction of a new defence for 'peer-reviewed statements and assessments in scientific and academic journals'[640]
- clarification that the cap on damages for non-economic loss operates as a scale and that aggravated damages are awarded separately.[641]

Many stakeholders who made submissions to the CAG Review indicated that the approach taken to determining reasonableness in relation to the current qualified privilege defence was 'overly restrictive'.[642] In response to these concerns the Draft Defamation Amendments include amendments to the qualified privilege defence, and the introduction of a public interest defence based on the approach in the UK.[643]

The role of technology was also considered by the CAG Review. The ACCC released its *Digital Platforms Inquiry Report* in July 2019. The government response is expected in late 2019. CAG will undertake a separate review regarding of digital platforms, taking into account both of these publications.[644]

The Commission's view

The Commission acknowledges that broader issues around the operation of the defamation provisions are beyond the scope of this Inquiry's Terms of Reference, and that many of these issues have been considered as part of the CAG Review, and Draft Defamation Amendments. The Commission encourages the CAG Review to consider the operation of the Model Laws (as proposed to be amended by the Draft Defamation Amendments), as they relate to workplace sexual harassment matters.

(c) Protections for witnesses in defamation and other civil proceedings

As noted above, recent high-profile defamation matters have involved women who had not made a formal complaint of sexual harassment and whose private complaints and allegations were aired by the media without their consent. This has raised concerns about the adequacy of existing confidentiality and other protections for victims of sexual harassment in defamation proceedings, and potentially other civil proceedings more generally.

This point was also emphasised in the submission of Ms Susan Price, a lawyer and academic, in the context of defamation proceedings.[645] Ms Price submitted that, if a person who has experienced harassment makes a public statement then they have made a deliberate choice to reveal their identity, and should bear the consequences of that. If not, their identity should be protected.[646]

Transparency and openness in the justice system—that justice must be seen to be done—is foundational to Australia's legal system.[647] A 'fundamental rule of the common law' is that the administration of justice must take place in open court.[648]

However, both the common law and statute law recognise that in some instances, unrestricted reporting of proceedings can be harmful to the administration of justice. At common law, limits on the principle of open justice include protection for police informers, the name of a blackmailer's victim, and cases involving national security.[649] International human rights law provides for similar exceptions.[650]

(i) Suppression and non-publication orders in federal courts

At the federal level, both the Federal Court and Federal Circuit Court have the power to make suppression orders or non-publication orders to prohibit or restrict the publication or other disclosure of information relating to proceedings before the court.[651]

The court may make such an order on its own initiative or on the application of a party to the proceeding or any other person with sufficient interest in the making of the order.[652] The courts have considered applications for the suppression and non-publication of names in a number of anti-discrimination cases.[653] In *X & Ors v Australian Prudential Regulation Authority*,[654] Kirby J identified criteria to be considered in granting a suppression order:

> The suppression of names ought to be confined to cases in which disclosure 'would prejudice the court's proper exercise of the function it was appointed to discharge, to do justice between the parties', or where disclosure 'would destroy the subject-matter of the proceedings and render them nugatory'. A case in which the use of names would seriously impede or discourage access to the courts might be another instance in which anonymity would be justified according to the statutory formula.[655]

In *Dye v Commonwealth Securities Limited*,[656] the Full Court of the Federal Court initially granted an order under section 50 (now repealed) of the *Federal Court of Australia Act 1976* (Cth) suppressing the name of a female referred to in the applicant's police statement. There was a possibility that she may have been the victim of a sexual offence and the court was not in a position at that time to assess whether she was entitled to have her identity suppressed under other legislation. However, no jurisdictional foundation was provided in this regard. The Full Court subsequently vacated the suppression order. It was noted that 'the mere consideration that the evidence is of an unsavoury character is not enough' but rather, it must be necessary to prevent prejudice to the administration of justice.[657]

The courts make a distinction between confidentiality and suppression orders. The court may keep allegations confidential without the need to make a suppression order. For example, in *Reynolds v JP Morgan Administrative Services Australia Limited (No 2)*[658] the court refused an application by a non-party to inspect the original complaint to the Commission and the notice of termination of the complaint by the President of the Commission. The Court held, inter alia, that granting access to these documents would mean the parties to the complaint lose the benefit of the confidentiality and non-disclosure provisions of their settlement.[659]

The Commission did not receive any submissions about suppression and non-publication orders in the Federal Court or the Federal Circuit Court arising from proceedings under the Australian Human Rights Commission Act.

(ii) Suppression and non-publication orders in state and territory courts

States and territories also have legislation governing suppression and non-publication of certain types of materials in court proceedings. For example, the *Court Suppression and Non-Publication Orders Act 2010* (NSW) applies to civil and criminal proceedings, and allows for a suppression or non-publication order to be made on a number of grounds, including where it is necessary to protect the safety of a person.[660] The court is required to specify the grounds on which an order is made, as set out in section 8(1) of the Act:[661]

Section 8(1) Grounds for making an order

(1) A court may make a suppression order or non-publication order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice,
(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
(c) the order is necessary to protect the safety of any person,
(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Division 10 of Part 3 of the Crimes Act 1900),
(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

When considering whether to make an order, the court must also take into account 'a primary objective of the administration of justice', namely, 'to safeguard the public interest in open justice'.[662]

(iii) Consideration of protections for witnesses and victims in court proceedings

There are several recent examples where the courts have considered applications for suppression and/or non-publication of names of witnesses or parties in defamation proceedings.[663]

In *Roberts-Smith v Fairfax Media Publications Pty Ltd*,[664] the court considered an application for a suppression order for a witness's name, and granted it on the grounds that suppression of the name was necessary to prevent prejudice to the proper administration of justice, and otherwise necessary to protect the safety of the person.[665] In that defamation proceeding, there were allegations of domestic violence between the applicant and the witness. It was argued that the witness was suffering mental harm and faced intimidation (including through online forums) from members of the public as a result of her involvement in the defamation matter and the domestic violence allegations.[666]

Analogous protections for certain witnesses and victims can also be found in criminal law. At the federal level, criminal law and relevant powers and procedures are set out in the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth). Each state and territory have their own criminal procedure legislation.

For adult complainants in certain criminal court proceedings deemed to be vulnerable, criminal procedure legislation provides for additional safeguards in how they give evidence.

For example, under the *Crimes Act 1914* (Cth), adult complainants involved in proceedings for an offence of slavery or trafficking in persons cannot be directly cross-examined by a self-represented defendant,[667] and their evidence may be given via closed-circuit television.[668]

Similarly, the *Criminal Procedure Act 1986* (NSW) provides for safeguards for complainants giving evidence in sexual offence proceedings, including allowing their evidence to be given in a closed courtroom and/or by means of closed-circuit television.[669] The *Crimes Act 1900* (NSW) also prohibits the publication or dissemination of any material that would identify a complainant in certain sexual offence proceedings.[670] The provisions are intended to protect the complainant's privacy, as well as to encourage victims to disclose criminal conduct to authorities without fear of public exposure.

The Commission's view

The Commission considers there are sound public policy reasons for providing protections for alleged victims of sexual harassment who are witnesses in civil proceedings and where their sexual harassment allegations are raised.

In particular, the cases discussed above demonstrate that alleged victims of sexual harassment may have little legal protection of their privacy and confidentiality, where material is published in circumstances where they have not made a formal complaint of sexual harassment, nor given permission for the allegations to be published.[671]

To give individuals confidence to report sexual harassment either in their workplace or to an external regulator, the Commission considers that consideration be given to introducing a standard direction or presumption in favour of suppression or non-publication of witness details in defamation proceedings, where the defamatory material includes allegations of sexual harassment.[672]

Drawing upon developments in criminal law matters aimed at minimising the re-traumatisation of victims, consideration should also be given to providing witnesses in defamation proceedings with a broader range of optional additional safeguards.

This would apply to situations where the individual is a witness in the proceedings, but has not consented to the publication of the defamatory material. Consideration should also be given to extending such protections for witnesses in other civil proceedings, where similar privacy and confidentiality concerns may arise.

RECOMMENDATION 39:

The Council of Attorneys-General consider how best to protect alleged victims of sexual harassment who are witnesses in civil proceedings, including but not limited to defamation proceedings. Measures could include amending state and territory legislation governing defamation proceedings to introduce a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in any defamation court proceeding, where the defamatory material includes allegations of sexual harassment. Consideration should also be given to additional witness safeguards and protections including:

a. **having the proceedings conducted in a closed courtroom**
b. **giving evidence from a remote room**
c. **having their evidence in chief be audio-visually recorded prior to the hearing**
d. **having an audio-visual recording of their evidence during the hearing be re-used in any subsequent proceedings**
e. **being protected from direct cross-examination by a self-represented party**
f. **having a support person present while giving evidence.**

5.9 Other legal and regulatory responses

> It has been increasingly recognised by the justice system that victims come to court with special needs. They often have suffered significant trauma from the incident that gave rise to the legal proceedings and often with a substantial impact on diverse areas of their lives ... The resolution of the legal ramifications of the incident that caused the trauma often involves negotiating a system that can feel alien and alienating. Victims are often at risk of secondary traumatisation at the hands of the legal process.[673]

Reflecting what the Commission heard throughout this Inquiry, this report has focused on anti-discrimination, employment and WHS laws as providing the key legal and regulatory frameworks with respect to addressing sexual harassment in the workplace. However, other general civil and criminal laws and regulatory responses can also play a role.

While a detailed examination is beyond the scope of this Inquiry, this section considers some of those other responses to provide a broader picture of the complex and intersecting legal and regulatory issues that relate to workplace sexual harassment. It also highlights the importance of ensuring that police and judicial responses are informed by an understanding of the nature, drivers and impacts of sexual harassment.

(a) General civil law

A number of areas of general civil law may be relevant where sexual harassment occurs in the context of an employment relationship.

(i) Contractual rights, duties and claims

Every employee has a common law employment contract with their employer which establishes the terms and conditions of their employment,[674] and imposes rights and obligations on them and their employer.

There are a range of contractual rights, duties and claims that may arise in relation to incidents of workplace sexual harassment, including:

- An express contractual right of an employer to terminate the employment of an employee who engages in sexual harassment, either on notice, or without notice if the sexual harassment constitutes serious misconduct.[675]
- An express contractual duty on an employer to comply with a sexual harassment policy or procedure that has been incorporated as a term of an employee's contract.[676] If the employer fails to comply with the policy or procedure, an employee may seek to sue them for breach of contract and recover damages for any loss they suffered as a result of the employer's breach.[677]

- An implied contractual duty on an employer to take reasonable care to avoid exposing employees to unnecessary risks to their health and safety,[678] and/or to act in good faith.[679] An employee who has been a victim of workplace sexual harassment may allege that their employer has breached these duties, and seek to recover damages for any loss they suffered as a result of the breach.[680]

Contractual rights and duties also arise in relation to the settlement of sexual harassment claims. Contract law has a role in the enforcement of settlement agreements regarding complaints of sexual harassment. As discussed in Section 5.4(i)(vi) above, this includes agreements reached through conciliation processes administered by federal and state human rights and anti-discrimination agencies.

The use of non-disclosure or confidentiality clauses in settlement agreements in workplace sexual harassment matters is discussed in Section 5.8(a). Terms of settlement agreements, including confidentiality obligations, can be enforced by a party to the agreement, with remedies available for breaches, such as injunctive relief (an order to do or not do something) and/or damages.

(ii) Duties under tort law—negligence claims

In addition to any contract law rights and obligations that an employee or employer may have in relation to workplace sexual harassment, they may also have rights and obligations under the law of torts.

For example, an employer has a duty under tort law to protect employees from reasonably foreseeable harm arising out of their employment.[681] Failing to take reasonable care for the safety of an employee can constitute a failure to fulfil the duty of care and can amount to negligence on the part of the employer.

A victim who suffers reasonably foreseeable harm as a result of workplace sexual harassment may seek to sue their employer for negligence and claim damages for the loss they have suffered as a result.[682]

Case study:

Mathews v Winslow Constructors (Vic) Pty Ltd[683]

Ms Mathews was employed as a labourer by Winslow Constructions Pty Ltd (Winslow). Over the course of her employment she was subjected to sexual harassment and bullying by Winslow employees and subcontractors. She was slapped on the bottom, had workers pretend to perform sex acts on her, was shown pornographic material and asked, 'Would you do this?', called offensive and disparaging names and threatened with rape. Ms Mathews reported this conduct, but Winslow took no action in response.

Ms Mathews brought a claim against Winslow, arguing that it had been negligent by failing to provide her with a safe working environment. Winslow initially denied liability, but part way through the hearing, admitted it had been negligent. As a result, the Court's sole task was to determine the quantum of damages to compensate Ms Mathews for the loss and damage caused as a result of her employer's negligence.

The Court found that the sexual harassment and bullying had caused Ms Mathews serious psychiatric and physical injury and accepted that she would never work again. It awarded Ms Mathews $1,360,027 in damages, comprising $380,000 general damages, $283,942 for past economic loss and $696,085 for future economic loss.[684]

(b) Consumer law claims

In certain circumstances, there may be scope for a victim of workplace sexual harassment to bring a claim against their employer under the *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law'), for engaging in misleading and deceptive conduct.[685] *Fraser-Kirk v David Jones Limited,*[686] provides an example of this type of claim.[687] If a person breaches the misleading and deceptive conduct provisions of the Australian Consumer Law, a party who has suffered loss as a result can apply to the Federal Court for a range of remedies, including injunctions, damages and compensatory orders.[688]

(c) Criminal law

The terms 'sexual harassment', 'sexual abuse', 'sexual assault' and 'rape' are sometimes used interchangeably within the community.[689] While sex discrimination and sexual harassment are unlawful, they are not criminal offences under the Sex Discrimination Act.

However, some behaviours that constitute sexual harassment under the Sex Discrimination Act may also amount to a criminal offence under criminal law. Each jurisdiction in Australia has its own legislation regulating sexual offences, which means there are differences in how civil and criminal laws relating to sexual harassment and sexual assault may overlap in each state or territory.

Sexual offences

Broadly speaking, the following offences may be relevant to an incident of workplace sexual harassment:

- 'Sexual assault' or 'rape' is the legal term for sexual intercourse or sexual penetration without consent, and there is an equivalent provision in each state and territory.[690]
- 'Indecent assault' covers sexual acts other than a penetrative sexual offence. It can relate to the unwanted touching of a person's body by another person, for example, kissing or touching a person's breasts, bottom or genitalia.[691]
- 'Stalking' involves a persistent course of conduct which is intended to maintain contact or exercise power and control over another person.[692]

Case study:

Worsnop v The Queen[693]

A personal care attendant in a nursing home, Worsnop, was convicted of stalking, indecent assault and rape of a co-worker, TH, a registered nurse. The stalking involved conduct over a three-month period, where he:

followed her around whilst she attended to patients, watched her as she performed her duties, watched at handovers when he had no reason to be there, made remarks to her with sexual connotations, and loitered outside the home.[694]

The other offences also took place at the home, including one incident where Worsnop pressed his pelvis against TH's bottom while she was dispensing medicine at a patient's bedside and asked if she could feel his erect penis, and another incident while she was attending a patient, when he pushed her down onto the bed and pushed his penis into her mouth.

The allegations came to light after TH made a complaint to a superior about Worsnop's behaviour, and Worsnop was dismissed. The Victorian Court of Appeal dismissed the appeal against conviction but allowed the appeal against sentence, reducing the total effective sentence to three years and eleven months' imprisonment. However, Ashley J noted that 'these were very unpleasant offences committed in the workplace, where the victim was at the same time vulnerable and yet might feel inhibited from raising complaint by the prospect of job loss.'[695]

Laws relating to child abuse can also intersect with workplace sexual harassment. The Shop, Distributive and Allied Employees' Association (SDA) submission noted that in the retail and fast food industries, workers are employed from the age of 15 years, and some as young as 14 years old with their parent or guardian's consent. As discussed in Section 3.5, 'People who experience sexual harassment in the workplace', the SDA submission noted the vulnerability of young workers to sexual harassment.[696]

A survey of SDA members found that just over half (51%) of young female workers aged 15–17 reported experiencing sexual harassment.[697] Experiences of these younger workers ranged from verbal comments to sexual threats and assault.[698] This type of behaviour could amount to a sexual offence against a child in some circumstances, depending on the relevant state or territory law.

The SDA also said it had received 'several complaints from minors working in retail, and more frequently fast food, where the behaviours can be deemed to be grooming of the worker with the intention that it will lead to sexual behaviour'.[699] The SDA noted that it had dealt with examples of grooming where young workers were 'exposed to sexual behaviours and harassment' and which 'led to health impacts and negative employment consequences'.[700]

All Australian states and territories also have laws mandating reporting by certain people or institutions of child abuse, including sexual abuse, to police, child protection or other agencies.[701] Who is required to report differs between the jurisdictions. For example, while in the Northern Territory reporting obligations apply to any person who has a belief on reasonable grounds that a child has suffered or is likely to suffer harm or exploitation,[702] in all other jurisdictions the scope is more limited. Some states and territories also have laws which make it a criminal offence to fail to disclose or report child abuse, and which apply to all adults.[703]

The extent to which these reporting obligations may apply to employers and to employment situations varies between jurisdictions.

(d) Regulation of technology

Sexual harassment that involves technology, including social media, may overlap with a range of civil and criminal offences relating to digital technologies (see Section 3.3, 'Nature of sexual harassment in the workplace).

Criminal laws at the federal, state and territory level can capture conduct amounting to harassment via the internet, social media and telephone. For example, a person commits an offence under the *Criminal Code Act 1995* (Cth) if they use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.[704]

There are similar provisions in the criminal laws of other states and territories.[705]

Where workplace sexual harassment involves surveillance, surveillance and monitoring device laws may apply, which are generally state or territory based.[706] There are also specific workplace surveillance laws in some states, for example, in NSW,[707] the ACT,[708] and Victoria.[709] There is also often a nexus between the use of technology, harassment and invasions of privacy.[710]

Technology, sexual harassment and the invasion of privacy

The following are examples of conduct involving the use of technology that may in some cases amount to an invasion of privacy as well as workplace sexual harassment:

- using surveillance devices, such as cameras, to monitor or harass someone
- reading private communication, such as emails or text messages
- publishing personal data as a means of harassment, for example, image-based abuse
- tracking someone's private activities or photographing them in private contexts without their permission
- persistently communicating with someone through the use of technology, for example frequent texts or phone calls.[711]

Amara's story[712]

Amara told the Commission in a consultation that she had worked in male-dominated industries since she was 13. She was employed in a workplace with 20 employees in a small town, and was the only female working on the production floor.

Amara said that the CEO of the company would watch Amara via cameras on the production floor, and stalk her husband's Facebook page. When the CEO could see that Amara's husband was out of town, he would text her saying, 'You're home alone, need some company? I'll bring dinner'. The CEO texted her constantly, and Amara would have to continually delete the messages so her husband wouldn't see.

Amara said she reported the sexual harassment to human resources, which was outsourced to another company, only for the CEO to find out. The CEO accused Amara of attempting to blackmail him. Given the CEO's position and the small town she worked in, Amara felt she couldn't mention it again.

The Office of the eSafety Commissioner (eSafety) operates several complaints and reporting schemes regulating online abuse. This may include workplace sexual harassment carried out via technology and social media.

As discussed in Section 3.3(a), 'Types of behaviours', eSafety does not capture data on whether complaints it receives occur in a workplace setting. However, the increasing connectivity of Australian workplaces, and the fact that many older children also work, as noted above, means it is increasingly possible that workplace sexual harassment carried out via technology or social media may also fall within one of eSafety's reporting schemes, provided the necessary thresholds and criteria are met.[713]

eSafety operates a cyberbullying scheme for Australian children who experience serious cyberbullying. Cyberbullying is defined as online behaviour that an ordinary, reasonable person would conclude is likely to have a seriously threatening, seriously intimidating, seriously harassing or seriously humiliating effect on an Australian child.[714]

eSafety also operates a reporting and civil penalty image-based abuse scheme, which provides support for Australians of all ages whose image or video has been shared or threatened to be shared without their consent.[715]

eSafety also informally operates an adult cyber abuse scheme. This aims to assist adults who experience serious cyber abuse, where their circumstances do not fall within one of eSafety's complaints or reporting schemes, by providing information, guidance and support.

Depending on the nature, context and severity of the online abuse, eSafety may also able to draw on its cooperative arrangements with social media services to get the cyber abuse material removed.[716]

(e) Police responses

As noted above, workplace sexual harassment may also amount to a criminal offence, such as sexual assault. In these circumstances, a victim may choose to report the matter to police. If the Commission receives a complaint that is also being investigated by police, it will consider (in consultation with the complainant and the police) whether it is appropriate to defer its investigation to avoid prejudicing the criminal investigation.

Effective criminal justice responses are important not only for individual victims, but also to encourage reporting and prevention of criminal conduct in the future. Police responses are particularly important because contact with police is usually a victim's point of entry to the criminal justice system. The way that police respond to people who report can have a significant impact on that person's willingness to proceed with a report and their satisfaction with the criminal justice response.[717]

Research has found that victims of sexual offences can feel re-victimised by the criminal justice system, including from their initial contact with police and throughout the police investigation.[718]

Intrusive and humiliating questioning by police, such as questions about their behaviour or what they were wearing, can trigger feelings of helplessness associated with the crime or cause emotional fatigue for victims.[719]

The Commission heard from victims of workplace sexual harassment in submissions and consultations about police responses to reports that lacked sensitivity and understanding.[720] One worker told the Commission about an incident she reported to police where her manager invited her to dinner to discuss her future, and insisted she drink with him. She said that she noticed two tablets at the bottom of the glass and discovered later that they were likely sleeping tablets:

> I went to the local police, but of course [my manager] was a well-known businessman with deep pockets. They said to me: 'You should be more careful who you drink with.' That was all.[721]

Another worker, who told the Commission she had been subjected to sexual harassment and assault at her work, said she was asked questions by police about her behaviour that implied she was responsible for what happened:

> The workplace investigation and HR proceedings took almost three years, with it also being forwarded to the ... Police. Only one of the males was asked to leave the organisation ... For the entire investigation I was made to feel like it was my fault, with the [police officer] in charge advising me she believed 'this was because of your (my) flirtatious behaviour on the nights in question'.[722]

Another individual described that police could be dismissive of incidents which had arisen in a workplace context:

> If you're getting harassed at work and you're the breadwinner and you've got to support your kids ... it's really hard to speak up and say this is what's happening to me ... And if you go outside and you go to the police they'll turn around and say this needs to be dealt with through work.[723]

The Commission heard that some segments of the community can face particular barriers when reporting to police.[724] The Commission also heard about poor police responses to migrant workers on temporary visas who reported workplace sexual harassment:

> 80% of farmworkers in Australia are on visas or undocumented ... Police are overstepping their mark, and based on your visa status is how they will treat your complaint ... They're not interested in pursuing justice for a transient visa holder.[725]

In the context of sexual assault, research has indicated that poor police responses to complaints may stem from police cultures which reflect and reinforce masculine and heteronormative views and can be difficult to change.[726] These cultures can equally impact on responses to sexual assault and harassment arising within police organisations. Recent reports and inquiries have highlighted sexual harassment and sex discrimination in several Australian police organisations—with some described as 'boys' clubs'—and the barriers that discourage or prevent reporting by police employees.[727]

(i) Measures to improve police responses

Police organisations have committed to improving police education about sexual harassment through increased training and development. Some police organisations have also created institutional units and consultative bodies to improve reporting pathways and ensure greater oversight of sexual harassment within police organisations.[728]

For example, as discussed in Section 3.4(d), 'Other cultural and systemic factors', in 2015, Victoria Police commissioned VEOHRC to conduct an independent review of sex discrimination, sexual harassment and predatory behaviour in Victoria Police.[729] The review recommended a series of reform initiatives aimed at dismantling the dominant, masculine policing culture, to drive cultural change and remove barriers to gender equality.

These are progressively being implemented by Victoria Police.[730] While the review focused on issues occurring within the organisation, VEOHRC and Victoria Police hope that cultural change will enable Victoria Police to improve its service delivery to the community, particularly in relation to gender-based violence.[731]

While police organisations have taken steps to reduce workplace sexual harassment among their ranks, the experience of people reporting workplace sexual harassment to police has received less attention from police organisations and researchers.

However, Australian police organisations have committed to improving their responses to sexual violence more broadly in recent years. This includes:

- introduction of codes of conduct, policy documents and other written guidelines[732]
- development of training and education programs[733]
- creation of dedicated units or teams tasked with delivering 'specialist' responses to alleged incidences of sexual assault.[734]

One example of police guidelines for responding to sexual violence is Victoria Police's *Code of Practice for the Investigation of Sexual Crime*, which sets out an approach for victim-centred investigations and provides information about linking victims with support services. The Code notes that Victoria Police's priority in sexual crime cases is the care of the victim and that 'the welfare of the victim is maximised when police conduct the investigation in a supportive and non-judgemental manner'.[735]

Police organisations have also developed guidelines, policies and programs in recognition that some community groups, including CALD communities, Aboriginal and Torres Strait Islander communities and LGBTQI communities, may be hesitant to approach police.[736]

However, the introduction of rules, guidelines and policy documents alone will not necessarily affect police practice.

Police officers have considerable discretion in the exercise of their powers, and research has shown that officers are more likely to follow an administrative rule when doing so corresponds with the occupational knowledge and behaviours they have learned and shared with their colleagues.[737] These may differ across different branches and units of a police organisation.

The research suggests that changing police behaviour, such as changing police responses to sexual violence, may also require changing the structure and culture of a police organisation.[738]

(ii) The need for specialised police training

Some state and territory police organisations now have dedicated units or teams that receive specialised training and advice for handling sexual assault matters.[739]

Research has shown that police personnel with specialised knowledge have greater sensitivity towards victims of sexual assault and employ interviewing and reporting techniques that are less likely to lead to re-traumatisation.[740] This underscores the importance of providing training, education and other initiatives for police personnel working with sexual violence victims and alleged perpetrators.

Case study:

Examples of response practices to incidents of sexual violence in Victoria

- Victoria Police have transitioned to a specialist model of investigation, where specially selected and trained detectives are dedicated to investigating sexual offences and child-abuse related crimes (Sexual Offences and Child Abuse Investigation Teams).[741]
- Multidisciplinary Centres (MDCs) have co-located police alongside child protection and sexual assault counselling services, and are designed to prevent victims from falling through the gaps between agencies by providing coordinated specialist services.[742]
- Victoria Police have adopted a 'Whole Story' investigative framework to investigate sexual assault crimes.[743] The 'Whole Story' investigative framework looks at the whole story of the relationship between the victim and the perpetrator, including what happened before and after the offence, to understand why the offence occurred and why people responded as they did.[744]
- Centres Against Sexual Assault (CASA) act as overarching, umbrella organisations for sexual assault services, and provide phone and in-person support, and often work in partnership with the police.[745]

The Royal Commission into Institutional Responses to Child Sexual Abuse also explored the need for specialised training for police officers handling child sexual abuse matters.[746] Its recommendations relating to police included a focus on the following principles for initial police responses:

- recognising that a victim or survivor's initial contact with police will be important in determining their satisfaction with the entire criminal justice response and in influencing their willingness to proceed with a report and to participate in a prosecution
- ensuring that all police who may come into contact with victims or survivors are trained to:
  - » have a basic understanding of complex trauma and how it can affect people who report to police, including those who may have difficulties dealing with institutions or persons in positions of authority
  - » treat anyone who approaches the police to report with consideration and respect, taking account of any relevant cultural safety issues
- establishing arrangements to ensure that, on initial contact from a victim or survivor, police refer them to appropriate support services.[747]

These key principles could also form the basis of a sensitive and trauma-informed police response to sexual harassment matters.

The Commission's view

The Commission reiterates the importance of ensuring that police responses to victims and others affected by workplace sexual harassment are trauma-informed and sensitive to the nature, drivers and impacts of these behaviours. This includes recognising that sexual harassment is a form of gender-based violence driven by gender inequality.

The Commission is encouraged by work underway in this space and supports the continued development of these resources and initiatives to improve culture and practice in police organisations, including an enhanced focus on police responses to sexual assault and sexual harassment matters. However, the Commission acknowledges that long-term behavioural and institutional change must be accompanied by ongoing leadership commitment, resources and robust evaluation to ensure initiatives to improve culture and practice in police organisations are effective.

(f) Judicial responses

The judiciary also plays an integral role in how victims of sexual harassment experience the justice system.

Sexual harassment matters can arise within the judicial system in a number of ways. For example, if a complaint under the Sex Discrimination Act is not resolved or is discontinued for another reason, an applicant can take their complaint to the Federal Court of Australia or the Federal Circuit Court of Australia.[748] Sexual harassment matters can also arise in a range of other civil and criminal proceedings, such as defamation, employment, workers' compensation or Freedom of Information proceedings.

As discussed in Section 5.8(c), various protections and safeguards exist for vulnerable witnesses in legal proceedings, including complainants in sexual offence proceedings. While evidentiary protections for victims are important, they need to be partnered with education and training initiatives for the judiciary. It is vital that judges, magistrates and tribunal members have an understanding of the nature, drivers and impacts of sexual harassment, to manage these cases in a way that supports and does not re-traumatise victims.

In the context of sexual assault, improvements to court processes and practice have been made to better address the needs of victims. These improvements have largely occurred in the criminal jurisdiction in relation to sexual assault and family and domestic violence. However, many similar issues may arise for victims of sexual harassment.

Further, some research has suggested that there remains a 'need for ongoing education of legal and non-legal actors with respect to the social context(s) of sexual assault' as well as 'effective training of legal actors in relation to sexual assault'.[749] For example, the Royal Commission into Institutional Responses to Child Sexual Abuse explored the need for greater and ongoing judicial education and training in relation to child sexual abuse.[750] It found that:

> Assumptions that judges make about how complainants behave and how memory works are embedded in the common law. They have been repeated regularly over the decades by appellate judges, with limited, if any, reference to any relevant research to support them.[751]

(i) Existing resources and training for judicial officers and tribunal members

A number of existing bodies perform a lead role in informing, training and providing education to the judiciary. These include:

- the Australasian Institute of Judicial Administration
- the National Judicial College of Australia
- the Judicial Commission of New South Wales
- the Judicial College of Victoria.[752]

While judicial officers from across Australia can attend the Australasian Institute of Judicial Administration and National Judicial College of Australia programs, these bodies play a particularly important role for judicial officers in states and territories outside NSW and Victoria, where there are no specific judicial education bodies.

As discussed above, there has already been an increasing focus on education and training for the judiciary on sexual assault and family and domestic violence. For example, judicial officers in relevant jurisdictions now have access to the NSW *Sexual Assault Trials Handbook*[753] and the National *Domestic and Family Violence Bench Book*.[754]

The National Judicial College of Australia has also developed the National Curriculum for Professional Development for Australian Judicial Officers, which includes programs on equality and diversity, family and domestic violence and vulnerable witnesses.[755]

The *Equality Before the Law Bench Book* is an example of guidance circulated to NSW judicial officers,[756] with similar resources in some other jurisdictions.[757] The NSW Bench Book provides practical guidance to assist the judiciary to take into account the special requirements of different groups of people. Section 7 of the Bench Book focuses on women.

Case Study:

NSW *Equality Before the Law Bench Book*

Section 7 of the NSW Bench Book provides information about gender inequality, gender bias and practical considerations for judicial officers around use of language and terminology, timing of proceedings and modes of addressing women.

The Bench Book also provides information about domestic violence and sexual assault matters, including information about myths and assumptions and suggests a range of ways for judicial officers to adapt court proceedings to ensure that individuals receive a fair and just outcome.[758]

The Judicial College of Victoria released *Victims of Crime in the Courtroom: A Guide for Judicial Officers* in August 2019.[759] It details considerations for judicial officers and court staff to limit re-traumatisation of victims and enhance opportunities for post-traumatic growth (the theory that people can benefit and experience positive gains after experiencing adversity, through a focus on understanding and managing trauma).[760] The guide also has an intersectional focus with specific sections on people of CALD backgrounds, Aboriginal and Torres Strait Islander peoples, people of diverse religious backgrounds, people with disability and the LGBTQI community.

There has also been an increasing focus on information and resources directed towards bullying and harassment in the judicial system.[761] For example, in recent conferences, the Judicial Commission of New South Wales has included sessions that focus on bullying and harassment in the court-room, as well as strategies judicial officers can use to actively manage their wellbeing following exposure to bullying in the courtroom and where a judicial officer displays bullying behaviours.[762] Similarly, the National Judicial College of Australia has included a session on bullying and power imbalances in the courtroom in its recent programs.[763]

(ii) The need for further judicial education and training

In recent years, and particularly as result of the #MeToo movement, there has been increased discussion and growing awareness in the community about workplace sexual harassment. This has been reflected in some judicial decisions, which have demonstrated an understanding of the significant harm that workplace sexual harassment can cause to victims. These decisions have recognised that the amounts awarded to victims should adequately compensate them in a way that reflects current community standards.

For example, in *Richardson v Oracle Corporation Australia Pty Ltd*,[764] the Full Federal Court considered the amount of compensation that should be awarded to Ms Richardson, for the loss and damage caused to her by sexual harassment by a co-worker over several months.[765] In increasing the amount of damages awarded to Ms Richardson, Justice Kenny noted that the typical range of damages awarded to victims in sexual harassment cases used by the Court at first instance had:

> resulted in an award in Ms Richardson's case that, judged by prevailing community standards, is disproportionately low having regard to the loss and damage she suffered. As noted earlier, the general range of general damages in respect of pain and suffering and loss of enjoyment of life caused by sex discrimination has scarcely altered since 2000 and does not reflect the shift in the community's estimation of the value to be placed on these matters. The range has remained unchanged, notwithstanding that the community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct.[766]

In *Kerkofs v Abdallah*,[767] Judge Harbison demonstrated an understanding that many victims do not report sexual harassment or assault immediately or at all and noted that this alone should not be taken to diminish their credibility.[768] Judge Harbison also recognised the potential for victims to be exposed to further trauma as a result of the legal process, and of the need to adequately compensate victims consistent with current community standards, for the significant and far-reaching impacts that sexual harassment can have on their lives.[769]

While some decisions reflect a nuanced understanding of sexual harassment and its impacts, and some judges manage proceedings and respond to victims in a way that minimises further harm to them, the Commission heard that this was not always the case.

Some submissions from individuals and organisations raised the need for increased training for judicial officers to improve responses to victims of sexual harassment.[770] For example, the Commission heard:

> It seems like judges also fail to be aware of what sexual harassment is, and perhaps some also think it is only inappropriate touching … judicial officers also need to be made aware of what sexual harassment means and how it affects the person on the receiving end.[771]

In her submission to the Commission, Susan Price, an employment lawyer, argued that there is a need for greater judicial education on gender inequality and gender-based violence, as this broader contextual framing is important to understanding sexual harassment.[772]

Price recommended all judicial officers undergo training that 'recognises the role the legal system plays in setting the standards for condoning or excusing violence against women when it is assessing conduct that includes sexual harassment'.[773] Price recommended that this training align with Our Watch's *Change the Story* framework. As discussed in Section 4, 'Prevention outside the workplace', *Change the Story* has been endorsed by all Australian governments as a national approach to preventing violence against women and their children.

It is important the judiciary continues to build upon improvements in understandings of trauma and the nature and harms of gender-based violence, including sexual harassment, to minimise the risk of victims being re-traumatised through court processes.

Given the role of tribunal members in handling sexual harassment matters, particularly those who hear anti-discrimination complaints, employment matters and workers' compensation cases, training and education should extend to tribunal members.

While some tribunal members are judicial officers, others are not, so it is important that any training be extended to non-judicial members. Professional development for tribunal members is coordinated by each tribunal's committee responsible for professional development.[774]

The Council of Australasian Tribunals is the national body intended to facilitate liaison and discussion between the heads of tribunals.[775] It supports the development of best practice models and model procedural rules, standards of behaviour and conduct for members and increased capacity for training and support for members. Like the judicial education bodies mentioned above, it could perform a lead role in providing the education outlined in this section to tribunal members.

The Commission's view

In submissions and consultations, the Commission heard the devastating accounts of victims who had been traumatised through their interaction with the legal system. This underscores the importance of courts and tribunals having sensitive, trauma-informed and gender-responsive approaches to victims of workplace sexual harassment.

Given their critical roles in the justice system, judicial officers, magistrates and tribunal members should be strongly encouraged to undertake education on the nature, drivers and impacts of sexual harassment, including that it is driven by gender inequality and is a form of gender-based violence. This education should address court processes, such as factors that could reduce the risk of re-traumatisation of victims in hearings, and also inform judicial decision-making.

The education could be integrated into existing judicial training, programs and resources. The education could apply to both improving judicial understanding and responses to victims who are witnesses in proceedings in which sexual harassment matters arise, as well as in relation to sexual harassment within the judicial workplace.

In addition to judicial officers and tribunal members who oversee discrimination and sexual harassment matters, such as appeals from the Commission or anti-discrimination agencies, the Commission encourages the judiciary to examine the ways they may indirectly encounter sexual harassment victims, such as where they are witnesses in or parties to defamation or other civil proceedings.

To build upon broader primary prevention work, and other recommendations in this report, this education and training should be in line with the principles of *Change the Story.*

RECOMMENDATION 40:

All Australian governments should:

a. **Ensure that relevant bodies responsible for developing training, programs and resources for judges, magistrates and tribunal members make available education on the nature, drivers and impacts of sexual harassment. This should be trauma-informed and in line with the principles of *Change the Story*.**

b. **Support and encourage judicial officers and tribunal members across civil and criminal jurisdictions who may come into contact with victims of sexual harassment to undertake this education and training.**

(g) Industry codes of conduct

There are a number of industry and professional codes of conduct, which may also regulate workplace sexual harassment. For example:

- Legal Profession Uniform Law (including uniform conduct rules for solicitors and barristers)
- Australian Medical Association Code of Ethics
- Royal Australasian College of Surgeons Code of Conduct
- Health Practitioner Regulation National Law

Individuals working in professions that are regulated by external bodies may have additional avenues through which they are able to report workplace sexual harassment, additional options for resolution of complaints, and additional consequences for perpetrators, for example a finding that the person is unfit to practice in that profession.

For example, Rule 8 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 provides that a barrister must not engage in conduct which is:

(a) dishonest or otherwise discreditable to a barrister;

(b) prejudicial to the administration of justice; or

(c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

Rule 123 provides that a barrister must not in the course of practice, engage in conduct which constitutes:

(a) discrimination,
(b) sexual harassment, or
(c) workplace bullying.

If a barrister is found to have engaged in professional misconduct, they may be found to be unfit to practice as a barrister.

The Royal Australasian College of Surgeons (RACS) Code of Conduct specifies that a surgeon will not discriminate against, bully or sexually harass a trainee, International Medical Graduate, junior doctor, student or any other healthcare professional,[776] and breaches of the Code of Conduct may be subject to sanctions.[777]

The Commission received submissions that described existing regulation (including any gaps) in specific industries, including for example, the conduct of barristers,[778] and the Australian health care system.[779]

The Commission is not proposing to make any specific recommendations targeted to the regulation of sexual harassment in particular industries that are subject to additional legislative or other regulation. However, the report's broader recommendations that are targeted to employers and the community about best practice prevention, response and improvements to the regulatory framework are equally relevant to other industry regulatory schemes, such as the ones mentioned above.

Section 6.3, 'Industry-based approaches to addressing workplace sexual harassment', discusses in further detail the benefits of using industry, profession or sector-wide initiatives to address workplace sexual harassment.

1 Organisation, Submission 406, *Sexual Harassment Inquiry*.
2 Law Council of Australia, Submission 249, *Sexual Harassment Inquiry*, 28.
3 International Labour Organization, *Ending Violence and Harassment in the World of Work* (ILC.108/V/1, International Labour Conference, 2019) 4.
4 *International Labour Organization Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 2, 19, 32(1), 36.
5 *Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 1–3, 11; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 26; *International Labour Organization Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 4–5.
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7 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 6.
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613 Karen O'Connell, 'Geoffrey Rush's Victory in His Defamation Case Could Have a Chilling Effect on the #MeToo Movement', *The Conversation* (News Article, 11 April 2019) <www.theconversation.com/geoffrey-rushs-victory-in-his-defamation-case-could-have-a-chilling-effect-on-the-metoo-movement-115127>.

614 Northern Territory Women Lawyers Association Inc, Submission 251, *Sexual Harassment Inquiry*, 3; Unions NSW, Submission 354, *Sexual Harassment Inquiry*, 53; Susan Price, Submission 373, *Sexual Harassment Inquiry*, 6; NOW Australia, Submission 439, *Sexual Harassment Inquiry*, 18.

615 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) 10.

616 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) 9.

617 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) 9.

618 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) 11.

619 Model Defamation Provisions 2005 cl 3.

620 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

621 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) 14.

622 Model Defamation Provisions 2005 pt 2, div 2, s 9 states: (1) A corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication. (2) A corporation is an excluded corporation if: (a) the objects for which it is formed do not include obtaining financial gain for its members or corporators, or (b) it employs fewer than 10 persons and is not related to another corporation, and the corporation is not a public body.

623 Model Defamation Provisions 2005 pt 4, div 2.

624 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) 26.

625 Model Defamation Provisions 2005 cl 30.

626 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

627 *Model Defamation Provisions 2005* cl 30(3).

628 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) 27.

629 Matt Collins, 'Let's End the Defamation Law Horror Story', *The Australian* (online, 28 October 2018) <www.theaustralian.com.au/business/media/defamation-laws-need-bold-reform/news-story/988e2c7e9815bb7fae765d233da2b0cc>.

630 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) 27.

631 *Defamation Act 2013* (UK) s 4(1).

632 Unions NSW, Submission 354, *Sexual Harassment Inquiry*, 54.

633 Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Inquiry into the Future of Public Interest Journalism* (Final Report, February 2018) 128; Unions NSW, Submission 354, *Sexual Harassment Inquiry*, 53.

634 NSW Women Lawyers' Association, Supplementary Submission 340, *Sexual Harassment Inquiry*, 4.

635 Council of Attorneys-General, Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Draft D15, 12 November 2019).

636 *Defamation Act 2013* (UK) s 33; Council of Attorneys-General, Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Draft D15, 12 November 2019) sch 1, item 2; NSW Department of Communities and Justice, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 25–9. As part of these amendments the defence of triviality (section 33) will be repealed from the Model Laws.

637 Council of Attorneys-General, Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Draft D15, 12 November 2019) items 31–2; NSW Department of Communities and Justice, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 10–12.

638 Council of Attorneys-General, Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Draft D15, 12 November 2019) items 6–18; NSW Department of Communities and Justice, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 13–17.

639 Council of Attorneys-General, Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Draft D15, 12 November 2019) items 22–4; NSW Department of Communities and Justice, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 20–2.

640 Council of Attorneys-General, Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Draft D15, 12 November 2019) item 25; NSW Department of Communities and Justice, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 19–20.

641 Council of Attorneys-General, Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Draft D15, 12 November 2019) items 28–9; NSW Department of Communities and Justice, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 30–1.

642 NSW Department of Communities and Justice, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 20.
643 Council of Attorneys-General, Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (Draft D15, 12 November 2019) items 22–4; NSW Department of Communities and Justice, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 20–2.
644 Department of Justice, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 30.
645 Susan Price, Submission 373, *Sexual Harassment Inquiry*, 6.
646 Susan Price, Submission 373, *Sexual Harassment Inquiry*, 6.
647 Andrew T Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27(2) *Adelaide Law Review* 279.
648 *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing).
649 *Hogan v Hinch* (2011) 243 CLR 506, [21]; *John Fairfax Group v Local Court of NSW* (1992) 26 NSWLR 131, 141.
650 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).
651 *Federal Court of Australia Act 1976* (Cth) pt VAA s 37AF; *Federal Circuit Court of Australia Act 1999* (Cth) pt 6A s 88F.
652 *Federal Court of Australia Act 1976* (Cth) s 37AH; *Federal Circuit Court of Australia Act 1999* (Cth) s 88H.
653 *CC v Djerrkura* [2003] FMCA 372; *Lawrance v Commonwealth* [2006] FMCA 172; *Lawrance v Watson* [2008] FMCA 984.
654 *X v Australian Prudential Regulation Authority* [2007 HCA 4.
655 *X v Australian Prudential Regulation Authority* [2007 HCA 4, 86.
656 *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118.
657 *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118, [122]–[124].
658 [2011] FCA 489
659 *Reynolds v JP Morgan Administrative Services Australia Limited (No 2)* [2011] FCA 489, [30].
660 *Court Suppression and Non-Publication Orders Act 2010* (NSW) pt 2.
661 *Court Suppression and Non-publication Orders Act 2010* (NSW) ss 8(1)–(2).
662 *Court Suppression and Non-publication Orders Act 2010* (NSW) s 6.
663 *Rush v Nationwide News Pty Ltd (No 6)* [2018] FCA 1851; *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36; *Doe v Dowling* [2017] NSWSC 1793.
664 *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36.
665 *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36, [40].
666 *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36, [13]–[14].
667 *Crimes Act 1914* (Cth) s 15YG.
668 *Crimes Act 1914* (Cth) s 15YI.
669 *Criminal Procedure Act 1986* (NSW) pt 5.
670 *Crimes Act 1900* (NSW) s 578A.
671 See, eg, NSW Women Lawyers Association, Supplementary Submission 340, *Sexual Harassment Inquiry* 2.
672 Susan Price, Submission 373, *Sexual Harassment Inquiry*, 7; NSW Women Lawyers' Association, Supplementary Submission 340, *Sexual Harassment Inquiry*, 2.
673 The Australasian Institute of Judicial Administration, 'Victims', *Research* (Web page) <aija.org.au/research/resources/victims/>.
674 This is the case even if they have no written employment contract. An employment contract may be written or verbal. It may contain terms that are expressly agreed by the parties and/or implied by law or fact, or a combination of both. Australian Government, Department of Industry, Innovation and Science, 'Types of Contracts', *Contracts and Tenders* (Web Page, 11 November 2019) <www.business.gov.au/products-and-services/contracts-and-tenders/types-of-contracts>.
675 Serious misconduct is discussed in Section 5.5(d). Where an employee's employment has been terminated because they have engaged in sexual harassment, if the employee is eligible to make an unfair dismissal application to the Fair Work Commission, they may seek to challenge the termination of their employment on the basis that it was harsh, unjust or unreasonable. This is also discussed in Section 5.5(d).
676 For example, an employer's workplace policy may be incorporated into their employee's employment contract if the policy is reproduced, or referred to, in the contract (*Riverwood International (Australia) Pty Ltd v McCormick* (2000) 177 ALR 193), or if the language used in the policy, and the context in which it is used, would lead a reasonable person to believe that the employer intended to be bound by the policy (*Goldman Sachs JB Were Service Pty Ltd v Nikolich* [2007] FCAFC 120).
677 Such a situation arose in *Goldman Sachs JB Were Service Pty Ltd v Nikolich* [2007] FCAFC 120, [24], where part of the employer's workplace policy, which required the employer to 'take every practicable step to provide and maintain a safe and healthy work environment for all [employees]' was found to have been incorporated as an express term of Mr Nikolich's employment contract. The majority of the Court found that the employer had breached this contractual term by failing to respond promptly to Mr Nikolich's complaint that his manager had bullied him, and was liable to provide Mr Nikolich with damages for the psychiatric injury this caused him. See also *Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177.
678 *Naidu v Group 4 Securitas Pty Ltd* [2005] NSWSC 618; *Goldman Sachs JB Were Service Pty Ltd v Nikolich* [2007] FCAFC 120, [72].

679 There is ongoing legal debate about whether, under Australian law, there is a general duty of good faith implied into all contracts, and employment contracts in particular, and there have been conflicting decisions on this issued by Australian courts. See, eg, *Commonwealth Bank of Australia v Barker* [2014] HCA 32 per Kiefel J at [107]; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, [40], [155]; *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28, [287]; *CGU v Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193; *Regulski v State of Victoria* [2015] FCA 206, [219]; *Whelan v Cigarette & Gift Warehouse Pty Ltd* [2017] FCA 1534.

680 *Naidu v Group 4 Securitas Pty Ltd* [2005] NSWSC 618; *Goldman Sachs JB Were Service Pty Ltd v Nikolich* [2007] FCAFC 120, [72]. The implied contractual obligation and its interaction with the tortious obligation to protect employees from reasonably foreseeable harm arising out of their employment is discussed in Section 5.9(a)(ii). See, eg, *Toni Govier v Uniting Church in Australia Property Trust* [2018] HCATrans 65.

681 This tortious duty is similar to the implied contractual duty to protect victims from unnecessary risks to their health and safety, addressed above.

682 See, eg, *Swan v Monash Law Book Co-Operative* [2013] VSC 326, where an employee alleged that her employer had caused her psychiatric injury by exposing her to an unsafe workplace in which she had been subjected to bullying and harassment. The employer was found to be negligent and the employee was awarded $300,000 for pain and suffering and loss of enjoyment of life and $292,554.38 for past and future economic loss. *New South Wales v Mannall* [2005] NSWCA 367; *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15. See also Australian Human Rights Commission, *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* (October 2008) 48.

683 *Mathews v Winslow Constructors (Vic) Pty Ltd* [2015] VSC 728.

684 *Mathews v Winslow Constructors (Vic) Pty Ltd* [2015] VSC 728.

685 *Competition and Consumer Act 2010* (Cth) sch 2, s 18 ('Australian Consumer Law') contains a general prohibition on misleading and deceptive conduct. Section 31 of the Australian Consumer Law is specifically directed at employment arrangements and provides: 'A person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to: (a) the availability, nature, terms or conditions of the employment; or (b) any other matter relating to the employment.'

686 *Fraser-Kirk v David Jones Limited* [2010] FCA 1060 (Flick J). Ms Fraser-Kirk's claim relied upon equivalent misleading and deceptive conduct provisions contained in the *Trade Practices Act 1974* (Cth)—the consumer protection legislation that preceded the Australian Consumer Law and was in place at the time of her claim.

687 In that case Ms Fraser-Kirk, a victim of alleged workplace sexual harassment, alleged (among other things) that her employer, David Jones, had breached consumer laws by making misleading or deceptive representations to her during her job interview, about its workplace culture and conditions. These included representations made in David Jones policies that the company was committed to 'providing a safe and healthy workplace', 'did not tolerate harassment, discrimination or bullying' and was committed to the values and behaviours described in its 'Code of Ethics and Conduct'. Ms Fraser-Kirk alleged that the sexual harassment she experienced in the course of her employment demonstrated that these representations were misleading and deceptive. Ms Fraser-Kirk also alleged that, in failing to correct misstatements made during press conference and in the media, the directors of the David Jones board had engaged in misleading and deceptive conduct. Ms Fraser-Kirk's case was ultimately settled, so the Federal Court was not required to rule on her misleading and deceptive conduct claims.

688 See Australian Consumer Law, ch 5, pt 5-2.

689 NSW Government, 'What Is Sexual Assault?', *Department of Justice* (Fact Sheet, 2 December 2016) <www.victimsservices.justice.nsw.gov.au/sexualassault/pages/sexual_assault_victims.aspx>.

690 *Crimes Act 1900* (NSW) s 61I; *Crimes Act 1900* (ACT) s 54, read with s 50; *Criminal Code Act 1983* (NT) s 192(3); *Criminal Code Act 1899* (Qld) ss 347–349, read with s 1; *Criminal Law Consolidation Act 1935* (SA) s 48, read with s 5(1), (3); *Criminal Code Act 1924* (Tas) s 185, read with s 1; *Crimes Act 1958* (Vic) ss 38, read with s 35; *Criminal Code Act Compilation Act 1913* (WA) s 325 read with s 319.

691 *Criminal Code Act 1983* (NT) s 188(2)(k); *Criminal Code Act 1899* (Qld) s 352; *Criminal Law Consolidation Act 1935* (SA) s 56; *Criminal Code Act 1924* (Tas) s 127; *Crimes Act 1958* (Vic) s 40; *Criminal Code Act Compilation Act 1913* (WA) s 323.

692 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13; *Criminal Code Act 1899* (Qld) s 359; *Criminal Law Consolidation Act 1935* (SA) s 19AA; *Criminal Code Act 1924* (Tas) s 192; *Crimes Act 1958* (Vic) s 21A; *Criminal Code Act Compilation Act 1913* (WA) s 338E; *Crimes Act 1900* (ACT) s 35.

693 *Worsnop v The Queen* [2010] VSCA 188.

694 *Worsnop v The Queen* [2010] VSCA 188, [10].

695 *Worsnop v The Queen* [2010] VSCA 188, [85].

696 SDA National, Submission 455, *Sexual Harassment Inquiry*, 74.

697 Australian Human Rights Commission, *Everyone's Business: Survey on Sexual Harassment of Members of the Shop, Distributive and Allied Employees' Association* (2019) 60.

698 SDA National, Submission 455, *Sexual Harassment Inquiry*, 67–8. See also, Australian Human Rights Commission, *Everyone's Business: Survey on Sexual Harassment of Members of the Shop, Distributive and Allied Employees' Association* (2019) 62.

699 SDA National, Submission 455, *Sexual Harassment Inquiry*, 72–3.
700 SDA National, Submission 455, *Sexual Harassment Inquiry*, 73.
701 *Children and Young People Act 2008* (ACT) s 356; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27; *Care and Protection of Children Act 2007* (NT) ss 15, 16, 26; *Child Protection Act 1999* (Qld) pt 1AA, ss 13e, 13f; *Education (General Provisions) Act 2006* (Qld) ss 364, 365, 365A, 366, 366A; *Children's Protection Act 1993* (SA) ss 6, 10, 11; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3, 4, 14; *Children, Youth and Families Act 2005* (Vic) ss 162(c)–(d), 182(1)(a)–(e), 184 ; *Crimes Act 1958* (Vic) s 327; *Children and Community Services Act 2004* (WA) ss 124A–B; *Family Court Act 1997* (WA) ss 5, 160.
702 *Care and Protection of Children Act 2007* (NT) ss 15, 16, 26.
703 In NSW, all adults who know, believe or reasonably ought to know that a child (under 18 years of age) has been sexually abused, physically abused or neglected, are required to report that information to police, unless they have a reasonable excuse for not reporting the information. See *Crimes Act 1900* (NSW) s 316A; adults working in organisations in NSW are also guilty of committing an offence if they have the power and responsibility to reduce or remove the risk of an adult worker engaged by that organisation, who is engaged in child-related work, and who poses a serious risk of abusing a child (sexual or serious physical abuse), and they negligently fail to reduce or remove that risk. See *Crimes Act 1900* (NSW) s 43B. In Victoria, it is a criminal offence for an adult to fail to disclose information to police if he or she forms a reasonable belief that a sexual offence has been committed against a child (under 16 years of age) by an adult, unless he or she has a reasonable excuse for failing to disclose the information to police. See *Crimes Act 1958* (Vic) s 327. In the Northern Territory, a person is guilty of an offence if he or she fails to report, as soon as possible, that he or she reasonably believes that a child is likely to be a victim of a sexual offence. This relates to children under 14 years of age, or, in the context of a special care relationship, children under 18 years of age. See *Care and Protection of Children Act 2007* (NT) s 26(1).
704 *Criminal Code Act 1995* (Cth) s 474.17.
705 See, eg, *Criminal Code Act 1899* (Qld) s 359A(7)(b); *Crimes Act 1958* (Vic) s 21A(2)(b).
706 *Invasion of Privacy Act 1971* (Qld); *Listening Devices Act 1991* (Tas); *Listening Devices Act 1992* (ACT); *Surveillance Devices Act 1998* (WA); *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 2007* (NSW); *Surveillance Devices Act 2007* (NT); *Surveillance Devices Act 2016* (SA).
707 *Workplace Surveillance Act 2005* (NSW).
708 *Workplace Privacy Act 2011* (ACT).
709 *Surveillance Devices Act 1999* (Vic) pt 2A.
710 Australian Government, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Discussion Paper 80, March 2014) 212 [14.7]–[14.8].
711 Australian Government, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Discussion Paper 80, March 2014) 212 [14.7]–[14.8].
712 Consultation with women, Darwin.
713 Office of the eSafety Commissioner, Submission 253, *Sexual Harassment Inquiry*, 4.
714 *Enhancing Online Safety Act 2015* (Cth) s 5.
715 *Enhancing Online Safety Act 2015* (Cth) pt 5A.
716 Office of the eSafety Commissioner, Submission 253, *Sexual Harassment Inquiry*, 3.
717 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Executive Summary and Parts I–II, 2017) 8, 17.
718 Patricia Easteal and Jessica Kennedy, 'The Conception, Gestation and Birth of Legislation: The Sexual and Violent Offence Legislation Amendment Act 2008' (2011) 10(2) *Canberra Law Review* 8, 12.
719 Australian Government, Australian Institute of Family Studies, 'Current Approaches to Preventing and Responding to Sexual Assault: A Rapid Evidence Assessment' (Literature Review, 2017) 41; Patricia Easteal and Jessica Kennedy, 'The Conception, Gestation and Birth of Legislation: The Sexual and Violent Offence Legislation Amendment Act 2008' (2011) 10(2) *Canberra Law Review* 8,12.
720 See, eg, Individual, Submission 279, *Sexual Harassment Inquiry*.
721 Individual, Submission 294, *Sexual Harassment Inquiry*.
722 Individual, Submission 295, *Sexual Harassment Inquiry*.
723 Public consultation, Brisbane.
724 Pride in Diversity (ACON), Submission 240, *Sexual Harassment Inquiry*; Law Council of Australia, Submission 249, *Sexual Harassment Inquiry*.
725 Consultation with policy stakeholders (temporary visa holders), Sydney (Ashfield).
726 Holly Johnson, 'Why Doesn't She Just Report It: Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police' (2017) 29(1) *Canadian Journal of Women and the Law* 36, 40. See also Victorian Equal Opportunity & Human Rights Commission, *Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police* (Phase 3 Audit and Review, 2019) 219, 248; Government of South Australia, Equal Opportunity Commission, *Sex Discrimination, Sexual Harassment and Predatory Behaviour in South Australia Police: Independent Review* (2016) 8, 32; Pride in Diversity (ACON), *LGBTI Domestic and Family Violence: A Guide to Best Practice for Workplace Policy* (2018) 31; on police culture and socialisation processes more broadly, see Janet BL Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge University Press, 1997); Janet BL Chan, Chris Devery and Sally Doran, *Fair Cop: Learning the Art of Policing* (University of Toronto Press, 2003).

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731 Victorian Equal Opportunity & Human Rights Commission, *Independent Review into Sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police* (Phase 3 Audit and Review, 2019) 2, 32, 245, 307.

732 See, eg, Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (2016).

733 See, eg, South Australia Police, Submission 220, *Sexual Harassment Inquiry*; Victorian Equal Opportunity & Human Rights Commission, *Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police* (Phase 2 Audit, 2017) 173, 178, 187–8.

734 See, eg, NSW Police Force, 'Child Abuse and Sex Crime', *Crime* (Web Page) <www.police.nsw.gov.au/crime/sex_crimes/child_abuse>; Victoria Police, 'Sexual Offences and Child Abuse Investigation Teams', *Sexual Offences* (Web Page, 8 April 2019) <www.police.vic.gov.au/sexual-offences-and-child-abuse-investigation-teams-1>; Western Australia Police Force, 'Sexual Assault', *Your Safety* (Web Page, 20 November 2018) <www.police.wa.gov.au/your-safety/sexual-assault>; Queensland Police Service, 'How Sexual Assault Is Investigated', *Victims of Crime* (Web Page, 16 August 2019) <www.police.qld.gov.au/units/victims-of-crime/support-for-victims-of-crime/how-sexual-assault-is-investigated>.

735 Victoria Police, *Code of Practice for the Investigation of Sexual Crime* (2016) 2; see also Australian Government, Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017).

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SECTION 6:

Preventing and responding to sexual harassment in the workplace

I think we really need to admit that relying on the individual complaints has failed. All the evidence is that there's just been no shift at all … I don't think it's anyone's fault, we've all tried, but it hasn't worked, and we need to do something radically different.[1]

SNAPSHOT

- Current approaches to preventing and responding to sexual harassment in workplaces are inadequate. They typically focus on policies that prohibit sexual harassment and complaint mechanisms for workers to report it. They are reactive, legalistic and often contribute to ongoing (albeit unintended) harm to workers. These approaches, which have remained largely unchanged for decades, have failed to stop rising rates of workplace sexual harassment.
- While workplace sexual harassment is bad for workers and businesses, workplaces lack a clear, comprehensive roadmap for action, and practical resources to tackle sexual harassment effectively.
- In response to the shortcomings of current approaches, a new framework for workplaces to better prevent and respond to sexual harassment should be adopted, that is:
  - victim-centred
  - practical
  - adaptable for businesses of all sizes and in all industries
  - designed to minimise harm to workers.
- The new workplace framework is structured around seven domains. It recognises that improving workplace prevention and responses requires a new and more holistic approach that looks beyond policies, training and complaint handling procedures.
- To better **prevent** sexual harassment, the Commission recommends action in the following areas or domains:
  - **Leadership**—the development and display of strong leadership, that contributes to cultures that prevent workplace sexual harassment.
  - **Risk assessment and transparency**—greater focus on identifying and assessing risk, learning from past experience and transparency about sexual harassment, both within and outside of workplaces, to mitigate the risk it can pose to businesses. This can help improve understanding of these issues and encourage continuous improvement in workplaces.
  - **Culture**—the building of cultures of trust and respect, that minimise the risk of sexual harassment occurring and, if it does occur, ensure it is dealt with in a way that minimises harm to workers. This includes the role of policies and human resources practices in setting organisational culture.
  - **Knowledge**—new and better approaches to workplace education and training, to demonstrate an employer's commitment to addressing sexual harassment and initiate change by developing a collective understanding of expected workplace behaviours and processes.

- To better **respond** to sexual harassment, the Commission recommends action in the following areas or domains:
    - » **Support**—prioritising worker wellbeing and provision of support to workers before they make a report, after they report and during any formal processes.
    - » **Reporting**—increasing the options available to workers to report workplace sexual harassment and address barriers to reporting. Creating new ways for employers to intervene to address sexual harassment, other than launching a formal investigation. Adopting a victim-centred approach to the way investigations are conducted when a report is made to minimise unnecessary harm to workers.
    - » **Measuring**—the collection of data at a workplace-level and industry-level to help improve understanding of the scope and nature of the problem posed by sexual harassment. This includes understanding the prevalence, nature and impacts of workplace sexual harassment as well as the effectiveness of workplace initiatives designed to address it.
- Industry-based approaches should be adopted as an efficient and effective method of addressing workplace sexual harassment.
- To support the new framework, a new online platform called *Respect@Work* should be developed, to provide clear, practical guidance and best practice resources on workplace sexual harassment, for workers and employers.

6.1 Overview

Sexual harassment continues to be a problem in Australian workplaces, regardless of their size, geographic location or industry.[2]

Over the course of the Inquiry, the Commission heard from a diverse range of employers and employer groups—from small and big businesses, in a wide range of industries and sectors and across urban and regional areas. Many employers agreed that sexual harassment has no place in Australian workplaces, and that it was damaging for workers and businesses, but said they found addressing workplace sexual harassment challenging.[3]

As discussed in this section, there was widespread acknowledgement by employers, workers and their representative bodies, that current regulation and approaches by employers—which have remained largely unchanged for decades—have failed to prevent or reduce workplace sexual harassment.

The Commission observed that some employers have a tendency to adopt a reactive, compliance-driven approach to addressing workplace sexual harassment, by waiting for a worker to make a report or complaint, and then responding to it in a way that focuses on minimising legal risk and reputational damage to their business. This section uses 'report' and 'complaint' interchangeably, to describe where a person makes an allegation or raises a formal or informal concern about an incident of workplace sexual harassment.

Victims who report instances of sexual harassment are often the unintended casualties of this approach. Many may experience further unnecessary harm because of the way their employer handles complaints. Many employers continue to treat workplace sexual harassment as individual misconduct, and lack awareness of the cultural and systemic drivers of workplace sexual harassment.[4]

The Commission also heard that in many workplaces, sexual harassment is a matter dealt with primarily by lawyers and human resources professionals, rather than by business managers and leaders. However, there is growing recognition that this needs to change. Leaders can play an important role in creating a culture that discourages sexual harassment and ensuring that, if it does occur, it is addressed in a way that minimises further harm to victims.

Employers, both large and small, told the Commission they wanted to understand what 'good practice' in addressing workplace sexual harassment looks like and what they can do to prevent and respond to it more effectively.

This part of the report focuses on the role of employers in preventing and responding to sexual harassment. As observed in the submission from Women NSW, the workplace should be recognised 'as a critical site to prevent and challenge sexual harassment and broader forms of sexual violence'.[5]

Section 6.2 proposes a holistic framework for addressing sexual harassment in Australian workplaces that examines elements of prevention and response.

Section 6.3 considers how industry and profession-wide approaches can be used effectively to support workers and to help employers better understand and address workplace sexual harassment.

Section 6.4 discusses the need to provide workers and employers with easy access to practical resources and support in addressing workplace sexual harassment and recommends the creation of a new collaborative online platform, *Respect@ Work*.

6.2 A workplace prevention and response framework to address sexual harassment

> I was told that I was making a big deal out of nothing and that the company had followed protocol. The person who was harassing me did not face any consequences in any way … I feel as though my outcome here, could have been completely different if my workplace supported me in anyway. Instead of blaming me, telling me I was making a big deal out of nothing and providing no support and failing to make any change … I was just expected to put up with sexual harassment, as though it was just another part of my job.[6]

Improving prevention and response to workplace sexual harassment requires a new, more holistic approach that looks beyond policies, training and complaint-handling procedures.

This approach recognises that sexual harassment is primarily driven by gender inequality and power imbalance and looks at all the steps that can be taken within workplaces to better prevent and respond to it. It more effectively meets an employer's positive obligation to provide a safe, harassment-free workplace.

As discussed in Section 5, 'The legal and regulatory framework', the Sex Discrimination Act provides that an employer can be vicariously liable for sexual harassment by an employee or agent.[7] An employer will not be vicariously liable if they can prove they 'took all reasonable steps to prevent' the alleged sexual harassment.[8] These laws have meant that employers have tended to focus on what they can do to avoid legal liability for sexual harassment in the workplace, including by adopting a policy that prohibits sexual harassment, training staff about the policy and establishing an appropriate process for responding to any complaints, to show they have taken 'reasonable steps'.

Many employers have diligently adopted this approach for decades. But it is clear that this approach has failed to reduce sexual harassment in Australian workplaces. The Commission has concluded that employers need to refocus their efforts to be more effective at eliminating sexual harassment, and heard during the course of this Inquiry that workplaces are keen to know how.

Figure 6.1: Workplace prevention and response framework to address sexual harassment

Figure 6.1 above illustrates seven different domains in a framework for workplaces to address sexual harassment, from prevention to response. Each of these domains are explored in more detail below.

(a) Leadership

Leaders have a crucial role to play in creating safe, respectful workplaces. They should be visible and proactive in their efforts to address sexual harassment, challenge inappropriate conduct and celebrate positive behaviour in the workplace, and be transparent about the organisation's shortcomings.

(i) Key features of good leadership

The Commission heard that leaders can have a positive influence on how their organisations address sexual harassment, by being visible and proactive in the way they address it. A 2019 report by Bain & Company noted:

> There is no substitute for leading by example, and men, in particular, must model the way. As one respondent said, 'A key roadblock is a lack of senior and executive leadership openly addressing diversity issues.' To make progress, programmes and conversations must be perceived as genuine, rather than token, and they must be part of the daily dialogue.[9]

For many employers, visible and proactive commitments will most frequently take the form of everyday actions, which can occur in workplaces of all sizes. Academic Dr Kirstin Ferguson emphasised the importance of:

> a sincere, visible and genuine dedication to workplace culture that demonstrates care for all stakeholders … a leader of an organisation could demonstrate a personal commitment to eliminating sexual harassment in the workplace through reminding all employees why such behaviour does not meet the expectations of the organisation [and] championing those who speak out.[10]

A number of workers told the Commission about leaders who did not see sexual harassment as a priority issue, who considered the issue 'trivial' and did not 'see a need to change'.[11] Others described instances where workplace leaders set a poor standard by their own disrespectful language and behaviour,[12] or 'turned a blind eye', thus contributing to a culture that condones sexual harassment.[13] In contrast, the Commission heard that leaders who call out sexual harassment should be valued.[14]

In addition to challenging unacceptable behaviour, the United States Equal Employment Opportunity Commission (US EEOC) has noted that leaders can encourage positive behaviour in their workforce by acknowledging and celebrating managers and workers who engage in good practice and taking active steps to prevent and respond to workplace sexual harassment. The US EEOC noted that this 'speaks volumes' and 'sends a message about what an organization's leadership cares about'.[15]

The Commission heard that good leadership also means being transparent about any mistakes that the organisation has made and how it intends to address them in the future.[16] For larger employers with greater resources and capability, this may include public statements of commitment.

In 2017, for example, senior leaders of Victoria Police publicly undertook to address the issues identified in an independent review into sex discrimination and harassment in Victoria Police workplaces. The Chief Commissioner of Police apologised to past and present personnel who had suffered harm and committed to implement the review's recommendations. Senior leaders presented to staff across the state about the review's findings and the case for change within Victoria Police. Visible and public commitments such as these can have broader influence beyond the specific workplace concerned. In the case of Victoria Police, the Chief Commissioner is a Male Champion of Change, and other Victoria Police leaders have supported efforts to build gender diversity in the police and emergency sector.[17]

(ii) Accountability of leaders, managers and board members

> [O]rganisational culture is manifested by what behaviours are formally and informally rewarded, it all comes down to accountability—and accountability must be demonstrated.[18]

The Commission heard that leaders at all levels need to be held to account with respect to workplace sexual harassment, including for their own behaviour, responsibility for creating a positive work culture and how they respond to incidents that arise.

Responsibility of leaders and managers

Individuals told the Commission that leaders and managers should foremost be accountable for their own actions. The Commission heard that when a leader harassed a worker with impunity, the damaging effect of the harassment on the worker was exacerbated and it sent a message in the workplace that sexual harassment was tolerated.[19] For example, one worker told the Commission:

> [I was the subject of] a lewd and personalised joke directed at me by my manager, in front of the entire organisation. The CEO heard, many other managers heard, I called it out publicly and STILL there was NOBODY else calling it out or telling him to stop. Colleagues afterwards said they were sorry that they felt unsafe to say anything at the time. Again, in a role where the management were obviously not going to do anything to ensure my safety at work, I left.[20]

The Commission also heard that in some cases harassers who were leaders or powerful or influential in the workplace were not sanctioned because they were considered to be of higher value to the workplace than the victims.

For example, one person recounted:

> I was removed from my position and effectively demoted. This transfer was made on the grounds that [the office manager] did not want [the harasser] and I working together and [the harasser] was too valuable in his current position to move … As far as I knew, whatever the outcome of [the office manager's] investigations were, there was no impact on [the harasser].[21]

All incidents of workplace sexual harassment should be subject to the same principles and processes for investigation and discipline, regardless of the position or rank of the harasser. In corporations, if the CEO engages in sexual harassment, board members have a responsibility to take action. One individual told the Commission:

> I've heard a story of a member who was sexually harassed by a CEO and reported that. The CEO has handed in his resignation because he'd had multiple complaints from multiple women and this was the final straw, and the board rejected his resignation because he did a good job for the [organisation]. So if the board isn't accountable, then no one is accountable.[22]

Responsibility of board members

For organisations with boards or governance bodies, there is already a range of responsibilities related to oversight of an organisation's governance, compliance, performance and management systems, and management of non-financial risks and legal obligations. For example, directors are required to exercise due diligence in relation to work health and safety (WHS) and can be personally liable for breaches of this duty.[23]

How incidents and risks of sexual harassment are managed in the workplace should be a focus for directors in fulfilling their responsibilities, but, as the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission) and the Australian Prudential Regulation Authority's (APRA) Prudential Inquiry into the Commonwealth Bank of Australia showed, boards and executive committees face challenges in overseeing and managing non-financial risks.[24]

The Commission heard that for board members to properly fulfil their oversight duties, they need to be properly informed.[25] Some submissions suggested that employers should be required to provide information to the board in relation to workplace sexual harassment.[26] For example, the Women Lawyers Association of NSW recommended 'regular de-identified reporting to the board of incidents that arise under the [sexual harassment] policy and actions taken in response (similar to WHS reporting)'.[27] Unions NSW also recommended that the existence of terms of settlement that require organisational change, such as policies, education or training, be reported to the board.[28]

There is increasing acceptance that inculcating ethical values in workplace operations and culture is an essential role for a board.[29] Boards have a pivotal part in selecting the CEO, the key leader responsible for driving workplace culture, and approving relevant governance policies and frameworks, such as codes of conduct. The goal of a workplace culture where sexual harassment is not tolerated should be a focus for boards in discharging these responsibilities.

The Commission heard that board members, too, need to be held accountable for their conduct. Current mechanisms to ensure that company directors behave properly in the exercise of their functions do not make specific reference to sexual harassment, although it arguably falls within their ambit.[30]

For example, under the *Corporations Act 2001* (Cth), directors of companies are obliged to exercise their powers and discharge their duties in good faith for the best interests of the company as a whole, for a proper purpose and with diligence.[31] Moreover, they must not improperly use their position to gain an advantage for themselves. If they breach this duty or commit a serious offence, they may be disqualified.[32] Similarly, directors of banks, building societies, insurance companies and superannuation funds must be 'fit and proper' to meet APRA standards.[33]

Codes of conduct offer another mechanism for board members to be held to account for personal behaviour. The peak body of the Australian Institute of Company Directors (AICD), the Governance Institute of Australia (whose members come from private corporations) and the Institute of Community Directors Australia (a network of not-for-profit boards, committees, councils, schools and their staff) all have codes of conduct or ethics. However, none of these codes explicitly mentions sexual harassment.[34]

(iii) Key learnings for employers

Leaders have a crucial role to play in creating safe, respectful workplaces and in helping to end workplace sexual harassment: 'tone from the top' matters.

Leaders also have the power to strongly influence how their organisation deals with sexual harassment and victims' experiences in the workplace.

Elements of good leadership include challenging unacceptable behaviour in the workplace, communicating clearly about actions taken to address unacceptable behaviours and transparency regarding mistakes an organisation may have made in the past and how it intends to act in the future.

A clear line of accountability in an organisation is important to prevent sexual harassment. Leaders and managers need to be responsible for their own actions and lead by example in establishing expectations of respectful workplace behaviours.

Board members in an organisation need to consider sexual harassment as a non-financial risk to the organisation. To do so, they need to be properly informed regarding any policies and programs in place to prevent sexual harassment, any incidents that occur and the response to those incidents.

The Commission understands that many leaders, particularly those in small businesses, want support to understand their obligations better and practical guidance on how to effectively identify, prevent and respond to workplace sexual harassment. In particular, there is a need to support and educate leaders to improve their understanding and capacity on gender equality more broadly, and sexual harassment specifically, and how to monitor and manage it as an important non-financial business risk.

The Commission is committed to working with the Workplace Sexual Harassment Council and governance bodies to provide this practical guidance for leaders and is equally committed to supporting leaders in small business. In Section 6.4 the Commission recommends that practical resources be made available through a new online platform to educate, support and guide leaders in businesses of all sizes on how they can effectively address sexual harassment in their businesses.

RECOMMENDATION 41:

The Australian Institute of Company Directors and the Governance Institute of Australia, in consultation with the Workplace Sexual Harassment Council, develop training for board members and company officers on good governance in relation to gender equality and sexual harassment.

(b) Risk assessment and transparency

The second domain in the workplace framework for addressing sexual harassment concerns risk assessment and transparency. Risk assessment has been recommended as a way of identifying and addressing workplace sexual harassment in recent international inquiries.

In the United Kingdom (UK), the House of Commons Women and Equalities Committee recommended that risk assessments form part of the code of practice for employers to meet their duty to prevent sexual harassment,[35] and that the Government introduce a 'specific duty under the UK Public Sector Equality Duty requiring relevant public employers to conduct risk assessments for sexual harassment in the workplace and put in place an action plan to mitigate those risks'.[36]

The Commission heard that there is a greater focus on proactive risk identification with respect to sexual harassment, particularly in large organisations. This is due to leaders becoming more aware of and interested in workplace sexual harassment and the risks that it can pose to their businesses.[37]

As discussed in Section 5.6, 'Work health and safety', the WHS framework in Australia provides that employers must actively identify, assess and control work hazards that may affect the physical or psychological health and safety of workers.[38] Safe Work Australia provides guidance to help employers and individuals identify psychosocial hazards, assess risks and control those risks.[39] While the guidance does not explicitly set out a risk identification process for sexual harassment, it identifies some key features of risk assessment processes which should be applied.[40]

Assessing risk in a WHS framework involves understanding the impact of a particular hazard in a workplace and making an assessment of the likelihood of it occurring. To do this, employers need to identify key risk indicators, and use or develop the right tools to gather this information. The process of identifying and assessing risk and developing control measures should be transparent. The WHS system builds worker consultation into its risk assessment frameworks,[41] and the ACTU's submission described the benefits of 'allowing people to act collectively to address safety risks, rather than bearing the cost and burden of sexual harassment alone'.[42]

In addition to identifying and mitigating risk, what is also required is transparency about issues relating to sexual harassment within the workplace. UN Women has observed:

> Organisations must develop ways in which to communicate the outcomes of cases. Transparency in disclosure of procedures, application of policies and/or complaints brought is part of feedback to the entire company.[43]

During the course of the Inquiry, it became apparent that most employers do not talk openly about workplace sexual harassment, either within their own workplaces or outside of them, for a range of reasons including confidentiality.

However, employers can better balance confidentiality and transparency in relation to workplace sexual harassment to promote safer and more productive workplaces. Transparency is an effective, relatively low-cost mechanism for engineering positive change. It is a tool that has long been used by policy makers and regulators to motivate positive social change and has increasingly been used as a tool to help achieve gender equality.[44]

Well-designed programs to measure and report on a problem can motivate or 'nudge' people to change their behaviour in order to address it.[45] Recent Australian gender equality public reporting regimes (considered further below) provide an example of how transparency has been used effectively as a tool to motivate positive behaviour change to increase gender equality.

Additionally, greater transparency about sexual harassment in the workplace can also serve the purpose of risk mitigation and management. Greater awareness regarding incidents, reporting and the ways in which workplaces respond to sexual harassment ultimately serve to inform workplace leaders and assist board members in discharging their duties relating to managing non-financial risk, while recognising the need to ensure confidentiality.

The discussion below considers:

- proactive risk identification and management
- internal sharing and reporting of de-identified sexual harassment data, to workers and leaders within businesses, as part of education and governance processes
- external public reporting of organisation and industry information about sexual harassment, including recognition of good practice and progress.

(i) Proactive risk identification and management

Active risk management is an important, and currently underutilised, strategy that employers can use to help prevent workers being harmed by workplace sexual harassment.

Risk management approaches are well understood in many Australian workplaces, as they have long been used in our WHS system to prevent and reduce harm to workers. As discussed in Section 5.6, 'Work health and safety', under existing WHS laws, Australian employers are required to adopt a proactive, systematic approach to managing safety risks in the workplace. Under a traditional 'WHS risk management approach', the first step is to identify safety hazards—that is, things that can cause harm to workers. These hazards can then be assessed and controlled.[46] Employers can use the insights gained through the 2018 National Survey and this report on prevalence, nature and drivers to identify, assess and control sexual harassment hazards.

Adopting this common WHS proactive risk management approach is a helpful tool for employers to use, prevent and manage the risks associated with workplace sexual harassment. The following case study provides an example of this.

Case study:

Sexual harassment and safety at BHP[47]

The health and safety of its people is BHP's first priority. Risk analysis is key to BHP's safety-based approach, with the goal to identify and manage controls that can either prevent an incident occurring, or minimise consequences if it does happen.

Aligned with its goal of achieving gender balance globally by 2025, BHP applied this risk approach to the way sexual harassment is managed in its business.

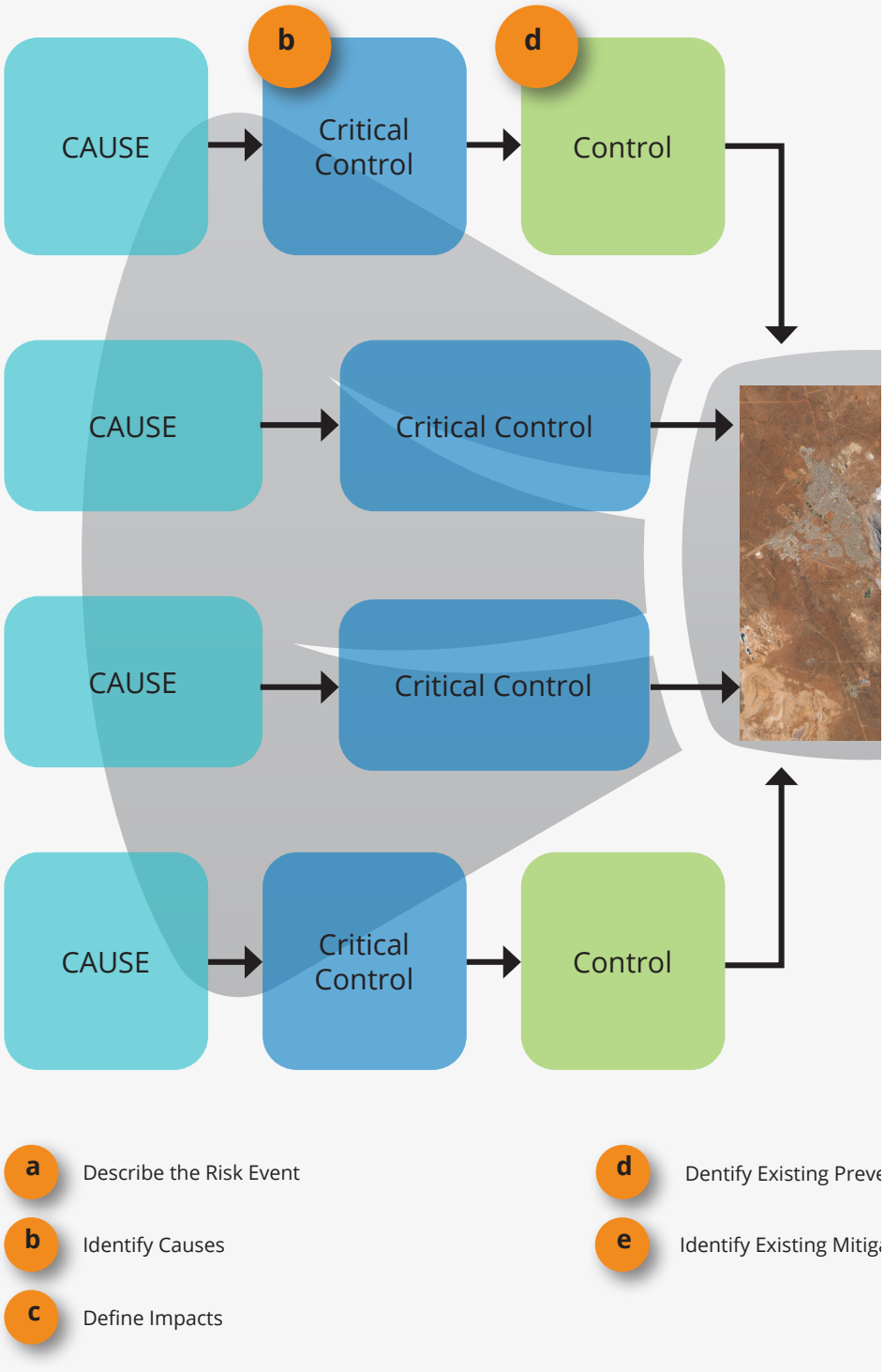
It identified that most of its strategies to manage the risk of workplace sexual harassment were reactive (applied after the event had occurred), and proactive, preventative strategies were minimal.

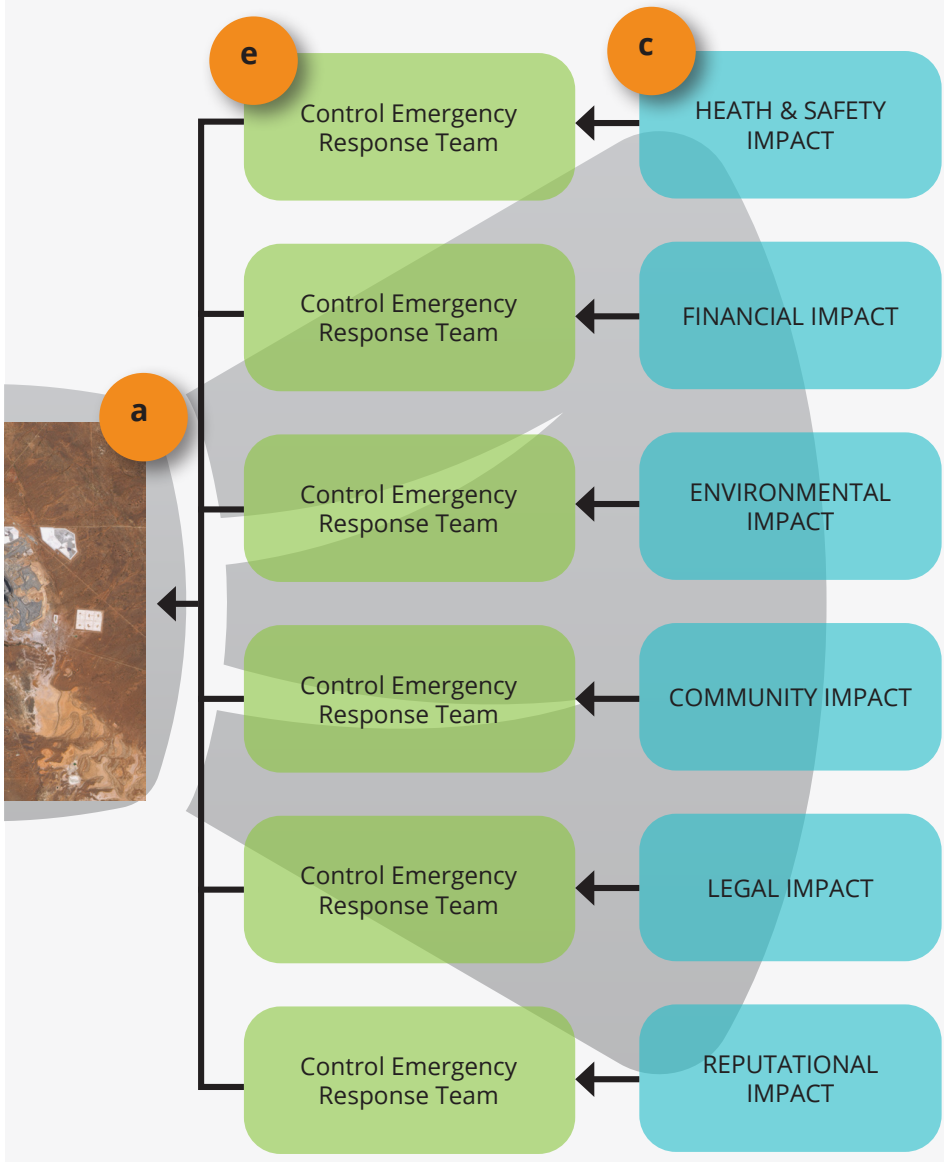
Based on these insights, BHP has committed to a number of actions to improve proactive risk management:

- increase employee confidence in reporting concerns of sexual harassment and further develop complainant-centric reporting avenues, including by enhancing the independence and skills of those responsible for investigating reports
- increase awareness and understanding of the issue of sexual harassment and acceptable workplace behaviours
- drive cultural change through leadership driven openness; and
- mobilise bystanders.

Figure 6.2: Risk analysis under a safety framework

The 'bowtie' diagram maps BHP's analysis of risk, with the left side showing preventative controls, and the right side showing controls to minimise the consequences if it does happen.





entative Controls

ating Controls

f Assess Maximum Foreseeable Loss for all impact types

g Determine Residual Risk Rating

Employers can use information from a number of sources to assess the risk of sexual harassment occurring in their businesses, as outlined in Section 6.2(g). For example, the 2018 National Survey and research shows that:

- There are certain groups of workers who are more likely to be targeted by harassers and face a greater risk of being sexually harassed at work (see Section 3.5, People who experience sexual harassment in the workplace').
- There are also certain types of workplaces in which there is a greater risk of sexual harassment occurring. Section 3.4, 'Cultural and systemic drivers of sexual harassment in the workplace' and Section 3.7, 'Workplace settings where sexual harassment occurs', examine some of the known structural, operational and physical factors in workplaces that can increase the risk of sexual harassment. These may include male-dominated workforces, hierarchical workplace structures, workplaces that involve a high level of customer or client contact, use and availability of alcohol in the workplace and isolated or remote work locations.

Employers can develop strategies to assess and control risk if they are aware that there is a higher risk of sexual harassment occurring in their business (or parts of it) due to, for example:

- the nature of their workplace
- the composition of their workforce
- certain risks unique to their business or industry
- workplace practices that allow opportunities for sexual harassment to occur.

The Commission heard about some proactive strategies which employers and unions had adopted or suggested to control known risk factors for sexual harassment. These included, for example:

- Where alcohol is present in workplaces or at work events—limiting or not offering alcohol at work events; introducing policies about and monitoring the responsible use and service of alcohol, or supervision and security protocols to monitor and respond to staff and customers under the influence of alcohol who pose a risk to the safety of others in the workplace.[48]

- Where workers work and live at remote worksites—using site planning and environmental safety protocols to control risks posed by the remote nature of the site (for example, layout and allocation of accommodation at remote sites; access to support services remotely; enhanced lighting and secure walkways).[49]
- Where a large component of work performed by workers involves interaction with customers—implementing measures and strategies to control the risk of sexual harassment by customers, such as workplace and public campaigns to stop abuse and violence and promote respectful behaviour;[50] procedures for requesting prompt attendance by security when customers engage in sexual harassment or other offensive behaviour;[51] and ensuring the business marketing campaigns and uniforms are designed in a way that avoids sexualisation of staff or the work environment.[52]
- Where workers are seconded to work at client sites and are away from the employer-controlled workplace—making safe working environments at client sites a contractual term of engagement; and conducting one-on-one discussions with the worker before they depart reminding them of the prohibition on sexual harassment, outlining the support and reporting avenues available to them and strategies and processes for addressing any issues that arise.[53]
- Where workers provide feedback about behaviour of a co-worker or the work culture that suggests sexual harassment has occurred or may occur—taking steps such as engaging in discussions with individuals or groups about sexual harassment, or use strategies designed to motivate acceptable behaviour.

(ii) Greater transparency

As noted above, the Commission heard that information about workplace sexual harassment was not widely shared in workplaces, either with leaders or workers.

Sharing information about sexual harassment with leaders

As the Banking Royal Commission and APRA's Prudential Inquiry into the Commonwealth Bank of Australia showed, boards of directors and governance bodies face challenges in overseeing and managing non-financial risks.[54]

During the Inquiry, the Commission heard that for board members to properly fulfil their oversight duties they need to be properly informed.[55] The importance of a board being provided with adequate, high quality information to enable it to properly fulfil its obligations in relation to managing non-financial risk was emphasised in the Banking Royal Commission.[56]

The Commission heard support for increased reporting on the incidence of sexual harassment complaints to boards, or senior management in smaller organisations (noting that numbers of complaints are not an accurate measure of the actual incidence of sexual harassment in a workplace, and that the confidentiality and privacy of workers should be prioritised).[57]

The Commission heard that in some large businesses in the financial sector, there were established, formal protocols for reporting on non-financial organisational risks associated with employee misconduct. This involved, as part of standard risk-reporting practices, regular formal reporting to senior management and the board on the number of formal investigations conducted into worker misconduct complaints.[58]

Often the misconduct of key concern within these businesses was theft or financial fraud, but sexual harassment and other behavioural misconduct was also captured.

This meant that details of the number of employees found by the business to have engaged in sexual harassment (through a formal investigation process) would be included in these reports, in a de-identified way that respects the privacy and confidentiality of workers involved, and communicated to leaders and the board on a regular basis as part of the business' standard risk reporting practices.[59]

Sharing information about sexual harassment with workers

The Commission heard that while there is an overwhelming lack of transparency about the prevalence of sexual harassment in many workplaces, in contrast, information about physical workplace safety incidents is shared more openly. For example:

- In the mining industry, the number of workplace fatalities, lost time injury statistics and injury frequency rates are common measures disclosed publicly in company annual reports and media.[60]
- Safe Work Australia and state and territory WHS regulators publish national, state/territory and industry-based fatalities and 'lost time injury/day' statistics.[61]
- Safe Work Australia provides a 'lost time injury frequency calculator' that allows employers to benchmark their occupational health and safety performance against their industry.[62]

Commissioner Kenneth Hayne AC QC observed in the Banking Royal Commission that where a board of an organisation has identified misconduct among leaders and has, in response, imposed serious sanctions against those leaders, there are benefits to be gained in being transparent about this with staff.

He noted that when staff are informed of such incidents and actions, it 'sends a clear message to all staff about both accountability and what kinds of conduct the board regards as unacceptable'.[63]

The Commission considers that these observations on the benefits of transparency identified by Commissioner Hayne are directly applicable to incidents of sexual harassment in workplaces.

Employers can, for example, share with staff de-identified or aggregated data about sexual harassment that occurs in the workplace, or industry-level data, at periodic intervals to communicate prevalence and trends. Importantly, care should be taken to ensure data does not identify the individuals involved. Also essential to this type of transparency is providing information on what steps were taken to resolve complaints and how long this process took.

The Commission heard that good leadership means being transparent with the workforce about any mistakes that the organisation has made and how it intends to address them in the future.[64] For larger employers with greater resources and capability, this may include public statements of commitment.[65]

The submission from Victorian Women Lawyers noted recent examples of large professional services firms, in Australia and the UK, being transparent with their workforces about sexual harassment and misconduct.

This included several 'all staff', firm-wide direct communications issued by CEOs following the investigation or dismissal of senior partners for alleged sexual harassment. The submission suggested that these 'responses are clear and unambiguous signals that employees and markets are demanding change, and CEOs are responding'.[66]

The Commission heard that sharing information about reports of sexual harassment holds the potential for broad positive impacts across a workplace. One worker told the Commission that learning that reports of sexual harassment were being investigated in their workplace, 'created a lot of awareness … It really changed the conversation when [the complaint handler] finally stopped dealing with things behind closed doors to protect people'.[67]

(iii) External reporting

External or public reporting regimes or requirements can also motivate or encourage employers to improve their approach to and metrics on sexual harassment in their workplace. As the Australian Medical Association (AMA) noted in its submission, 'There is inherent positive competition arising from reporting (intra and inter organisation).' [68]

The Commission heard about a number of organisations that have recently taken steps to become more transparent about the prevalence of sexual harassment in their organisations and their progress towards eliminating it.

Victoria Police,[69] the Australian Federal Police[70] and the Royal Australasian College of Surgeons,[71] have all adopted public reporting of sexual harassment prevalence and progress data, to increase confidence both externally to the public they serve, but also to increase confidence internally.

Workplace Gender Equality Agency

Currently, private sector businesses with 100 or more employees across Australia ('reporting organisations') are required by legislation to make annual reports to the Workplace Gender Equality Agency (WGEA) on key gender equality indicators. Reports submitted by reporting organisations are publicly available on the WGEA website.[72]

While the overall gender pay gap remains significant (at 20.8%[73]) and progress has been slow on many fronts, WGEA has noted that, based on data collected since its reporting regime commenced in 2013–14, 'when employers take action, it makes a difference'.[74]

In the six years since reporting obligations were introduced, there have been measurable and significant increases in a number of the key metrics that WGEA measures in relation to employer action on gender equality, including for example:

- The number of reporting organisations analysing payroll data for gender pay gaps increased 20.7 percentage points (from 24%[75] to 44.7%).[76]
- The number of reporting organisations with pay equity objectives in their remuneration policy or strategy increased 22.8 percentage points (from 18.1% to 40.9%) and the number of reporting organisations that took action as a result of their gender pay gap analysis increased 14.5 percentage points (from 46% to 60.5%).[77]
- The percentage of reporting organisations that have an overall gender equality strategy or policy increased 9.2 percentage points (from 66.2% to 75.4%).[78]

In its 2017–18 Progress Report, WGEA recommended changes to improve its data collection and public reporting with respect to sexual harassment.[79] These included that:

- employers be required to report on the provision and frequency of workplace training on sex-based harassment and training for all employees (as opposed to management training only)[80]
- WGEA expand its data set to the public sector, with mandatory reporting for all tiers of government to be phased in over time. WGEA suggested that the Australian Public Service be the first tier of government to be required to report.[81]

WGEA also indicated that it is currently upgrading its reporting and data management system, which will enable public sector employers to voluntarily report for the first time, potentially increasing the size of WGEA's dataset to approximately 75% of Australian employers.[82]

These recommendations, if implemented, will potentially improve the scope of external reporting on sexual harassment. However, a number of submissions argued that employers should be required to report on additional details, such as de-identified data on workplace complaints and their outcomes,[83] how many complainants continued in the organisation after making a complaint,[84] and numbers of workers' compensation cases relating to sexual harassment.[85]

As noted in Section 6.2(g), data on formal complaints alone does not provide a complete picture of the prevalence of sexual harassment or whether there is a systemic problem in the workplace.

The SDA submitted that there is scope for WGEA to play a more significant educative role in relation to sexual harassment, using reporting obligations as an initial lever,[86] and that employers should be required to provide more information to WGEA on the implementation of policies, procedures and training on sexual harassment or other outcomes, not simply whether they are in place.[87]

The Women's Electoral Lobby proposed that WGEA could follow up with employers when their approach 'shows gaps and flaws in their policies and procedures'.[88] The Young Women's Advisory Groups of Equality Rights Alliance and Harmony Alliance suggested that WGEA could assess workplace policies against good practice, such as the Commission's Code of Practice for employers, with possible consequences for failure to meet certain standards.[89]

Australian Securities Exchange

The Australian Securities Exchange (ASX) presents another potential avenue for public reporting by employers on sexual harassment prevalence, prevention and response.

Every year, ASX-listed entities are required to benchmark themselves against the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations.* These Principles and Recommendations set out corporate governance practices that, in the Council's view, are likely to achieve good governance outcomes and meet the reasonable expectations of investors.[90]

The ASX encourages, but does not require, ASX-listed entities to adopt the Principles and Recommendations. However, reporting against them is mandatory, and ASX-listed entities must disclose either in their annual report or on their website the extent to which they have followed the Principles and Recommendations in the previous year, and if they have not adopted any, the reasons why not.

This has been described as a 'comply-or-explain' approach to promoting gender diversity.[91]

The latest data released indicates that at 30 September 2019:

- the percentage of women on ASX 200 boards is 29.5%. This has increased significantly from a low base of 8.3% in 2009—an increase of over 21 percentage points in just 10 years
- the proportion of women comprising new appointments to boards in 2019 is 31.7%—significantly up from 5% in 2009; this proportion has remained above 20% every year since 2010.[92]

The Principles and Recommendations were recently reviewed, leading to an updated fourth edition which will take effect from 2020. Several principles in the fourth edition are relevant to sexual harassment. These include:

- Principle 1, which refers to the roles and responsibilities of a listed entity's board and management. Recommendation 1.5 states that listed entities should have and disclose a diversity policy and measurable objectives for achieving gender diversity on their board, among their senior executives and in their workforce generally.
- Principle 3, on how a listed entity instils and reinforces a culture of acting lawfully, ethically and responsibly. Recommendation 3.2 suggests a code of conduct and measures to ensure the board is informed of any material breaches of it, while Recommendation 3.3 refers to a whistleblower policy.[93]

Both these Principles could be further articulated to refer specifically to sexual harassment in diversity policies, gender equity targets, codes of conduct and whistleblower protections. The *Corporate Governance Principles and Recommendations* are reviewed approximately every three years.

Transparency—The importance of using the right measurements

External reporting of the kinds examined above creates an incentive for employers to improve their performance in relation to the data sets being measured, so as to be recognised as a leading employer or employer of choice.

However, to leverage this mechanism to reduce sexual harassment, it is vital that careful consideration be given to what data and metrics are being reported to external agencies.

There is a risk that requiring employers to report on some measures may, in fact, have unintended and undesirable consequences, driving counterproductive behaviour in reporting organisations, in an effort to appear to be 'performing well' in relation to these measures.

For example, while a reporting organisation may report to WGEA on whether or not it has a gender equality policy or strategy, or training program in place, this measurement alone does not provide any indication of the effectiveness of the policy, strategy or training.

Organisations that report that they do have such policies or strategies in place may assume that they have 'performed well' on this front—without further consideration of the content of their policy, strategy or training, or whether it has been effective in meeting its stated goals of improving gender equality and behaviour in the workplace.

In these circumstances, measuring these matters may provide reporting organisations with false confidence about the rigour and effectiveness of their approach to gender equality.

Similarly, if reporting organisations report only on the number of reports of sexual harassment made by workers in their organisations, this may create an incentive for organisations to engage in behaviour designed to reduce the number of reports in their business, for example by deterring workers from making complaints, or encouraging them to settle complaints confidentially. In such circumstances, requiring organisations to report on this measure could have the perverse outcome of allowing sexual harassment to continue with impunity and contributing to a culture where it is not addressed in a transparent manner.

Currently, WGEA's Employer of Choice citation is the principal program to recognise employers who meet a wide range of leading practice requirements. While it is important that careful consideration be given to the measures and way in which the Employer of Choice citation is designed and awarded, the Commission considers that programs for recognising and rewarding workplaces for positive programs and achivements in gender equality are useful tools to help better address workplace sexual harassment.

The Commission encourages other industry bodies to introduce similar citations or award programs, that recognise good practice by employers in addressing workplace sexual harassment.

The set of indicators that the Commission has recommended be developed (see Recommendation 46), together with the good practices identified in this report, will facilitate new and more valuable measures of good practice in addressing sexual harassment in Australian workplaces.[243]

(iv) Key learnings for employers

A risk management approach to sexual harassment, similar to the approach commonly used to address other WHS risks, can be used by employers to identify and develop measures to control or eliminate risks of sexual harassment in their businesses.

Employers' accountability can also be promoted through increased transparency, both within their own organisations and in reporting externally to reporting bodies. Communicating more openly about workplace sexual harassment data in a workplace:

- normalises discussion about it in the workplace and demonstrates to workers that their leaders understand and prioritise the issue—contributing to the development of a culture of trust and respect within the workforce
- can be a useful tool to motivate employers to increase their efforts to eliminate sexual harassment.

In practical terms, greater transparency about sexual harassment may include:

- For small businesses—talking to staff regularly about sexual harassment and their zero-tolerance approach where an incident has occurred. Appropriately de-identified information about the incident or learnings from it should be used to educate workers through discussions conducted by managers or supervisors as part of regular team meetings or 'toolbox talks'. This allows workers to understand the employer's approach and see that action is taken to respond when incidents occur.
- For larger businesses—regular reports to senior management or the board, publishing annual data on sexual harassment internally, or an annual email or post-incident email, acknowledging any issues and reiterating that such conduct is not tolerated. This should be done in a way that respects the needs and confidentiality of workers.

Reporting to external authorities can increase scrutiny and incentivise employers to take more effective action to address sexual harassment.

In the Commission's view, existing avenues for public reporting on workplace sexual harassment to WGEA and the ASX can and should be expanded to cover more of the Australian workforce, and more robust data obtained to provide an accurate and comprehensive understanding of the situation in Australian workplaces.

The set of indicators that the Commission has recommended be developed (see Recommendation 46 below) will facilitate new and more valuable measures of good practice in addressing sexual harassment in Australian workplaces.[243]

RECOMMENDATION 42:

The Workplace Gender Equality Agency work with the Workplace Sexual Harassment Council to consider how good practice indicators for measuring and monitoring sexual harassment prevalence, prevention and response may apply to reporting in relation to sexual harassment under the *Workplace Gender Equality Act 2012*.

RECOMMENDATION 43:

The Australian Government:

a. **amend the *Workplace Gender Equality Act 2012* to require public sector organisations to report to the Workplace Gender Equality Agency on its gender equality indicators**
b. **fund the Workplace Gender Equality Agency adequately to meet these expanded reporting obligations.**

RECOMMENDATION 44:

The ASX Corporate Governance Council introduce sexual harassment indicators for ASX-listed entities to report against, under its Corporate Governance Principles and Recommendations. This could include:

a. **specific mention of sexual harassment in guidance on company codes of conduct (ASX recommendation 3.2)**
b. **information about measures taken to address sexual harassment, as part of its requirements that listed entities have and disclose a diversity policy and set measurable objectives to achieve gender diversity (ASX recommendation 1.5).**

(c) Culture

The third domain in the workplace framework for addressing sexual harassment relates to the culture of an organisation.

The Commission heard that the culture of an organisation is another critical factor that determines how it addresses sexual harassment. As one employer told the Commission, 'if the culture's a bit toxic, it doesn't matter if all those policies and procedures are in place. People won't speak up.'[94]

Recent workplace reviews of sexual harassment and gender-based violence have also emphasised the importance of leadership commitment to cultural change and efforts to prevent and reduce sexual harassment.[95]

The Commission heard that diverse and inclusive, gender-equal workplaces that had cultures of respect, integrity and trust were most effective at preventing and responding to sexual harassment[96]—and that employers were increasingly aware of this.[97] However, to effectively drive cultural change, employers must first understand their workplace culture and the issues that affect it. The section below discusses:

- steps employers can take to understand the culture in their workplace
- issues that affect workplace culture
- how to drive cultural change
- potential 'backlash' to driving cultural change
- the role that organisational policies and procedures have in driving cultural change.

(i) Understanding workplace culture

The culture of a workplace can be described as the shared values and norms that shape behaviours and mindsets.[98] In everyday terms, culture can be described as the 'way we do things around here',[99] or 'what people do when no one is watching',[100] or as the 'internalised' or 'instinctive' application of shared values and norms.[101]

Recent inquiries, such as the Banking Royal Commission,[102] the Prudential Inquiry into the Commonwealth Bank of Australia,[103] and the Royal Commission into Institutional Responses to Child Sexual Abuse,[104] along with inquiries examining (among other things) workplace sex discrimination, sexual harassment and/or sexual assault in the Australian Defence Force,[105] Victorian and South Australian Police Forces,[106] Australasian surgical profession[107] and Victorian legal profession,[108] have all examined the critical role of organisational culture in enabling aberrant or harmful behaviour to occur.

These inquiries have received significant media and public scrutiny. They have focused the attention and understanding of the broader Australian community—and large employers and corporate regulators in particular—on the importance of 'getting organisational culture right', to create workplaces and work practices that are safe and respectful and reduce the risk of aberrant behaviour.[109]

An important first step for any organisation enquiring into or seeking to change its workplace culture is to assess the existing culture and identify positive aspects that support a safe and productive culture, as well as any deficiencies or areas of concern which need attention. A key factor is identifying how comfortable staff feel to speak up about any issues that concern them.

An example of how evidence on workplace culture is collected in the public sector is provided in the following case study.

Case study:

NSW Public Service People Matter Survey[110]

Every year, the NSW Public Service Commission runs the People Matter Employee Survey to ask employees about their experiences with their work, team, managers and organisation. The People Matter Employee Survey is a rich source of data to drive good practice across the 400,000 strong NSW public sector work force. This is the largest government employee survey in Australia, with over 185,000 responses in 2019 and over 50% of the workforce responding to the survey.

Since commencing in 2012, the People Matter Employee Survey has become an important annual organisational health check for the sector. Secretaries and senior leaders are highly invested in the process and use the results to pinpoint areas of concern and drive improvements.

The People Matter Employee Survey asks employees about their experience of unacceptable conduct, including workplace bullying and physical harm and/or sexual harassment or abuse. In 2019, 4% of NSW public sector respondents reported experiencing physical harm/and or sexual harassment or abuse, with a smaller number within this group reporting sexual harassment or abuse.

The NSW Public Service Commission is working towards a more contemporary survey strategy to ensure the most accurate reporting of sexual harassment but in the meantime, the survey data has already provided a deep understanding of the dynamics that relate to unacceptable conduct. Survey data, including insights about employee engagement; diversity and inclusion; flexible working; and wellbeing is shared with all departments and agencies. This information goes all the way down to the business unit level so that managers can understand their teams and improve work culture and reduce the risks related to sexual harassment.

The NSW Public Service Commission is exploring increasingly sophisticated analytics to understand how all these factors come together to shape employee experience. Data driven insights that help to target the right responses to the right places, is one of the next steps for the NSW Public Service Commission in continuing to promote inclusive workplaces with a zero tolerance for sexual harassment.

The Banking Royal Commission provides an instructive example of steps taken by a large organisation to assess its workplace culture:

Case study:

ANZ Bank cultural assessment tool[111]

The Banking Royal Commission highlighted the work that the Australia and New Zealand Banking Group Limited (ANZ) has undertaken in order to assess and improve its organisational culture.

In 2016, ANZ designed a cultural assessment tool to measure four key 'levers' identified as affecting its organisational culture and the way its people worked:

- leadership (tone from the top)
- middle management (tone from the middle)
- risk environment
- transparency ('speak up' culture).

ANZ's internal audit team uses this tool to assess culture within the business in four steps. First, it engages with 'business leadership' to clarify the assessment process and determine its scope. Second, it conducts an online survey of relevant employees, with a target response rate of 60%, and undertakes a statistical analysis of the data returned. Third, it conducts focus groups and individual interviews with relevant employees to clarify cultural strengths and challenges and undertakes associated root-cause analysis. Fourth, it engages with the business about the outcomes of the survey, which involves:

- presenting an executive summary to the leadership team
- the leadership team developing an action plan to address any cultural issues identified by the analysis over a three-month period, with oversight from the internal audit team
- continuing engagement with management to discuss the effectiveness of agreed actions, with formal reassessments undertaken as needed.

By 30 June 2018, ANZ's internal audit team had conducted more than 30 culture assessment reviews, covering over 21,000 ANZ employees. ANZ has indicated that certain business units will be reassessed, so that it can evaluate cultural change in those units over time. Shayne Elliott, CEO of ANZ, said that this work produced 'enormously valuable information' and had played a part in changing 'the culture and the conversation at the most senior level of the bank'. He said his team, the board and the Human Resources Committee all cared about, and are giving consistent consideration to, the results of the culture audits.

Section 3.4(d), 'Other cultural and systemic factors', identifies that an 'organisational climate' or workplace culture that tolerates sexual harassment can contribute to the prevalence of workplace sexual harassment. As discussed in that section, workplace cultures that tolerate sexual harassment are often characterised by perceptions that it is risky to complain, that complaints are not taken seriously, or that there is a lack of consequences for harassers. Other factors can include the level of general incivility in a workplace or a workplace culture characterised by a 'customer is always right' mentality.[112]

(ii) Influencing workplace culture

Many submissions highlighted the need to address poor workplace culture to prevent sexual harassment, but acknowledged that changing and influencing culture could be a challenging and long-term process.[113] The AICD has observed that culture can seem like a nebulous concept,[114] while the Banking Royal Commission concluded that culture is difficult to prescribe or legislate for.[115]

The Commission heard some useful suggestions about what employers can do to understand and guide behaviours and build a positive culture in their workplace. For example, Consult Australia suggested:

> regular team building and social events, rewards and recognition initiatives, regular surveys on engagement and workplace culture, flexible working arrangements, and regular communications with and access to senior leaders.
>
> The focus is taking deliberate steps to create a workplace that is open, supportive and collaborative. A positive culture is not created overnight, and requires effort and buy-in from all in an organisation.[116]

One employer described simple steps that can be taken by leaders in small and large businesses, to promote a positive, inclusive culture that does not tolerate sexual harassment:

> I think it just needs to be talked about and promoted by discussions—raising it regularly, so that new staff coming on board understand the culture and what's required … what's acceptable in our workplace. And if it's … raised regularly, then that improves and betters understanding … especially if it's led by senior people and it's seen as 'this is what's acceptable'.[117]

Practical guidance on improving an organisation's values and culture is provided in 'Managing culture—a good practice guide', jointly produced by Chartered Accountants Australia New Zealand, The Ethics Centre, Governance Institute of Australia and Institute of Internal Auditors Australia.[118]

The guide suggests employers identify the current culture in their organisation as well as the culture they desire, then take steps to close the gap between the two. It suggests that measures to improve organisational culture may involve the following 'crucial influences':

- good governance, which cascades through an organisation
- measuring, monitoring and reporting on culture

- remuneration and other incentives tied to cultural improvement
- human resources activities, including performance management, training, recruitment and orientation activities.[119]

The NSW Legal Service Commissioner has sought to change the culture across the legal profession, by creating safe and confidential mechanisms for people to report sexual harassment outside of their workplace. The Commission heard that fear of speaking up is common for Australian workers, which can result in negative conduct continuing with impunity, while employers feel unable to take action. Anonymous complaints can still provide employers with useful trend data to act upon.

Case study:

Changing culture across the legal profession—Office of the NSW Legal Services Commissioner

The Office of the NSW Legal Services Commissioner (OLSC) is the regulator responsible for receiving complaints about NSW lawyers. It has the power to investigate and discipline NSW lawyers for unsatisfactory professional conduct and professional misconduct. The OLSC has stated that, in its view, a lawyer who engages in sexual harassment can be investigated and disciplined for professional misconduct.[120]

In 2019, the OLSC launched a program to improve the culture in the NSW legal profession in relation to sexual harassment. The program identifies sexual harassment as a workplace health and safety issue. It aims to end the 'culture of silence' around sexual harassment in the legal profession and to encourage law practices to adopt effective, victim-centred processes to prevent and respond to reports of sexual harassment in law practices.

A key part of the program is the introduction of a new process for people to make reports to the OLSC (anonymously if they wish) about sexual harassment by a person in a law practice. Reports are encouraged from both those who have experienced and those who have witnessed sexual harassment.

Reports can be made to the OLSC either via a telephone service or using forms available from its website. An online reporting platform is also currently being developed. Six OLSC staff members have been specifically trained to handle any reports made, sensitively and supportively.[121]

The program's guiding principle is to never cause further trauma to a person making a report and to give them control over what use is made of the information they provide.[122] A person making a report can choose whether to make an anonymous report, disclose their identity to the OLSC but (subject to any legal limitations) request that their identity not be disclosed to others, or make a report in which their identity is revealed to relevant parties.

The OLSC will collate, monitor and analyse information provided via these reporting channels. Reports may also trigger compliance audits of law practices and (subject to the wishes of those making reports and the requirements of procedural fairness) disciplinary investigations of individual lawyers.

(iii) Using performance incentives to influence culture

Some stakeholders suggested that employers could use remuneration and other incentive strategies to positively influence worker behaviour (especially for leaders) and create a more respectful workplace culture that discouraged sexual harassment.

For example, the Commission heard that employers can identify 'respect for others' as a key organisational value and provide for a performance assessment and remuneration program that assesses worker behaviour against that value. By rewarding respectful behaviour, and penalising disrespectful behaviour, employers can provide a powerful (financial) incentive for workers to engage in respectful behaviour and help create a more respectful workplace.[123]

The Harvard Business Review suggested:

> Organisational leaders should strive to calculate actuarial costs of sexual harassment in their institutions—in terms of accumulated absences, lost productivity, compromised hiring and retention, legal costs, and reputational harm, and report those costs to their board of directors/trustees. Leaders' compensation should be tied to decreasing these costs. To the extent possible, executive teams need to make these costs transparent, so that investments in prevention of harassment are understood to be cost effective.[124]

The Commission heard that there was opportunity to incentivise businesses more broadly to improve their culture and approaches to workplace sexual harassment, through the use of industry, state or federal awards and recognition programs. Examples of existing gender equality and diversity award and recognition programs include the WGEA Employer of Choice citation (see Section 6.2(b)(iii)), the Australian Human Resources Institute Workplace Diversity Awards,[125] the Australian Public Service Diversity and Gender Equality Awards,[126] the Engineering Gender Diversity Awards,[127] and the Science in Australia Gender Equality (SAGE) and Athena SWAN Awards.[128]

The Commission was also told about industry-based incentives that have been adopted to drive cultural change in the entertainment industry:

> [O]ne of the things that Screen Australia did was they said 'we are now going to attach finance to this [sexual harassment] policy so if you create a film and we are funding that film and you've breached this policy, you can have your funding removed.' So they gave it some stick at the end of that as well.[129]

(iv) Culture and gender equality

Section 3.4, 'Cultural and systemic drivers of sexual harassment in the workplace', considers the role of gender inequality as a key driver of workplace sexual harassment. The Commission heard that employers need to focus on addressing gender inequality to create a positive workplace culture where sexual harassment is not tolerated.

NOW Australia noted: 'Workplace cultures can promote gender equality, reducing the risk of sexual harassment, or they can reinforce negative attitudes towards women.'[130]

The Commission heard that in workplaces where gender equality was valued and there were more women in leadership roles, this changed the tone of a workplace, informed its approach to addressing, and increased its immunity to, workplace sexual harassment.[131]

Our Watch recommended that 'all employers should develop and implement strategies to prevent sexual harassment (and other forms of violence against women) by addressing the four gendered drivers of violence against women'.[132] It also suggested that, ideally, strategies on sexual harassment should be part of a broader gender equality strategy.

The Commission heard about resources designed to assist workplaces to develop gender equality strategies, with the aim of preventing workplace sexual harassment, including:

- Our Watch's Workplace Equality and Respect Standards, which encourage workplaces to challenge gender stereotypes and build support for change, and to implement effective systems to respond promptly to complaints of violence and sexual harassment.[133]
- The WGEA Gender Equality Strategy toolkit, which focuses on sex-based harassment and helps organisations 'to diagnose performance, set goals and build a comprehensive gender equality strategy'.[134]
- VicHealth's Equal Footing toolkit, designed to help workplaces to promote gender equality and respectful relationships.[135]

Case study:

Our Watch's Workplace Equality and Respect Standards[136]

Our Watch has developed a set of standards to support workplaces to take action to prevent violence against women. The Workplace Equality and Respect (WER) Standards are freely available and all Australian employers are encouraged to adopt these standards in their workplaces.

The WER Standards confirm an organisation's commitment to gender equality and provide a flexible and adaptable guide for workplaces to follow, with the aim of ensuring that all staff are held accountable for promoting a culture of gender equality and respect.

The WER Standards address the four drivers of violence against women, outlined in the national framework to end violence against women, *Change the story*. The WER Standards encourage workplaces to challenge gender stereotypes, promote women's equality at all levels of the workplace and build leadership support for change. They also provide guidance to workplaces on implementing systems to respond appropriately to staff experiences of sexual harassment, family violence and other forms of violence against women. The WER Standards read:

1. We are committed to preventing violence against women and have structures, strategies and policies that explicitly promote gender equality.
2. We embed gender equality in our recruitment, remuneration and promotion processes and men and women utilise flexible work options, without penalty.
3. All staff feel safe and confident to express themselves, and gender stereotypes, roles and norms are actively challenged in the workplace. Staff can raise concerns about gender inequality and potential discrimination without adverse consequences.
4. We have the structures, practices and culture to ensure an appropriate response to staff and external stakeholders who experience violence, bullying and sexual harassment.
5. We demonstrate our commitment to gender equality and the prevention of violence against women in all our work and interactions with stakeholders.

(v) Diversity and inclusion in workplace culture

While gender inequality is a key driver of sexual harassment, the Commission heard that other forms of discrimination intersect with sexual harassment, increasing the risk for certain groups of workers.[137]

As discussed in Section 3.5, 'People who experience sexual harassment in the workplace', young workers, people with disability, lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) workers, migrant workers, workers from culturally and linguistically diverse (CALD) backgrounds and Aboriginal and Torres Strait Islander workers are likely to experience sexual harassment at higher rates than other workers. The way they experience it may also differ, with implications for measures taken by employers to prevent and respond sexual harassment in the workplace.

Diversity Council Australia told the Commission that employers should consider the specific experiences of different groups of workers in any measures they take to set a workplace culture where sexual harassment will not be tolerated.[138] It recommended that employers 'focus on workplace inclusion as a key part of any prevention framework' and 'utilise evidence-based guidelines to build inclusive organisations, and train inclusive leaders'.[139]

(vi) Addressing backlash and achieving buy-in

As discussed in Section 4.3(g), 'Dealing with backlash', cultural change initiatives, including initiatives aimed at achieving gender equality in the workplace, may be perceived as unfair and met with a negative or hostile reaction known as 'backlash'.[140] Attempts to achieve gender equality and reduce sexual harassment in the workplace have led, in some cases, to male workers and leaders withdrawing from their female colleagues, out of fear that an allegation of sexual harassment will be made against them.[141]

Several submissions recommended that employers prepare for backlash as they introduce gender equality and sexual harassment strategies in the workplace, in an attempt to positively change culture.[142]

VicHealth and Male Champions of Change have identified and developed resources to provide employers with practical guidance on managing backlash to gender equality in their workplaces.[143] The Commission also heard about the steps that Victoria Police took to prepare for backlash, when implementing workplace changes in response to the Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) review into sexual harassment including predatory behaviour in the force.

Case study:

Tailoring a strategy to meet possible backlash—Victoria Police[144]

In 2015, VEOHRC published its Phase 1 report on its review into sexual harassment in Victoria Police. The report warned of possible backlash, stating that 'a careful and comprehensive employee engagement process' was needed 'to ensure that women are not targeted, ostracised or discriminated against' while Victoria Police implemented the review's recommendations.[145]

Victoria Police took a number of steps to avoid backlash. It established a unit to support and advocate for victims, new counselling services, a Diversity and Inclusion Framework, Gender Equality Strategy and Action Plan, Women in Policing Advisory Group, and training for all leaders and managers. It also ensured that regular workforce 'pulse checks' (surveys) tracked shifts in reporting culture and confidence in management, helping identify resistance factors so that tailored materials could be crafted for those areas. A peer-to-peer mentoring program for middle managers, and senior leadership engagement in leader-led conversations also helped address resistance.[146]

The Commission also heard concerns that addressing sexual harassment as a gender equality issue may cause men in the workplace to feel blamed, and therefore unwelcome to engage in discussion or contribute their perspectives.[147] For example, Consult Australia warned that:

> The conversation about gender equality, and subjects such as sexual harassment in the workplace, too often does not include men in the room, or worse by naming and shaming inappropriate behaviours without consideration of how our culture contributes to, and upholds them. By not authentically engaging with men, we run the risk that measures to overcome sexual harassment will create backlash and potentially cement traditional views.

These issues were discussed in a 2019 report on increasing male engagement in gender equity initiatives by Bain & Company, which noted that men are apt to engage when they realise that gender parity can positively impact business outcomes (including for example greater retention, higher levels of employee advocacy, overall better performance and faster growth) and deliver benefits to all workers, not just women.[148]

This highlights the importance of ensuring there are initiatives designed specifically to ensure men are educated about the numerous benefits of gender equality. The case study below provides an example of an Australian gender equality program designed specifically for male managers.

Case study: Engaging Men Action Group—Consult Australia's Male Champions of Change

The Engaging Men Action Group aimed to foster gender equality across several Consult Australia firms through a half-day, interactive session for male leaders in construction, using a 'personal, experiential strategy informed by cultural transformation, engaging men and brain neuroplasticity research'.

The program gave participants the opportunity to virtually experience everyday sexism, using real life stories from women across the industry. Participants were also asked to reflect on how beliefs are formed on the role of men and women at work, at home and in society. Consult Australia advised that, through the program, participants gained 'a deep appreciation of, and genuine commitment to overcoming barriers such as everyday sexism'.

At the end of the session, participants made personal commitments to support gender equality at work and a greater work-life balance, including to:

- 'ditch the "boys' club" mentality' and introduce social events inclusive of both men and women
- 'ask the team to call me out if they witness sexist language or behaviour and give me permission to do the same with them'
- 'highlight female contributions, be more collaborative, less directive'

Consult Australia said the participatory nature of the program led to greater personal commitment and buy-in among those who took part. After the program, male leaders reportedly showed greater support for initiatives that contribute to gender-equal workplaces, such as flexible work arrangements, unconscious bias training, recruitment and promotion targets, and pay gap redress.[149]

(vii) Policies and organisational culture

Conventional approaches to sexual harassment policies

Many employers told the Commission that one of the main ways they sought to increase awareness in their workforce about sexual harassment was by adopting a sexual harassment policy. The Commission heard that sexual harassment policies are a common (but not universal) feature in many large Australian workplaces though are less common in small workplaces.[150]

WGEA data showed that in 2017–18, over 96% of reporting employers (private sector employers with 100 or more employees) had formal policies or strategies on sexual harassment prevention and grievances.[151] However, WGEA data captures less than half the Australian labour force, and WGEA does not conduct any analysis on the nature or effectiveness of these policies.[152]

ACCI told the Commission that in small and medium-sized businesses, 'informal "common sense" processes and approaches preponderate',[153] and that 'both formality and informality can play a powerful role in ensuring workplace behaviours and conduct meets expectations'.[154]

The Australian Small Business and Family Enterprise Ombudsman noted that requiring all businesses to have a formal written sexual harassment policy and procedure might be an effective compliance mechanism for larger businesses, but would only serve to:

> limit the time small employers can spend in actually working with their employees and proactively addressing issues as they arise. The result would be to produce worse outcomes in practice and even act to mask those worse outcomes.[155]

However, overall the Commission heard that policies form an essential part of any workplace plan to address sexual harassment, provided they are evidence-based, implemented effectively and accompanied by a suite of preventive measures.[156]

While workplace policies and prevention strategies have limitations, they are considered a 'minimum benchmark' for prevention of workplace sexual harassment and 'have a greater capacity to change attitudes and behaviour than relying on legal protections alone'.[157]

Content of policies

Australian and international reports, and submissions to this Inquiry, have discussed how policies on sexual harassment should be framed, developed and implemented.[158] The Commission has previously produced resources for small, medium and large employers which include some of the key elements of sexual harassment policies.[159]

Australian and international good practice has indicated that where workplaces have written sexual harassment policies, they should include some core content, including:

- recognition that sexual harassment is unlawful and unacceptable
- application to workers at all levels, including leaders and managers all the way to the CEO and the board, as well as others in the workplace such as customers, clients and contractors
- a clear definition of sexual harassment, with practical examples that include diverse groups of workers

- a definition of sexual harassment that includes online sexual harassment through digital technology
- recognition that sexual harassment is driven by gender inequality
- identification of the responsibilities of management and workers
- a clearly described and robust complaint process, investigation process, and range of sanctions that may be taken against harassers
- external reporting and support channels available to victims
- clear assurance that people who report sexual harassment will be protected against retaliation.[160]

The Northern Territory Anti-Discrimination Commission suggested that 'interactive policy development tools would assist organisations develop policies that work for their particular workplace'.[161]

Developing and implementing policies

The Commission heard about the way policies are developed, communicated and implemented and that the following measures may assist to ensure policies are well known and accepted within workplaces:

- Developing policies in consultation with both workers and employers may instil in workers a sense of ownership in the policy and greater familiarity with it.[162]
- Policies need to be easily accessible and workers told where and how to access them. Translation into other languages or accessible formats should also be considered to ensure accessibility for all workers.[163]
- Policies should be clearly written and regularly communicated to the whole organisation, in a variety of forms and methods if possible.[164]
- Policies should be regularly evaluated for effectiveness and refreshed as necessary, ensuring they refer to relevant contacts, up-to-date legislation and emerging risks, such as use of technology.[165]
- Managers and supervisors should be familiar with policies and discuss them with workers regularly and directly. This helps to increase awareness of policies and demonstrates to workers that their managers understand and value the policies, which may encourage workers to raise concerns.[166]

Criticisms and concerns about conventional approaches to sexual harassment policies

While, as noted, sexual harassment policies are common in many Australian workplaces (particularly large workplaces), many small businesses indicated that they did not have policies and did not feel that they were appropriate for their businesses. Some submissions and consultations observed that policies are not always effective in addressing workplace sexual harassment.

The NSW Bar Association cited evidence suggesting that having a policy alone does not make a material difference to reporting rates, although workplaces with both policies and training for workers have better outcomes.[167] Ai Group told the Commission:

> Simply creating policies and grievance procedures, while important for any business to have, often has limited effect on broader workplace change.[168]

Victims also told the Commission they experienced sexual harassment despite the existence of a workplace policy that prohibited it.[169] Some research has even suggested that policies can even be harmful where they are focused more on protecting employers from liability than assisting victims, for example, by preventing reporting to external organisations.[170]

Suggestions for new and better approaches to sexual harassment policies

In Australia, while most sexual harassment policies tend to be specific to workplaces, company and organisations, the Commission heard about the development and use of single industry-wide or sector-wide policies.

For example, the Commission heard about a recent industry-based model sexual harassment policy adopted in the entertainment industry by Live Performance Australia and Screen Producers Australia,[171] and industry-based anti-discrimination guidelines created for the NSW hotel and accommodation industry by the Australian Hotels Association of NSW and Tourism Accommodation NSW in partnership with the Anti-Discrimination Board of NSW.[172]

The Commission considers that there are a number of benefits to industry-based approaches to addressing sexual harassment, including the use of model sexual harassment policies that apply across all workplaces in an industry, profession or sector.

The use of industry-wide policies can encourage consistency across an industry and can help provide greater clarity for workers about the policies that apply to them at work. This may be especially useful given the changing nature of work and the trend towards increased mobility of workers and non-standard work arrangements (see Section 2.4, 'Changing nature of work', and Section 3.5(g), 'People in insecure work').

Industry-based approaches to addressing sexual harassment and the benefits they can offer Australian workers and employers are addressed further in Section 6.3.

The Commission notes that industry, profession or sector-specific policies will have the benefit of:

- being able to incorporate typical industry scenarios and systemic risks, using industry data, making it more tailored to the highest risk areas
- reducing confusion for workers moving between different employers within an industry, profession or sector, as they will know the same policy will apply across workplaces
- enabling creation of more practical guidance material, which will be more helpful to workers
- being of particular assistance to small and medium-sized businesses that lack the resources or expertise to draft their own policy.[173]

In the absence of industry-based policies and given that policies remain a central element of how many Australian workplaces address sexual harassment, the Commission understands that employers continue to want guidance on what to include in these policies.

However, the Commission also accepts that a written sexual harassment policy may not be appropriate for every business. In particular, some small businesses may not have the desire or resources to create their own business-specific written policy.

The practical reality is that small employers can communicate the important information contained in policies to workers without the use of a written policy, if they are committed to having clear, regular and open discussions with their workers about these matters, and supplementing this with simple written materials in the workplace (for example, stickers, posters or pop-up computer messages).

Employers can use technology (such as open access staff intranets and websites, and remote staff access to workplace systems and sites) to facilitate fast and easy access to policies for workers.[174] This can assist workers to access information about their rights, workplace processes and support available to them, without needing to identify themselves or speak with anyone in the organisation directly if they do not wish to do so.

Employers should also consider accessibility options, such as whether it is helpful for their workforce for policies to be produced in languages other than English, in simplified language, in online and hard copy formats or via open access intranets or websites.

Workplace sexual harassment policies have been a common part of the Australian workplace landscape for decades, and the Commission has concluded that there is ample good guidance material—provided by the Commission and state and territory human rights and anti-discrimination agencies—about how to draft and what to address in workplace sexual harassment policies. The Commission sees merit in consolidating this material for ease of reference by employers and recommends that this be done via the *Respect@Work* platform (see Section 6.4(d)).

(viii) Human resources practice and culture

Human resource practice is critical to both achieving and reinforcing organisational culture. There are a range of activities that employers can undertake at the front end of the human resources cycle to prevent sexual harassment or reduce the risk of it occurring in their workplaces. These are considered below.

Screening candidates

As discussed in Section 3.6(e), 'Repeat harassers', some stakeholders expressed concern that people who had engaged in sexual harassment, in particular 'serial harassers', were able to be employed, and even promoted, sometimes despite an organisation knowing about their past. Some described them as 'rolling bad apples'.[175]

Some submissions suggested that employers should take active steps during the recruitment process to prevent or reduce the risk of workplace sexual harassment occurring by using a system to 'screen out' job applicants with a history of engaging in sexual harassment.[176]

Currently, employers can request police checks and lawfully screen out applicants who have a criminal record, as long as it is relevant to the requirements of the position they are applying for.[177] However, unlawful sexual harassment which does not constitute an offence will not be revealed in a police check.

Some stakeholders suggested additional screening processes be introduced in industries where clients or workers are at higher risk of sexual harassment.[178] One example was requiring Working with Children Checks for supervisors and managers of workers below the age of 18.[179]

In 2018, the United Nations (UN) introduced a sexual harassment screening database, known as 'ClearCheck'. The 'ClearCheck' database can identify individuals whose working relationship with a UN organisation ended, either because they were found to have engaged in sexual harassment, or they left while a sexual harassment investigation and/or disciplinary process was pending.[180]

Reference checking

During the recruitment process, employers may also seek to reduce the risks associated with hiring a person with a history of sexual harassment and convey the importance to them of a harassment-free workplace by properly checking applicant references and asking questions to elicit information relevant to sexual harassment. This might include information about a candidate's people management and interpersonal skills, or support for gender equality and respectful behaviours, for example, through questions about an applicant's values and their understanding of anti-discrimination laws.

Induction

The Commission also heard that induction of new workers provides an important opportunity for employers to set standards and expectations for workplace behaviour. In small businesses, owners or managers can play a direct and immediate role in this process by meeting with each new worker to explain what is acceptable and unacceptable behaviour, express the organisational commitment to ensuring safe and respectful workplaces, and explain how to get help.[181]

In workplaces of all sizes, induction processes can pre-emptively address sexual harassment by taking new workers through relevant policies and codes of conduct, as part of ongoing reinforcement of the importance of cultures of respect.[182]

The Royal Commission into Institutional Responses to Child Sexual Abuse highlighted the importance of codes of conduct in setting clear behavioural standards within businesses.[183] As Ai Group submitted 'more employers are hiring and firing on a strong overarching code of conduct. In doing so, employers are claiming ownership of how they expect their employees to behave and enforcing accountability.'[184]

(ix) Key learnings for employers

Ensuring that workplaces have an inclusive and respectful culture is essential to ending workplace sexual harassment. There are steps that organisations of all sizes can take to assess and improve or create a respectful workplace culture that values gender equality and diversity and minimises the risk of sexual harassment occurring, and ensure that if it does occur, people are supported to speak up and it is addressed in an effective way that minimises harm to workers.

To shape workplace culture, employers must first assess the existing culture in their workplace—they need an understanding of existing organisational values and behaviours and whether they tend to support or reduce the risk of sexual harassment occurring. They can assess organisational culture in a range of different ways, suitable to the size and nature of their workplace, including identifying the positive aspects of a culture. For example:

- In small businesses, culture can be assessed by owners or leaders talking to staff about values and respectful behaviour at work, identifying concerns about workplace behaviour and culture by observing how staff interact with each other and customers, and monitoring staff and customer complaints.
- In larger businesses, assessing culture may involve conducting staff surveys, focus groups or workplace observations, to determine whether worker behaviour and operations in the business align with stated business values and promote workplace equality and respect.

A range of different levers are available to influence positive aspects of culture and address risks, including:

- building leadership capability and engagement around organisational values, gender equality and diversity
- engaging workers through education, interaction, performance management and remuneration systems
- recognising and rewarding positive behaviour, and acting on aberrant conduct
- supporting a speak-up culture.

Policies alone will do little to raise worker awareness about sexual harassment. However, when policies include appropriate content and are inclusive and accessible to all workers, they can assist in ensuring gender-equal, respectful, inclusive workplaces.

(d) Knowledge

The fourth domain in the workplace framework for addressing sexual harassment is knowledge. This relates to workplace education and training on understanding sexual harassment and how to prevent and respond to it (sexual harassment education and training). Workplace education and training can help address sexual harassment in various ways. They can demonstrate an employer's commitment to addressing harassment and can initiate change by developing a collective understanding of expected workplace behaviours and processes.[185] However, conventional approaches to workplace training have not worked to address sexual harassment.

(i) Conventional approaches to sexual harassment education

The Commission heard that many small employers did not provide formal training to workers about sexual harassment. Where workers in small businesses did receive 'training', it was likely to be informal and involve discussions between workers and business owners, rather than formal presentations or structured training activities (see Section 3.7(f), 'Small businesses').

The Commission is aware that the cost of sexual harassment training, particularly face-to-face training, is a key concern for small businesses and not-for-profit organisations.[186]

Where employers did provide training to workers, it was typically standalone, structured or formal compliance training, directed specifically to sexual harassment (commonly alongside other forms of workplace misconduct, such as bullying and unlawful discrimination). This is referred to below as 'conventional sexual harassment training'.

The Commission heard that conventional sexual harassment training typically focuses on sharing information with workers on what constitutes sexual harassment, that it is prohibited and how to report it. Proof of training is used to avoid employers' legal liability.[187]

The Commission heard that training was commonly conducted online, as this was often a cheaper and more flexible option than face-to-face training.[188] Workers also frequently mentioned that they received training when they commenced work (as part of a general program of workplace induction training), and then annually (at best) or only every few years.[189]

Some stakeholders told the Commission they found training helped to ensure workers' understanding of policies and drive home practical lessons about the types of behaviour that were and were not acceptable in a workplace.[190]

They also said it could help address sexual harassment by demonstrating an employer's commitment to a respectful workplace, and by developing a collective understanding of expected workplace behaviours and processes.[191]

The efficacy of workplace training can depend on how it is delivered and whether it stands alone or is supported by a holistic strategy. The Commission's 2017 *Change the course: National report on sexual assault and sexual harassment at Australian universities* noted that although training alone is not a guarantee of behavioural change, it can be effective in addressing attitudes and norms.[192]

VicHealth similarly observed that training alone is unlikely to produce change;[193] while other research has suggested that it should be conducted as part of a holistic approach to sexual harassment, rather than as a stand-alone activity.[194]

Research on the efficacy of workplace sexual harassment training is limited, both domestically and globally.[195] Some submissions recommended that further research be undertaken on workplace education and training.[196]

Research has found that conventional sexual harassment training programs may be useful in leading workers to be more sensitive to the issue of sexual harassment;[197] that it can improve attitudes towards sexual harassment;[198] and that it can be effective when part of a holistic program to address sexual harassment in workplaces.[199]

(ii) Criticisms and concerns about conventional approaches to sexual harassment training

Some stakeholders criticised conventional sexual harassment training provided by employers. They said it made 'no difference' to the conduct of workers in the workplace;[200] that mandatory training was merely a 'tick the box' compliance exercise, designed to protect employers from legal liability and that workers did not take it seriously;[201] and that training (typically conducted when a worker commenced work and then every one or two years afterwards) was not conducted regularly enough.[202]

These concerns are echoed in international research and commentary, which has criticised conventional training methods for focusing on legal compliance and avoiding legal liability for sexual harassment, and business leaders for failing to enquire whether training is effective in reducing harassing behaviour in the workplace.[203]

The Commission considers that the conventional training approaches to date have largely been misconceived—focusing on delivering information about definitions of sexual harassment, prohibited conduct, complaint procedures and punitive consequences for those who engage in sexual harassment.

Consistent with this, a 2019 UN Women discussion paper referred to studies suggesting that conventional 'fear-based' training, which focuses on punitive responses to sexual harassment, has limited impact. It observed that a model of training that focuses 'on prohibition, policy and procedure' is inadequate as it 'misses the mark, failing to address equality and respect, additionally failing to change the culture'.[204] The paper also noted that conventional sexual harassment training 'which focuses only or primarily on sharing information or limiting liability cannot be expected to bring behavioural change'.[205]

Some research has also suggested that conventional training in some cases can make the problem worse or trigger other problems in the workplace.

Behavioural science involves the study of how human nature (psychological, cultural, social and emotional factors) can cause people to make irrational decisions or behave in counterintuitive ways.[206] Behavioural design suggests ways to change systems and processes, to make it easier for people to make rational decisions and motivate them to change their behaviours in the desired way.[207]

For example, it may seem rational to assume that providing all staff with mandatory sexual harassment training will increase staff awareness about what sexual harassment is, that it is prohibited and that there are adverse consequences of them engaging in it in the workplace—and that this will ultimately help reduce the risk of sexual harassment.

However, some researchers have suggested that mandatory workplace diversity and sexual harassment training may be perceived negatively by some staff as an attempt by their employer to coerce their commitment to diverse, respectful workplaces.[208] To counteract this effect, one study suggested positioning training as a business-driven initiative, designed to assist workers and managers, rather than as an externally mandated legal compliance activity.[209]

Research has also indicated that conventional training can have unintended, undesirable consequences, including reinforcement of stereotypes and generating backlash by men against women (with this effect strongest among men committed to traditional gender norms).[210] One study suggested that this backlash may arise because conventional sexual harassment training may make some men feel threatened and afraid they will be subject to false accusations, and as a result they may respond in a defensive manner.[211]

One strategy suggested to avoid the reinforcement of stereotypes is to ask workers attending training to 'practice behaviours that increase contact with and empathy for members of other groups'.[212] Strategies for addressing backlash are considered in Section 6.2(c)(vi).

(iii) Suggestions for new and better approaches to sexual harassment education

In submissions, consultations and recent research, the Commission identified a range of new approaches and ideas for sexual harassment education and awareness raising, which suggest better and more effective ways to educate workers.

Targeted education in the workplace

Sexual harassment education and training should be inclusive and accessible to all workers, and accommodate the particular needs and experiences of the particular workforces or groups in a workplace, including women, men and gender-diverse/non-binary workers.[213] There are specific groups in workplaces who require or may benefit from special or targeted sexual harassment education.

In the context of awareness-raising and education in the workplace, male workers told the Commission in consultations that training sessions had been an effective way to learn more about sexual harassment and gave greater clarity and context to incidents they observed or were involved with in the workplace.[214]

They also said that education programs—designed to include components delivered separately to groups of men and women, before joining the groups together to reflect on their different insights and what they had learned—differed markedly to the conventional training they had previously attended and were more engaging and impactful than 'traditional "this is the policy" training'.[215]

Stakeholders spoke about the value of creating 'safe spaces' for men to have open discussions and improve their understanding about the causes, nature and impact of sexual harassment, without fear of offending others, appearing ignorant or being penalised for their views and observations.[216]

Cohorts of workers who are at higher risk of experiencing workplace sexual harassment—such as younger workers, workers with disabilities, migrant workers and Aboriginal and Torres Strait islander workers—should also be recognised in education initiatives and may benefit from educational materials being tailored to address their needs.

Employers can and should also consider how other workers who may not traditionally have been included in workplace training programs, including casual staff, contactors, consultants or expert advisers, customers and labour hire staff, are provided with adequate sexual harassment education.

People managers and those charged with responsibility for managing sexual harassment complaints will need special education to understand their role and responsibilities. In particular, they should receive education on how to receive reports of sexual harassment and appropriately triage them where necessary, to ensure no further harm is caused to workers through the manner and method by which their report is taken.[217]

Direct line managers, small business owners and CEOs of large companies all need people management skills to equip them to address sexual harassment. Board directors need knowledge and skills to enable them to properly perform their governance role. To facilitate this, the Commission recommends that further educational programs be developed for board members and company officers on good governance in relation to gender equality and sexual harassment (see Section 6.2(a)(iii)).

As specialist advisers (such as human resources professionals, contact officers, independent workplace investigators, lawyers, WHS advisors and media advisers) are the people that most commonly support employers to address sexual harassment, they need to be equipped with appropriate skills to allow them to prevent and respond to workplace sexual harassment effectively, in a victim-centred and trauma-informed way.

Bystander intervention training

Bystanders are individuals in a workplace who see or hear about incidents of sexual harassment.[218] Bystander intervention strategies are designed to encourage people to act in response to workplace sexual harassment when they see or hear about it, in order to help prevent it and reduce the harm it causes. Bystander skills development is especially important for managers as these same skills equip them to act when an event occurs that requires their response.

Bystander interventions can include a variety of responses, such as talking or listening to the target of sexual harassment, reporting the harassment, speaking with the harasser, contacting authorities, removing the harasser or directing them to leave the premises.[219]

Bystander intervention training has been identified as a useful form of sexual harassment education and awareness raising. While research has suggested that bystander training is more effective than conventional training in achieving positive behavioural change and in increasing the likelihood of workers intervening when they see or hear about sexual harassment, further research is required to assess its effectiveness in reducing the prevalence of workplace sexual harassment.[220]

Conventional sexual harassment training, focused on identifying prohibited conduct and punishment, can polarise workers and in particular alienate men (who may perceive they are only being viewed as potential harassers). However, bystander training treats all workers as potential allies, who have the ability to intervene to stop sexual harassment or reduce the extent of harm it causes.[221]

To equip bystanders, the Commission heard that it was vital to provide them with:

- practical education and guidance on what sexual harassment looks like in their workplace
- knowledge on how they can intervene to stop and prevent it
- understanding the importance of them doing so
- the protections available to them if they act.[222]

The Commission heard about some employers who currently conduct bystander training,[223] and resources available to assist with bystander approaches. VicHealth has developed a range of tools and resources to enable organisations to encourage more positive bystander actions and create cultures that support respect and equality.[224]

Diversity Council Australia recommended that employers empower bystanders to be agents of change by 'asking questions such as, "How could we let this happen?" and "How can we prevent it from happening again?"', and 'providing bystanders with the words to challenge a harasser such as, "What you said earlier really bothered me" or "I wonder if you realise how that comes across?"'.[225]

One employer told the Commission about a strategy in their workplace, in which workers were encouraged to take action as bystanders by using the simple phrase, 'Say again?', to call out inappropriate behaviour, 'giving people an opportunity to correct their behaviours themselves'.[226]

The Commission sees bystander intervention programs as a promising way for employers to drive positive behavioural change in their workplaces in relation to sexual harassment, including for managers.

Education and support for workplaces on how to have conversations about sexual harassment

As noted above, workplaces with cultures of respect and trust can help prevent sexual harassment. One important way to develop greater trust in workplaces involves establishing open communication channels between workers and people managers (including business owners in small businesses). Being able to engage in open and respectful conversations with staff about challenging topics is an important skill for managers and one that can be developed and supported through education and training.

The Commission considers that to better address workplace sexual harassment, it is essential to normalise discussion about preventing sexual harassment in the workplace. Workplaces can utilise simple approaches adopted in the WHS space to help them do this. These approaches have proven to be effective in normalising workplace conversations about safety, driving a more positive safety culture and assisting to educate workers about the importance of WHS harm prevention.

Effective workplace WHS education, particularly in higher-risk workplaces, is often achieved through simple, regular, open discussions and reminders about safety risks and risk management approaches. Daily 'toolbox talks' are a common feature of this approach. These involve direct supervisors and line managers conducting informal discussions on safety issues with their teams at the start of work, as part of 'business as usual' daily operations.[227]

While formal safety policies and procedure documents may be developed and communicated to staff, these policies and procedures are 'brought to life' through constant discussion within the workplace. To ensure a better understanding of what constitutes sexual harassment and a better appreciation of the risks associated with it, it is essential that similar conversational approaches are adopted.

Another example of a simple and practical educational resource designed to support managers to discuss sexual harassment with staff is the 'Have your say' Conversation Toolkit designed by the Commission.[228]

Case study:

The Commission's 'Have your say' Conversation Toolkit[229]

The Conversation Toolkit was designed to facilitate workplace discussions about sexual harassment and generate input to the Inquiry. The Conversation Toolkit sets out the following four questions, designed to generate open discussion among staff about the prevalence and prevention of, and responses to, sexual harassment in the workplace. Conversation prompts are included for each question to assist facilitators to lead the discussion and gather staff views:

What do you think are the causes of sexual harassment? Are there particular places or times where sexual harassment is more likely to occur?

How do you think sexual harassment in the workplace can be prevented: what works, what doesn't work?

When sexual harassment occurs organisations can respond in a number of ways. If an incident of sexual harassment occurred in your workplace, what it is the response you'd like to see? What can go wrong?

What outcomes or recommend-ations would you like to see from this National Inquiry?

New digital educational and training resources and approaches

Technology is increasingly being used to assist in addressing workplace sexual harassment.

Technological solutions have been employed to improve and expand methods for reporting sexual harassment (see Section 6.2(f)(iv)) and the Commission has also learned about ways that technology is being used to change the way sexual harassment education and training is offered to workers.

As noted above, online sexual harassment training is now common in workplaces in Australia and internationally. Training modules using text, video and interactive assessment components are widespread and such products can be purchased from many commercial training providers as either 'off the shelf' or custom-designed products.[230]

Virtual reality training initiatives designed to address and prevent workplace sexual harassment are also being developed.[231] Their developers suggest that virtual reality, by placing users in the shoes of others, can engage users empathetically and promote behavioural change more effectively than other training methods and formats.[232] While the Commission is not aware of any independent evaluations of the effectiveness of such initiatives, they demonstrate the potential of technology to offer new workplace training options.

Computer games may be another way technology can be used to deliver education and training. The Center for Interdisciplinary Inquiry and Innovation in Sexual and Reproductive Health at the University of Chicago has developed a computer game as part of a sexual violence prevention program designed for students, to promote discussion and education about sexual harassment and sexual assault.[233] The game draws on behavioural theories, and is 'designed to promote the skills, attitudes, and awareness that empower adolescents to help end sexual violence'.[234]

Evaluation of the game is ongoing, but initial results from a small sample of users in the initial pilot indicate that users agreed it presented valuable information and that programs like this assisted young people to be active bystanders.[235] While this game was used as an educational tool in a school setting, games or interactive programs of this nature may have broader application in workplace settings.

'Chatbots' are another digital tool that may be used to provide education and training. The Victorian Equal Opportunity and Human Rights Commission developed a chatbot as part of its *Raise It!* program, to provide education and information about topics including workplace sexual harassment.

Case study:

Using chatbots to educate and guide workers on workplace sexual harassment[236]

VEOHRC recently piloted a workplace training program called *Raise It!* This program is designed to support and equip Victorian workers to have safe conversations about sexual harassment, pregnancy, parental leave and access to flexible work.

The *Raise It!* program included the development of an interactive digital sexual harassment support and response 'chatbot' tool, to provide support and resources to users about workplace sexual harassment.

The chatbot identifies support pathways users can access if they experience workplace sexual harassment and provides 'evidence-based suggestions' for supporting colleagues who are victims of sexual harassment, for 'calling out' sexual harassment and for reporting workplace 'culture issues … in a way that protects victims of harassment'.

The chatbot provides a range of topics or issues for users to choose from and then generates support options and prompts for ways that users can discuss these issues with others, if they wish.

The chatbot is accessible 24/7 from a mobile device and is completely anonymous. It does not require workers to sign-in to access it, nor does it record any personally identifying information. This anonymity feature is emphasised to workers during face-to-face training sessions, where they are guided through what the chatbot is and how to use it.

Industry-based sexual harassment education

The Commission supports the creation and use of high-quality industry, sector and profession-based education campaigns and resources to deliver consistent training to all workers across an industry, sector or profession. These should be tailored to reflect the particular workforces and work environments, challenges and risks of the relevant industry, sector or profession. These types of 'industry-wide' initiatives create opportunities to offer greater access to consistent, quality education to all workers across an industry. Industry-based approaches are discussed in Section 6.3.

By focusing on initiatives that apply across industries, professions and sectors, uniform education can be offered to different types of workers regardless of the nature of their work arrangements. For example, ongoing employees, independent contractors and labour hire staff within the same industry can all be offered the same educational programs. This will help facilitate greater consistency in education across worksites where there may be different types of workers working together, but under multiple working arrangements.[237]

Education for small and medium-sized employers

The Commission recognises the concerns raised by small employers—that they do not have the time or resources to provide formal training programs for their workers. However, training and educating a workforce does not need to involve a formal process, with sophisticated training materials and presentations or online tools. While such approaches may be appropriate in larger businesses, the Commission accepts that they are not essential or appropriate for all businesses.

The Commission considers that effective training and education of workers in a small or medium-sized business may simply involve:

- direct and regular conversations with workers about what constitutes sexual harassment (using examples relevant to the workplace)
- a clear message from the 'top' that it is not tolerated
- clear information about what to do if it occurs to them or someone else in the workplace (which can be as simple as an owner telling staff to come and speak to them about any concerns, and discussing bystander intervention strategies they can use)

- the use of simple written materials in the workplace to reiterate and reinforce the key information about sexual harassment outlined above—such as notices, posters, stickers, screen savers, computer pop-up messages and emails.

(iv) Best practice sexual harassment education and training structure, delivery, methods and content

A 2019 UN Women discussion paper provides valuable guidance on current best practice approaches to sexual harassment education and training. The paper observed that 'state of the art' training:

> understands the climate in each organization, recognises that culture change requires interactive and experiential training methods from trainers with sexual harassment expertise, acknowledges that single sex sessions might have a role [and] commits to maintenance of learning and engagement over time.[238]

The discussion paper concluded that training can be an important tool to drive positive cultural change on equality and inclusion in an organisation, which can, in turn, help prevent and improve responses to sexual harassment. However, to achieve this goal, it is vital that training not be viewed in isolation—instead it must be 'conceived and practiced as part of a process of organisational change', of the construction of respectful and non-discriminatory workplaces, and as a 'tool for establishing collective ownership of that process of change'.[239]

The discussion paper suggested that training be positioned as simply one aspect of a broader cultural change program, which should begin with a consultative process of 'roundtables' designed to establish shared organisational values and objectives, and 'audits' designed to assess the prevalence, nature and support for sexual harassment in the organisation. Training is suggested as the tool to then move from an organisation's audited current practices to the aspiration of a workplace free from sexual harassment.[240] This is consistent with approaches previously advocated by the Commission and supported in submissions to this Inquiry.[241]

The UN Women discussion paper outlined current best practice training structure and delivery, methods and content, as summarised in Table 6.1 below.[242]

It is important to emphasise these are current best practice approaches—and not all aspects may be appropriate for employers. However, they do provide a helpful indication from an international perspective of the best standards for sexual harassment training and the Commission considers them a useful guide for employers.

Table 6.1: Summary of UN Women review of sexual harassment training evaluations[243]

Structure and delivery:

1. Training should run over one or two days, with the same duration and content for all staff.
2. Training should be compulsory and offered to all new joiners.
3. Workers, managers and leaders should all participate regularly and seriously.
4. Trainers should have expertise on sexual harassment, inequality and discrimination and the skills to engage with complexities.
5. Training should be an embedded part of an organisational commitment to cultural change, conveyed by leadership and practised by all.
6. Follow-up micro-training should be conducted to maintain commitment and trace change at the individual level.
7. Consider whether training in assertiveness and/or self-defence may be relevant for women especially those with client or customer facing roles.

Method:

1. Training should be conducted face to face.
2. Participation should be active; participants to engage with what they know and think they know.
3. Consider whether the training should be single sex, and how to address the range of cultures within an organisation.
4. Encourage debate and discussion, and create space for questions, doubts, concerns.
5. Provide space for reflection and revision of positions.
6. Explore and address resistance from women and men about sexual harassment policy and training.
7. Experiment with new and original approaches.

Content:

1. Useful, relevant and up-to-date materials need to be created, for the specific context.
2. There should be strong links between the content and intended impacts and outcomes.
3. Case studies should be authentic, linked to the organisation, and used to explore what difference it would make if the parties had different characteristics, for example, in terms of age, sex, race/ethnicity, sexuality.
4. They can also be based on examples of where processes did not work. This enables consideration of what could or should have been done differently.
5. The content should be immersive and safe, with a focus on new ways of thinking and acting rather than right answers.
6. Explore social and sexual ethics in the workplace explicitly, what is and is not acceptable and how to judge if behaviour may be unwelcome.
7. Present a range of options for action other than formal reporting—e.g. collective ownership of change, first responder options, support for victims, and questioning the behaviour of harassers. Role plays are often useful for practising different ways of acting, especially if time is taken to explore what it felt like for the intervener, for the victim and for the harasser.
8. When promoting first responder interventions, explore what could go wrong, what might be the barriers to intervening and enable alternative forms of action to be explored.
9. Include space for personal and group action plans: how people will become change makers.

(v) Key learnings for employers

Increased knowledge through education and training is an essential part of a suite of measures to address sexual harassment. A policy addressing sexual harassment cannot be effective unless it is brought to life for workers through appropriate and embedded education.

It is evident that most Australian workplaces to date have focused on conventional compliance training that is narrow in its scope and may be of limited effect in achieving the cultural and behavioural changes necessary to reduce workplace sexual harassment.

Industry, profession and sector-wide campaigns and training resources could be an effective way for small employers to educate staff. Alternatively, regular conversations with staff about sexual harassment, including using scenarios from the workplace, industry or current affairs, will demonstrate to workers that the small business owner prioritises a respectful workplace.

If workplace leaders normalise discussions about workplace sexual harassment, this sends a strong message to workers not only about expected standards of behaviour, but also that prevention of sexual harassment is a priority of their leaders. In the Commission's view, the normalisation of this issue through regular discussion in the workplace is a critical element for an effective workplace education program.

Other factors the Commission considers essential to good practice sexual harassment education and training programs include that:

- educational initiatives are part of a broader workplace commitment to cultural change, gender equality and inclusion, conveyed by leaders
- educational initiatives are innovative, engaging, interactive and, where possible, industry-based, comprising regular engagement with workers rather than single, standalone, annual information sessions
- different educational initiatives be accessible and tailored for different audiences, including managers and supervisors, boards, male workers, young people, LGBTQI workers, CALD workers, Aboriginal and Torres Strait Islander workers and workers with disabilities
- any education should be evidence-based and regularly evaluated, to ensure that it is effective.

Clear practical guidance and resources for employers are needed, to ensure they understand what constitutes sexual harassment and how they can increase their workers' awareness about sexual harassment. However, resources and materials produced need to be appropriately tailored to ensure that they are accessible to all workers and appropriate for businesses of all sizes.

In Section 6.4, the Commission recommends the creation of the *Respect@ Work* online platform, that collates practical resources (including policy and training materials) for businesses of all sizes to use, to support them in raising awareness in their workplaces about sexual harassment.

RECOMMENDATION 45:

Industry educational bodies, in consultation with the Workplace Sexual Harassment Council, develop accredited education and training for individuals in roles that are responsible for advising employers on addressing workplace sexual harassment. The training should aim to:

a. **build skills and capacity on how to prevent and respond to workplace sexual harassment**
b. **be trauma-informed**
c. **include content on the nature, drivers and impacts of sexual harassment.**

(e) Support

Support is the fifth domain in the workplace framework for addressing sexual harassment, and is critical when responding when sexual harassment has already occurred.

The Commission heard that some employers appeared to prioritise the protection of the business—its reputation, legal and financial position.[244] Employer strategies may tend to focus on responding to reports of sexual harassment after it has occurred, through formal, legalistic investigation procedures, rather than taking action to prevent the sexual harassment from occurring in the first place. Only offering workers protection from sexual harassment after it has occurred, and on the proviso that they report it, can cause additional harm to workers.

As Dr Purna Sen, Executive Co-ordinator and Spokesperson on addressing sexual harassment and other forms of discrimination, UN Women, observed:

> There is a narrative about sexual harassment that sees the primary victims being the organisation—which risks reputational damage—and alleged perpetrators, who claim that they are maligned because they would 'never' behave in such ways. It may well be right that organisations suffer damage and it is certainly true that sexual harassment impedes the mission of most organisations; that is why investment in the hard work of prevention and elimination matters. This means placing victim-survivors at the core of this work: listening, learning and changing the culture. This also means providing support, care and redress. Managers and leaders carry responsibility for these efforts.[245]

(i) Victim-centred responses

Taking a victim-centred, safety-driven approach to responding to workplace sexual harassment, that focuses on minimising harm to workers, can deliver significant benefits for both employers and victims. A victim-centred approach provides that 'the victim's wishes, safety and wellbeing take priority and shape any actions taken in their name'.[246]

UN Women has recently published guidance on the use of victim-centred approaches to respond to sexual harassment, reflecting best practice.[247] The information contained in this section draws heavily on that important and leading work.

Where procedures and practices in a workplace are developed and implemented with a victim-centred approach, this can make a significant difference to how confident and willing victims are to use organisational systems to report and address sexual harassment.[248] Adopting a victim-centred approach can improve the effectiveness of reporting systems and efforts to address workplace sexual harassment.

By designing and operating systems and processes that are more supportive of and focused on victims, employers can make it easier and more likely for victims to report. As Professor Catherine MacKinnon has observed:

> The people who are most abused are least likely to say so, they are the least likely to come to people in authority. It's a challenge that any procedure needs to begin with: to justify the trust of someone who has been violated by someone with power over them. It is not the case that survivors don't want to talk—it's a question of under what circumstances, to whom … It's our challenge to create these conditions.[249]

While sexual harassment is 'bad for business' and inconsistent with the stated values of many organisations, in Australia and many other jurisdictions around the world it is the organisation that is held responsible when workplace sexual harassment occurs. This means that may be in an organisation's legal interests to deny that sexual harassment has occurred, and 'begin a pre-emptive defence to possible legal liability'.[250]

However, in so doing the organisation effectively may be siding with harassers rather than victims. UN Women has noted that a victim-centred approach therefore requires 'reorienting corporate and educational culture to identify the interests of the entity with those of [victims]'.[251]

Taking a victim-centred approach, organisations recognise that it is the victim who suffers the primary harm when sexual harassment occurs—although the organisation is also harmed as a result—and situates the organisation on the side of the victim, 'making a common cause with them against [the harassment] that undermines them in common'.[252]

Principles of victim-centred work include:

- listening to victims without interruption; following their lead; ensuring that the language used when speaking with victims is neutral, free from judgement or bias
- ensuring that investigation protocols (including interviewing techniques and communications during the investigation process) are designed to minimise harm to victims and respect their preferences; prioritising safety, privacy and wellbeing of victims; never blaming victims for the harassment they have experienced
- anticipating the distress that sexual harassment causes and recognising and accommodating the fact that this may cause victims to temporarily or permanently withdraw from work life or employment.[253]

UN Women has identified nine core elements of a victim-centred approach to addressing sexual harassment:

1. Give control to the victim, to make or not make a report. If they do choose to report, allow them to do so at a time and in a manner appropriate for them.
2. Clarify issues of privacy and confidentiality as soon as possible and preferably before details are shared, so that victims are aware of how their report will be treated.
3. Ask and listen without judgement and show sympathy.
4. Keep the victim informed throughout any process and before any action is taken.
5. Ensure wellbeing, protection and safety of the victim, including understanding the trauma that victims can experience and how and when symptoms of that trauma may present.
6. Ensure timeliness in communications and investigations (if conducted).

7. Ensure equal treatment of the victim and the alleged harasser in any process, including investigation, including access to support, leave with pay, information and rights to appeal.
8. Offer the victim a range of administrative adjustments, should they wish, such as paid time off work or the option to temporarily work in another location away from the alleged harasser.
9. Make no assumptions about the truth or otherwise of the report. Convey an openness about what may have happened, which should include the possibility that the report is accurate. Importantly do not adopt the criminal justice system approach of beginning from an assumption of innocence of the accused.

It is important to recognise that engagements with victims can be supportive without the need to be conclusive about whether the alleged conduct has occurred or not. Issues relating to investigation processes are discussed further in Section 6.2(f)(v).[254]

The Commission notes that there was little discussion by workers or employers during the course of the Inquiry about guidance or support within workplaces being sought from, or provided by, experts in the field of trauma response (for example rape or sexual assault crisis counsellors or advisers). The Commission considers that the input of such experts is valuable and should be considered as part of a victim-centred response to workplace sexual harassment.

An example of a leading victim-centred response to sexual harassment, sexual assault and discrimination is the approach adopted by the Australian Football League under its Respect and Responsibility Policy.

Case study:

The AFL's Respect and Responsibility Policy[255]

The Australian Football League (AFL) Respect and Responsibility policy sets out the expectation that all people engaging with the AFL treat others with respect, and establishes a complaint process for those who experience disrespectful conduct in the form of sexual harassment, sexual assault or discrimination. The Respect and Responsibility is part of a suite of initiatives on gender equality and inclusion within the AFL.

In 2017, AFL published a new Respect and Responsibility Policy following an independent review of the operation of the 2005 policy. Significantly, the new policy shifted the focus of the complaint management from legal fact finding to victim welfare. The AFL implemented a number of changes that have significantly improved the outcomes of complaints for all concerned, including:

- Locating responsibility for complaints within the Integrity team, and appointing a specific Integrity Operations Coordinator with relevant expertise in dealing with sex offences, victim management and child abuse to handle respect and responsibility complaints.
- Establishing and publicising a new reporting platform under AFL.com for victims to make a complaint directly to the AFL Integrity Team (victims can also remain anonymous if they wish).
- Greater focus on victim welfare, including implementing a new more effective system to provide independent welfare support at three levels, covering referral to a counsellor, psychologist or psychiatrist, depending on need.
- Providing more open access to the Integrity team, including establishing a 24/7 response (mobile phone capability) from the Integrity team to take calls and respond to victims at any time of the day or night.

Tony Keane, AFL Head of Integrity, has observed that the change to a more victim-centric approach has produced better outcomes for the victims and is more cognisant of the welfare around all parties allegedly involved.

The number of complaints is higher than under the 2005 policy, reflecting the fact that victims now have more confidence to come forward when they believe the AFL will listen, support and guide them through this difficult journey in their lives. The AFL is now better equipped, experienced and qualified to manage sexual assault victims which has a direct influence on the number of people willing to make a report. Complaints are now being resolved more quickly, with higher satisfaction rates and less distressing media reporting causing harm to individuals.

Case study: The AFL's Respect and Responsibility Policy (continued)

Tony Keane has observed firsthand that many people just want to tell their story and do not wish to take it further. It is common for people who come forward to elect to receive welfare support only, and not to pursue their complaint through the Police or the AFL complaint process. Others have needed the welfare support over time, and then pursue their complaint when they feel well enough to do so. The Integrity team is happy to then pick the complaint up and take it forward when the victim is ready. Tony Keane has also seen that people are also really happy to receive an apology as the full resolution of their complaint.

To ensure the policy remains current and effective, the AFL Commission get an annual report on the number and nature of cases and the Integrity team work closely with the Inclusion and Social Policy team, who are responsible for coordinating industry-wide training and maintenance of the policy.

(ii) Providing support to workers when a report of sexual harassment is made

Given the significant impacts and harm caused by sexual harassment, and the further harm that workers can experience from reporting it, the Commission's view is that, consistent with their obligations under WHS laws, an employer's first priority on receiving a report should be to ensure the safety and welfare of the worker who has made the report, by providing them with suitable support.

Workers who experience or witness sexual harassment may need support dealing with the trauma of their experiences.[256] As noted above, because people who do report sexual harassment are most likely to report it to someone in their workplace,[257] workplaces are a critical source of information and support for these victims.

The Commission heard that a good reporting and response system should empower workers to report their experiences of sexual harassment, get the support they need, and feel confident that they will be taken seriously.[258] Those in the workplace with responsibility for receiving reports should support workers who make reports by listening to them with sensitivity and concern.[259]

Initial support for worker wellbeing when a report is made

Adopting this approach, in response to any report of workplace sexual harassment, an employer should first provide the reporting worker with information about, and access to, support designed to protect their safety and wellbeing.

This should be done before, or at least concurrent with, any discussion with the worker about options for responding to their report. Employer reporting mechanisms should reflect this priority and adopt practical steps to facilitate this.

In practical terms, individuals receiving reports must understand what support services are available to workers (inside and outside the workplace) and ensure that, as a 'first responder', the first step is to provide that support information to the worker. Ideally, information about and access to these support services should be available to all workers without the need for a worker to first raise a concern or make a formal or informal report to their employer. The worker should then be able to choose if they wish to pursue reporting options or they may feel that obtaining support is sufficient to meet their needs at this stage.

Ongoing support after a report is made

Workers affected by sexual harassment may need a range of different types of support from their employers both in the short and longer-term, before, during and after any report of sexual harassment is made.[260] This includes victims, bystanders and also workers subject to allegations of sexual harassment.

As discussed in Section 3.8(b), 'Impacts on other people', regardless of whether or not they are found proven or substantiated through a formal process, allegations of sexual harassment can be complex and sensitive, with far-reaching implications for all people involved.

It is important that all parties involved in an investigation or complaint of workplace sexual harassment are aware of and have access to support.

In *Hayes v State of Queensland*,[261] the Court of Appeal found that the employer owed a duty of care to support its employees during an investigations into alleged workplace misconduct.[262]

Section 3.8(a), 'Impacts on victims', discusses the significant financial implications for victims who needed to take time off work following an incident of sexual harassment, or who used up their leave to avoid the harasser or recover from their experience.[263] The Commission heard that victims should not be penalised if they need to take time off work following an incident of sexual harassment.

Some called for employers to consider offering a form of leave specifically for workers in these circumstances, similar to domestic violence leave.[264] As one worker explained, having a specific form of leave available would assist in easing the stress associated with a sexual harassment report, because 'while that investigation takes place you don't have to show up there and have everyone looking at you'.[265] Such initiatives are consistent with a victim-centred approach as set out above.

Employers can also support workers who have reported sexual harassment by protecting them from victimisation, respecting their wishes for privacy and confidentiality, and ensuring clear and timely ongoing communication with them about how their report is being handled. Good complaint-handling practice is discussed further below.

(iii) Key learnings for employers

The first priority for a victim of sexual harassment is to obtain any support they need for their health and safety. Workers are entitled to seek support external to the organisation, including from their own medical practitioners, and they may also seek support from their employer or through a workers' compensation claim. A victim-centred response will prioritise the worker's health needs ahead of the organisation's formal reporting and disciplinary processes.

Workers who report sexual harassment want to know about their rights and options before they commit to becoming involved in any employer-driven reporting or investigation process. Workers can seek information about support and rights through their employer or from a range of external avenues (see Section 7, 'Support, advice and advocacy').

(f) Reporting

The sixth domain in the workplace framework for addressing sexual harassment is reporting. The way in which a workplace handles a reported incident of workplace sexual harassment can have significant impacts not only on the victim or person making the report, but also the alleged harasser and the workplace as a whole. A timely, fair and appropriate response to reporting sexual harassment is therefore essential.

Most victims do not report workplace sexual harassment. When they do, they are most likely to report it to someone in their workplace.[266] As Professors McDonald and Charlesworth observed in their submission:

> Since the overwhelming majority of sexual harassment complaints do not get lodged with external agencies, the internal management of grievances determines, to some extent, *de facto* employment rights.[267]

However, the Commission heard from employers and workers that employer responses to reports of workplace sexual harassment varied considerably.

Employers of all sizes told the Commission they took reports and incidents of sexual harassment seriously. However, as noted in Section 3.7(f), 'Small businesses', the Commission heard that many small employers, in particular, were unsure of how to effectively respond to workplace sexual harassment.

Some employers said they felt overwhelmed by and unsure of how to handle complaints, and that this could lead to them ignoring or taking no steps to address complaints.[268]

One employer told the Commission that increased support for small businesses in responding to sexual harassment reports would be 'incredibly helpful', because when incidents arise, they can 'get overwhelmed' and 'push it under the carpet or just go, "sort it out yourselves and if you don't like it, leave"'. [269]

Some employers told the Commission that when they received reports, they sought support and advice on what to do from sources within or outside their business, including from human resources professionals, lawyers, and industry and professional bodies. But many small business employers said they did not have the financial means to get expert advice or were unsure where to go for help.[270] There was also confusion about what responses employers could take when anonymous reports were made.

Some employers recognised the need to provide support to workers who made a report to ensure their wellbeing. Employers with established sexual harassment policies and complaint procedures said that they responded to complaints by immediately 'activating' these policies and procedures.[271]

The discussion below considers reporting of sexual harassment and examines:

- workers' experiences of reporting
- early intervention
- reporting systems that can be adopted by employers
- responding to reports.

(i) Workers' experiences of reporting workplace sexual harassment

Workers who said they had experienced workplace sexual harassment and had reported it to their employers, described varied experiences.

The 2018 National Survey found that most people who said they reported the sexual harassment were satisfied with the outcome, and more than one in three were 'extremely satisfied'.[272]

During this Inquiry, some workers also described positive experiences with both small and large employers. Some described positive experiences following a report, that left them feeling supported and safe.[273] At best, victims said their employer took their complaint seriously, dealt with it promptly and sensitively, and in line with their preferences (whether their concerns were dealt with informally or through a formal investigation process), were protected from victimisation and were provided with helpful support—such as counselling services delivered via external Employee Assistance Program (EAP) providers, additional paid leave, or reimbursement for medical expenses incurred as a result of the sexual harassment.[274]

However, as described below, many victims identified shortcomings in the way their reports were handled by employers.

Poor experiences were described by victims working in both small and large organisations and in a wide range of industries. Some even said they regretted reporting altogether.

Employer inaction or inappropriate responses

At worst, victims said that their reports were ignored, not taken seriously, responded to inappropriately or no action was taken to address them.[275] For example, victims recounted a range of inappropriate comments made by managers, human resources and WHS officers following a report.

Some said they were told: 'I didn't just hear you tell me that';[276] 'you know how boys are';[277] or that they should be flattered;[278] were too pretty or friendly;[279] or should wear different clothes.[280] Others said they were told they were an 'angry woman',[281] were making things up,[282] that 'blackmail is an offence',[283] or that they 'needed to toughen up' as the harasser 'doesn't mean any harm'.[284]

The Commission heard that some managers treated reports of sexual harassment as a joke,[285] or refused to take any action in response to a victim's complaint because the harasser was a regular customer.[286] Other victims described a lack of empathy or compassion by those handling their complaints.[287]

The Commission was told that some employers appeared to care more about avoiding liability or protecting the organisation's reputation than looking after workers,[288] that human resources managers protected harassers because of their senior roles in the organisations,[289] or that those responsible for handling complaints were 'the same people who allow sexual harassment to flourish'.[290]

Workplace processes that resulted in delays and further trauma for victims

As discussed in Section 3.8, 'Impacts of sexual harassment in the workplace', the Commission heard that experiences relating to reporting could be more traumatising and disempowering for victims than the experience of sexual harassment itself.[291]

Victims described investigations that were unreasonably long, exacerbating the damage that had already been caused by the sexual harassment.[292] The Commission heard about employers who took months to act on reports of workplace sexual harassment or years to finalise investigations, placing 'mental strain on the victims, witnesses, families and partners'.[293]

One victim said their manager brought them into a room together with the harasser 'to sort it out',[294] while another described needing to make multiple reports before any action was taken.[295] Yet another said: 'Explaining my story over and over again to complete strangers was horrible and another re-traumatising feature of the way my workplace dealt with the harassment.'[296]

The Commission heard from both workers and employers that adversarial responses to reports could cause further harm to all workers, including witnesses, bystanders and harassers—but especially to victims:

> Our systems are set up on an adversarial basis, so it is one side against the other … until we can find a way to manage these horrendous circumstances and situations in a non-adversarial way … somebody's got to come out on top … And if there's got to be a winner, there has to be a loser and unfortunately it's the victims.[297]

Victimisation and other negative impacts of reporting

In addition to the impact of the sexual harassment, many workers said they experienced further harm as a result of being victimised after they reported the behaviour—even in situations where their report was substantiated and the harasser was dismissed as a result.[298]

Some victims described a lack of confidentiality that meant their report became 'public knowledge' in their workplace, sometimes resulting in victimisation by co-workers.[299] Research has indicated that victimisation by employers following a report of workplace sexual harassment is also common—for example, in the form of lower performance ratings and promotion rates, which can have financial and career impacts on victims.[300] This is consistent with what the Commission heard from workers.[301]

Some workers also described the heavy, sometimes crippling, financial burden of pursuing their complaints through the courts.[302]

Many victims told the Commission they had chosen to report sexual harassment because they wanted the behaviour to stop and did not want it to happen to anyone else. However, some said that if they had fully appreciated the far-reaching and damaging career, health and financial consequences of making a complaint, they never would have reported it in the first place. As one victim said, 'I chose to speak up and it was the worst decision I've made'.[303]

South Australia Police observed that its Restorative Engagement Program showed that, for many victims, 'the sense that the system had failed them lasted much longer in time than the initial incident and caused many to regret that they had complained'.[304]

(ii) Early intervention

Encouraging informal early resolution

The Commission heard that employers tended to use a limited number of options for responding to reports or incidents of workplace sexual harassment.

Formal investigation was the response that the Commission heard about frequently during the Inquiry.

Many employers appeared to operate from the misguided assumption that a formal investigation is the 'best' or only legally sanctioned way to respond to a report of sexual harassment—with the objective of providing a fair and rigorous process to determine the truth of the report and minimise legal risk to the business. Investigations are addressed in detail in Section 6.2(f)(v).

In contrast, the Commission heard that workers wanted employers to be proactive, intervene early to address workplace sexual harassment, and offer them a choice of different supported options, short of formal investigation, for responding to it quickly and in a low-key manner.[305] However, there was little evidence of employers using early intervention approaches, as considered below.

One informal 'early' or 'direct' response option provided by employers in their procedures for handling sexual harassment complaints is to encourage the worker who has experienced sexual harassment to respond to it themselves, by taking direct action to address it with the alleged harasser, with the support of an impartial third party if needed, and if they are comfortable to do so.[306]

As the Commission has observed, this approach may be useful where the worker who has experienced sexual harassment wants to discuss the matter informally with the alleged harasser, as there may have been a misunderstanding or miscommunication that caused offence, or the behaviour being complained about is not serious.[307]

This avenue should only be used with the worker's full and informed consent.

Concerns about early intervention

Despite the broad appeal of early intervention in sexual harassment matters, the Commission heard some concerns about this approach.

Employers and employer groups told the Commission that the current legal and regulatory framework forced them to focus on addressing sexual harassment in a narrow, legalistic way, with a view to ensuring procedural fairness for the harasser.[308] They said this led them to adopt formal, legalistic responses to sexual harassment (i.e. conducting formal investigations to make findings of fact about whether harassment had occurred or not) over informal early intervention options. Employers raised concerns that adopting informal early intervention options may increase industrial and legal risk.[309]

The Commission was told that in the wake of the #MeToo movement, some employers had taken intemperate early intervention approaches, 'rushing to judgement' without first conducting a formal fact-finding investigation, and this had led to unfair outcomes in some cases:[310]

> in the last couple of months, certainly, I know of two instances where someone made an on-the-nose joke and they were sacked with no procedural fairness at all. We're seeing a rise of #MeToo clauses in contracts, which are very onerous.

> They don't require a valid reason for termination. They just give all power to [managers] for instant dismissal … at the whiff of a scandal.[311]

Employers may also be concerned that by adopting new and early intervention options, they may face an increase in the number of sexual harassment reports made or incidents addressed by management. However, an increase in reports of sexual harassment incidents can reflect positive cultural change in a workplace. It can indicate increased understanding by workers and preparedness to make reports, feeling confident that the organisation will address them effectively.[312]

It is important for employers to take a long-term view of the benefits of early intervention initiatives and other activities that may result in an initial increase in the number of reports of sexual harassment. It should be recognised that this may ultimately translate into a longer-term improvement in workplace culture, and a reduction in sexual harassment prevalence and the cost and harm it causes to workers and businesses.

Determining appropriate levels of intervention

At a practical level, some methods for determining the appropriate level of intervention in response to concerns about conduct were brought to the Commission's attention. These included compliance pyramids used in some workplaces, including the Australian Taxation Office[313] and Australian Competition and Consumer Commission.[314]

Case study:

Professionalism Pyramid—Vanderbilt Center for Patient and Professional Advocacy[315]

The Professionalism Pyramid was developed by the Vanderbilt Center for Patient and Professional Advocacy (CPPA), a US-based academic centre working in the area of healthcare leadership and professional accountability.[316] The pyramid is a tool for guiding employer responses to unprofessional conduct, through a structure of escalated communication as patterns of unacceptable behaviour develop.

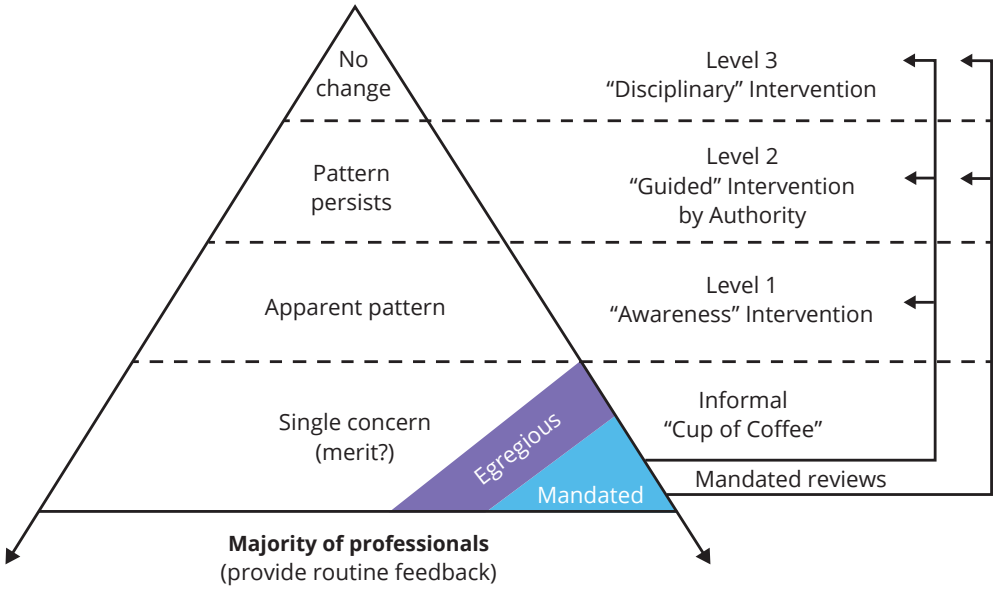
The tool is underpinned by research indicating that most workers conduct themselves with propriety, but all are subject to lapses and may engage in occasional acts of inappropriate conduct. Workers who exhibit a pattern of inappropriate behaviour need to have their conduct addressed. The level of intervention depends on the circumstances of a particular situation, and managers' judgement plays an important role in deciding how to proceed.

The tool is often used to address incidents of workplace sexual harassment. Inappropriate jokes and comments fall at the lowest level of the pyramid, while sexual assault is at its peak, with a range of other behaviours in the middle. If a worker engages in more serious conduct, or the same conduct repeatedly despite warnings, they will be subject to escalating intervention. The stages of the pyramid are demarcated by dashed lines (see diagram below), indicating managerial discretion on the appropriate level of intervention.

Managers using the tool remind workers at each intervention that they must not retaliate against victims or others involved in a complaint. The CPPA emphasises that managers should be equipped and supported to appropriately respond to workers' reactions to interventions.

All workers are trained in the operation of the pyramid at induction and regularly afterwards. A hotline is available to guide managers on using the tool in specific cases, which also allows for central data collection. An oversight group, comprising doctors, human resources officers, and diversity and inclusion officers, meets quarterly to monitor the operation of the tool.

Figure 6.3: CPPA Promoting Professionalism Pyramid



Adapted from: Hickson GB, Pichert JW, Webb LE, Gabbe SG. A complementary approach to promoting professionalism: Identifying, measuring, and addressing unprofessional behaviors. Acad. Med. 2007 Nov; 82 (11):1040-1048. Used with permission of the Vanderbilt Center for Patient and Professional Advocacy, 2019.

(iii) Empowering and supporting bystanders

As noted in Section 6.4(d)(iii), bystander intervention strategies are another tool that employers can introduce to workplaces to respond to sexual harassment. Bystander interventions seek to prevent and minimise the harm caused by sexual harassment, by encouraging workers to act when they see or hear about it occurring in the workplace. Bystander training can be provided for the broader workforce but has also been recognised as effective training for managers.[317]

While employers ultimately bear the duty to create a safe and respectful work environment,[318] studies have suggested that bystanders who do intervene when they witness or hear about workplace sexual harassment can effectively prevent and reduce harm to victims and contribute to a more respectful culture.[319]

The Commission heard that bystander action is more likely to be taken if it is actively encouraged and supported by employers.[320]

During this Inquiry, the Commission heard that bystanders offer great potential for addressing workplace sexual harassment and support for the greater use of bystander intervention strategies in workplaces.[321] However, evidence has suggested that bystanders are not currently meeting their potential to help respond to sexual harassment in the workplace.

For example, the 2018 National Survey found that only one in three people (35%) who said they had witnessed or heard about workplace sexual harassment of others in the workplace took action to prevent or reduce the harm of the sexual harassment they witnessed (this represented a decline when compared to the 2012 National Survey, where one in two people (50%) said they took action after witnessing or hearing about workplace sexual harassment).[322] However, nearly half of the people who said they did take action said the harassment stopped as a result.[323] These low rates of bystander action are consistent with other reviews.[324]

Professors McDonald and Charlesworth cautioned that while promoting bystander interventions 'is likely to be an important component of any multi-faceted strategy to eradicate workplace sexual harassment and abuse', it should not be viewed as 'the only solution'. Difficulties and drawbacks associated with bystander strategies must also be acknowledged.[325]

For example, bystanders may not understand what sexually harassing behaviour is when they see it or feel equipped to do anything about it.

Intervening to address sexual harassment can expose witnesses and bystanders to retaliation or victimisation.[326]

The 2018 National Survey found that one in ten bystanders who took action after witnessing sexual harassment were ostracised, victimised or ignored by colleagues, while 9% were labelled as troublemakers and 6% resigned after taking bystander action.[327]

The Commission's 2012 report on bystander approaches concluded they can only be effective if they are oriented towards the specific contexts of sexual harassment, crafted for use in typical situations in which sexual harassment takes place and supported by organisational change.[328]

Not all workplace sexual harassment is witnessed by a bystander, but individuals who do not witness sexual harassment and hear about it after it occurs, may still be able to engage in effective bystander intervention activities designed to reduce harm (for example by offering support to those involved or reporting it).

The primary responsibility for ensuring worker safety, including protection from sexual harassment, lies with employers. It is important to recognise that even if employers do adopt bystander intervention initiatives, this does not transfer their responsibility (or the responsibility of their people managers) onto workers in their capacity as bystanders.

The Commission notes that supervisors and managers are the most effective bystanders and the individuals to whom workers most commonly report sexual harassment. While bystander interventions may be one useful strategy adopted by employers to prevent and better control the risk of harm caused by workplace sexual harassment, engaging co-workers as bystanders is not a complete solution to the problem.

Case study:

Bystander Action Guide
VicHealth's 'Take Action: Empowering Witnesses To Act On Sexist And Sexually Harassing Behaviours'[329]

VicHealth has developed an action guide to assist organisations to introduce bystander initiatives as part of their work to reduce sexist and sexually harassing behaviours. The guide explains what bystander action is and outlines four key steps for implementing effective bystander initiatives.

1. **Organisational preparation**: ensure there is top-down support and ask leaders to openly and publicly state their support for active bystanders. A clear and enforced sexual harassment policy should also be in place, as well as effective reporting and resolution processes (that workers know they can access as bystanders) and metrics for tracking sexist behaviours and sexual harassment (such as statistics on worker retention by gender).
2. **Readiness assessment**: ask questions of the workforce to gauge skill levels and attitudes, then design initiatives to address the needs identified. For example, if awareness of sexual harassment is low, training should focus on improving recognition. If awareness and intention to act is high, initiatives should focus on behaviour strategies to support bystander action.
3. **Initiatives**: ensure initiatives comply with the 'EAST' framework, to make bystander action—**E**asy, **A**ttractive, **S**ocial and **T**imely. Initiatives may be facilitated by technology such as tools to screen communications for gendered language,[330] scan performance reviews for gendered terms, or even detect the number of male or female voices in a meeting.[331] Timely introduction of initiatives may mean they are implemented at a time of cultural change or to pre-empt peak periods for negative behaviour, for example, the work Christmas party season.
4. **Evaluation**: a range of indicators should be used. Participants may be asked about whether their behaviour changed (i.e. they took bystander action) in addition to whether they were satisfied with training or another initiative.

Informal feedback from peers or local managers as a form of bystander intervention

The Commission heard that proactive, prompt interventions in sexual harassment matters are a particularly useful operational approach for small businesses, and that many currently take this type of less formal approach when dealing with workplace issues. ACCI told the Commission that small business owners and managers:

> can 'nip things in the bud' and act on proto-behaviours and attitudes before they become problematic. This can include setting and enforcing expected standards of behaviour between staff, and … teaching some younger men how to act appropriately at work and respectfully to their colleagues. The informal and interpersonal touch can in many cases carry more weight than more formal and more bureaucratic management.[332]

One example of an informal intervention approach was identified by South Australia Police (SAPOL) in its submission. SAPOL told the Commission it had overhauled its process for managing staff bullying, harassment and victimisation complaints following a review by the South Australian Equal Opportunity Commission.[333]

Rather than responding to such complaints by initiating a formal investigation process, SAPOL provides for complaints to be directed to a dispute resolution team, staffed by trained professional mediators, with a 'bias for mediating outcomes quickly … sitting down with both parties to talk through the issues prior to matters becoming adversarial'. Where a complaint cannot be mediated, the complainant is given the option to pursue it through legal pathways.[334]

Some employers said they had introduced new mechanisms for responding to complaints and incidents in a structured, but informal way. For example, the Commission heard that if a worker had engaged in disrespectful behaviour, having a manager or peer 'tap them on the shoulder' and engage in an informal conversation with them about their behaviour could be an effective, informal way for employers to intervene early to prevent sexual harassment occurring or escalating.[335]

The Australian Medical Association (AMA) told the Commission about a 'tap on the shoulder' system used by Melbourne Health since 2016. Under this system, nominated doctors are authorised to speak privately with peers who are showing a 'trend of exhibiting negative behaviour'.[336] The AMA noted that the system is premised on the idea that 'a person would prefer to "know"' if their conduct was inappropriate, 'because often the behaviour is unconscious'. The AMA observed that this was an effective way to 'nip in the bud' and 'informally manage' disrespectful conduct, rather than waiting until a formal complaint was made.[337]

Case study:

Peer-led early intervention—St Vincent's Health Australia's Ethos Program[338]

St Vincent's Health's Ethos program (Ethos) was introduced in 2017 to address entrenched cultural issues in the health sector by building a culture of respect and safety in the workplace.

Ethos is a peer-led early intervention program which encourages a culture of speaking up, recognises staff who exhibit positive behaviour and addresses behaviour that undermines staff and patient safety.

The Ethos program is designed to remove barriers to speaking up by providing an avenue which is fast, fair and transparent. It supplements, rather than replaces, existing measures for disciplinary processes.

Ethos provides staff with training and information on responding to inappropriate or unsafe behaviours at an early stage and preventing them from reoccurring. Staff can submit reports about positive or negative behaviour they have observed through an online tool, with the option to remain anonymous.

When a negative report about a worker is made, it is assessed by the Ethos triage team which makes a decision about the most appropriate response. If the triage team decides a report is actionable, the worker involved will usually receive feedback about how their behaviour was perceived in the form of an informal, respectful and confidential 'Ethos message'. This is a conversation designed to deliver informal feedback to a worker and offer an opportunity to reflect on ways they may behave differently in the future.

Repeated reports of 'lower level' conduct will trigger a higher level of intervention. This is essentially an Ethos 'message' conversation involving an 'Ethos messenger', the worker involved and their line manager.

Reports of conduct including sexual harassment that are sufficiently serious to warrant disciplinary action will be referred to Human Resources and ordinary disciplinary processes will apply.

(iv) Effective workplace reporting systems

The Commission heard that good practice systems for reporting sexual harassment are characterised by supportive, victim-centred, flexible mechanisms that accommodate the needs of workers and offer workers a range of reporting options and multiple entry points.[339]

Clarity on reporting options

The Commission heard that reporting processes should be clear, transparent, open and accessible to all workers at all levels.[340] One worker said, 'It shouldn't be a mystery who to talk to when you want to report things. I should be able to look up the policy and see what will happen.'[341]

Consistent with the evidence from the 2018 National Survey on who victims report to, reporting processes should include avenues for seeking information and support, up to and including senior managers. It is preferable if a range of people of different genders and at different levels are sufficiently skilled to receive complaints.

In the context of small businesses, where a harasser may be the business owner (or in some cases related to them), workers may not know who they can report to. Workers in businesses of all sizes (and particularly in small businesses) should also be made aware of options for reporting to independent, external authorities. The Commission considers that these details should be explicitly set out in any workplace sexual harassment policy or procedure.

Tailoring reporting options for the workforce

The Commission also heard that it was important for workplace sexual harassment procedures to take into account the particular barriers to reporting that some groups of workers may face. For example, as discussed in Section 3.5(e), 'People with disability', workers with intellectual disability need clear information about their rights, keeping safe and making complaints.[342]

The Commission also heard that reporting channels and reporting processes needed to be culturally appropriate, to avoid further marginalising or excluding groups of workers including CALD women and Aboriginal and Torres Strait Islander women.[343] For example, in a consultation with Aboriginal and Torres Strait Islander workers, the Commission was told:

> We have been looking at our policies for sexual harassment recently and my offsider is a white male, [who] is like 'this is how we do it'. His approach is white and is culturally inappropriate. First thing he [did] was bring the complainant and perp together. He is completely oblivious … Some of the stuff he says to me without realising … He is talking about women's business. I have a good relationship so I can say 'that is inappropriate don't talk to me like this or others about this, it is women's business'.[344]

Flexible options for reporting

The Commission heard that it was important for employers to offer workers flexible options for reporting workplace sexual harassment for a number of reasons.

Flexibility in reporting systems allows employers of all sizes to find processes that work for them. For workers, flexibility fosters trust in a reporting system, by allowing victims to choose how to proceed according to their own needs and expectations.[345] This might be in relation to the level of formality, confidentiality or other factors.[346] It also allows for flexibility in responses to be proportionate to the conduct and harm. Victims may also be more likely to 'find someone with whom they are comfortable speaking if multiple routes are open to them'.[347] Community legal centres told the Commission:

> Workplaces should allow for multifaceted reporting systems, by those who have observed and those who have experienced sexual harassment. There should be … a choice of procedures (hotlines, web-based) and complaint handlers (such as managers and human resource departments).[348]

The Commission heard about a range of different methods for reporting sexual harassment in the workplace, including:

- sector or industry-based reporting
- anonymous reporting
- other informal reporting options
- reporting using digital technology.

Sector or industry-based reporting

Systems for reporting sexual harassment may apply within a single workplace, at multiple workplaces administered by a single employer, or across a sector or industry.

Case study:

A sector-wide approach to reporting, grievance resolution and disciplinary action

The Confederation of Australian State Theatres (CAST) is working with the Media, Arts and Entertainment Alliance (MEAA) and the artist-led initiative Safe Theatres Australia to develop a framework on reporting unacceptable behaviour, grievance resolution and disciplinary action that would apply in theatrical workplaces across the country.

In 2017, CAST companies released a statement on industry principles around sexual harassment, but workplace policies remained different for each company. The uniform set of standards under development is designed to fill gaps and eliminate the inconsistencies that exist between many of Australia's major theatrical workplaces. In a sector with a transitory workforce of actors, crew and others, who often work time-limited contracts according to production runs, this consistent framework should give workers confidence in their rights and obligations in relation to sexual harassment as they move between workplaces.

The new approach has implications for broader change across the sector, beyond empowering individual victims. Artistic Director of Belvoir Street Theatre, Eamon Flack, described this change:

> Before, there were so many different set-ups at different companies. Now they'll be the same everywhere, they're talked about openly on the first day of rehearsals. This is how you begin to change the culture. You put everybody on the same pitch, whether they're a brand-new grad or a big, powerful pillar of the profession.[349]

Anonymous reporting

Anonymous reporting channels in workplaces can be important tools to encourage workers to raise concerns and facilitate early identification of sexual harassment and intervention by employers to address it. As set out below, anonymous reporting can be facilitated in workplaces by employers through different means, including the use of digital technologies.

The Commission heard that some groups of victims were particularly reluctant to make formal reports and facilitating anonymous reporting was one way to encourage them to report. For example, a survey conducted by the St Kilda Legal Service found that LGBTQI workers would be more likely to report workplace sexual harassment if they could remain anonymous.[350]

Anonymous or informal reporting can occur in different ways. For example:

- inviting anonymous reports delivered as a note or letter to a secure mailbox or email account
- using existing whistleblowing reporting channels in an organisation[351]
- digital reporting technology, such as a staff intranet or app-based reporting tools (discussed below).

The Commission is aware of a number of organisations and agencies that are developing or provide for anonymous reporting via online or app-based technologies. For example:

- NSW OLSC is developing an online platform to allow for anonymous reporting of sexual harassment in law practices.[352]
- Victoria Police is exploring the option for anonymous reporting of workplace harm as part of an online complaints portal for recruits that it is currently developing.[353]
- The South Eastern Centre Against Sexual Assault runs the Sexual Assault Report Anonymously (SARA) website which allows anonymous reporting of sexual assault or harassment.[354]

- A number of Australian universities, including Swinburne University of Technology,[355] UNSW,[356] University of New England,[357] University of Newcastle,[358] James Cook University[359] and Southern Cross University,[360] advised the Commission following its 2017 report, *Change the course: National report on sexual assault and sexual harassment at Australian universities,* that they provide for anonymous online reporting of sexual assault and sexual harassment.

Anonymous reporting systems provide workers with an avenue to report sexual harassment without fear of victimisation, while potentially prompting action to stop the sexual harassment. For employers, anonymous reporting may provide a warning about sexual harassment that is happening to enable action, and can contribute to useful indicators of sexual harassment to drive better prevention.

Some employers were under the misapprehension that they could not legitimately act on anonymous reports of sexual harassment and could only take action if a victim was prepared to make a complaint. They believed the optimal and only legally appropriate response to a report of sexual harassment was to formally investigate it.[361]

The Commission heard that these beliefs were based on both the legal framework and the perception that sexual harassment was a matter of individual misconduct, rather than driven by a range of underlying systemic factors as identified in this inquiry.

Some leaders expressed surprise that they might be able to act on anonymous reports, or without disclosing the name or details of the person making the report. These employers said they were advised by their human resources and legal advisors that acting on anonymous reports was not possible or involved high legal risk for the business.[362]

The Commission accepts that while the extent to which direct or disciplinary action can be taken against an alleged harasser in an anonymous complaint is limited, due to considerations of procedural fairness, this does not mean that employers cannot or should not respond or intervene in some way to address anonymous complaints.

While the responses that are appropriate will necessarily depend upon the nature and content of any anonymous complaint, and the workplace in question, interventions and responses available to employers may, for example, include:

- Monitoring or surveying the areas of the workplace or individuals identified in the anonymous complaint, to seek further information to supplement or support that provided in the anonymous report. This may then prompt further response or action.

- Changing workplace protocols or procedures to control or eliminate any risk factors identified in the anonymous report and reduce the risk of sexual harassment occurring or continuing.
- Taking steps to remind workers of the standards of respectful behaviour required of them, for example by conducting discussions, sending email or using other workplace communication channels to remind and educate workers about their right to report sexual harassment and their obligation not to engage in it.
- While respecting privacy, conducting discussions with relevant individuals identified in the anonymous complaint or who may have information about matters raised in the complaint, to seek further information to supplement or support that provided in the anonymous report. This may also then prompt further response or action.

Other informal reporting options

Workplaces can offer other informal reporting options to increase the variety of ways that workers can report workplace sexual harassment, with a view to encouraging and increasing the likelihood of reporting.

Informal reporting may be facilitated through methods as simple as adopting an 'open door policy' and inviting workers to drop in for discussions with supervisors and managers about incidents. This approach can be well-suited to small businesses where 'owners and managers work very directly and personally with their people' and may be more 'highly attuned to their welfare and wellbeing, and to interactions between staff'.[363]

It is important that when a person reports, it should not automatically trigger a formal investigation (see Section 6.2(f)(v)). A flexible and victim-centred approach to reporting will allow for occasions where formal action is not pursued by the employer because of the preferences or health needs of the worker who has made the report. However, other prevention steps may still be implemented to reduce the risk associated with the reported conduct.

Reporting using digital technology

Technology offers the opportunity for further flexibility in the ways in which reports can be made by workers.

The Commission heard that technology is increasingly being used to identify both victims of workplace-related sexual harassment and harassers.[364]

The growing number of online and app-based tools in Australia for reporting sexual harassment, sexual assault or other forms of inappropriate conduct, include:

- **The Sexual Assault Report Anonymously (SARA) tool:** a mobile-friendly website run by the South Eastern Centre Against Sexual Assault, for victims who do not wish to make a formal police complaint to report sexual assault or harassment.[365]
- **The 'STOPit' app:** that allows workers to report inappropriate conduct including sexual harassment.[366]
- **The University of Sydney online reporting form:** that allows staff and students to make confidential disclosures of sexual assault and harassment.[367] A non-exhaustive list of other Australian universities that offer anonymous online reporting options appears above under the heading 'Anonymous reporting'.

Innovative digital reporting apps and tools developed internationally include:

- **ROSA:** a chatbot app in Timor-Leste that allows public servants to make complaints about sexual harassment by public servants.[368]
- **Vault:** a UK-based app that provides workers with a place to record incidents of workplace sexual harassment and save related evidence, and offers a 'GoTogether' feature that flags if another worker in the same organisation has reported a similar incident or individual.[369]
- **Talk to Spot:** an artificial intelligence (AI) chatbot in the UK that facilitates the documentation of an incident.[370]
- **Callisto:** a US non-profit that creates technology to detect repeat perpetrators of professional sexual coercion and sexual assault.[371]
- **Silent Choir Project:** a private network for victims of sexual harassment and abuse in the US.[372]

Systems such as these can facilitate reporting, provide for anonymity and allow victims to report from anywhere, anytime.

Technology can also provide the evidence that has historically made sexual harassment difficult to establish, such as digital records, screenshots and emails.[373]

The Commission heard that technology can help ease the evidential burden that makes it difficult for victims to report sexual harassment in the workplace, and may also help in overcoming 'cultural bias towards not believing women, victim blaming and an assumption that complaints of sexual harassment are exaggerated and embellished'.[374] For example, the Office of the eSafety Commissioner (eSafety) told the Commission that 'artificial intelligence, as well as word and phrase filtering, can also be used to block, record and report harassment'.[375]

Victorian Women Lawyers pointed to the benefits of technology in gathering and recording evidence for reporting, such as screenshots of inappropriate comments on social media or text messages, which could be:

> used by victims, employers and bystanders to identify perpetrators … This type of evidence is often considered more probative by employers, external bodies and courts in cases concerning sexual harassment.[376]

However, Caxton Legal Centre warned against over-reliance on digital evidence:

> When there is a written record of the behaviour a lot is read into the literal meaning of the messages, particularly the complainants' replies. In our experience many people do not respond to sexually implicit messages with explicit demands for the behaviour to stop … Instead, it is more likely for a complainant to try to deflect the behaviour by either laughing it off or changing the subject. In some cases, this has caused issues when determining if the behaviour was unwelcomed. It has also prevented clients from either bringing or continuing complaints because they fear that their responses will be criticised.[377]

One victim told the Commission that when she showed her employer messages between herself and the harasser, the employer said that because she had used emojis she 'must have been having a good time'.[378]

It is important to acknowledge that power imbalances can lead not only to sexual harassment but can also manifest in the responses of victims, who may be seeking to avoid escalating a situation or fearful of repercussions.

(v) Responding to reports

Workplace complaint-handling and investigation processes in response to reports of sexual harassment can be complex. However, adopting a victim-centred approach that focuses on minimising harm to workers, in line with the best-practice principles identified by UN Women in Section 6.2(e)(i), can benefit both employers and workers.

For example, for both workers and employers, the Commission heard that many benefits can flow from the timely conduct of investigations.

Better evidence is generally available and there is a greater possibility of preserving workplace relationships. Workers spoke about the advantages of a quick response to reports and speedy investigation process. The Commission also heard from both victims and employers about the compounding damage of delays in complaint handling.[379]

A victim-centred response to a complaint may have other benefits for an employer. One study suggested that where an employer responds to a worker's report of sexual harassment in a way that is 'timely, informative, and considerate toward the victim', rather than 'slow, dismissive, and discouraging toward the victim', this may reduce the reputational damage that can flow from a report.

The study observed this could 'circumvent public backlash, almost to the same level as an organization that has had no sexual harassment claim at all'.[380]

Workplace sexual harassment matters may be complex, sensitive and involve external authorities or agencies. It is essential that those responsible for dealing with these matters adopt a trauma-informed approach and have a high level of understanding of the gendered drivers of sexual harassment, the way it manifests and its impacts on different groups of workers.[381]

Issues of proof in investigations

The Commission heard that some victims of sexual harassment were reluctant to report because of the high standard of proof that would be used in a formal investigation. As one victim told the Commission in a consultation: 'No one believed me. The onus was on me to prove I hadn't encouraged him.'[382]

These concerns were reflected in submissions to the Commission.[383] For example, Professors McDonald and Charlesworth said:

> [O]ur research findings suggest that in many internal investigations a criminal burden of proof is applied before a finding is made that sexual harassment has occurred. Where investigations cannot establish sexual harassment beyond a reasonable doubt the complainant is often left hanging without any clear outcome being reached.[384]

Others suggested that the 'balance of probabilities' standard (applied in civil law matters) was the appropriate standard to apply, where sexual harassment should be established as more probable than not.[385] One workplace investigator suggested talking about 'persons of concern' rather than perpetrators, '[b]ecause it's not about proving who did what at that point. It's about, "you've caused concern, you can't challenge that".'[386]

The Commission understands that employers may apply a high standard of proof because of concerns that action taken in response to sexual harassment may give rise to industrial and legal claims, and concerns about the impact that an investigation finding that a person has engaged in workplace sexual harassment may have on their employment, future career and reputation.[387]

However, the Commission notes that sexual harassment investigations in the workplace are not criminal proceedings. Where criminal charges are laid in relation to incidents of workplace sexual harassment, these matters are dealt with through the criminal justice system, where criminal standards of proof will apply. Criminal standards of proof are not appropriate in non-criminal proceedings, particularly where they are likely to contribute to under-reporting of sexual harassment.[388]

Independent workplace investigations

After receiving a report of sexual harassment, an employer may decide that the matter cannot be handled internally in the workplace. This may be because it is too complex and the required level of expertise is not available in-house, or because interpersonal relationships may give rise to the appearance of bias.

In these cases, employers may engage an independent workplace investigator to investigate the report—although small businesses indicated that they typically did not have the resources to engage external experts to conduct independent investigations of reports (see Section 3.7(f), 'Small businesses').

Independent workplace investigators may have varied professional backgrounds and degrees of skills and experience. However, engaging an independent investigator to conduct a sexual harassment investigation may eliminate conflicts of interest, engendering trust in the investigation process. This may result in a fairer process for victims and better outcomes for workplaces.

Independent workplace investigators may also contribute to faster outcomes and have more specialised expertise than internal staff. A barrister told the Commission:

> more and more corporations are approaching the bar to do the investigations in this space … Because there is this concern around some of the quality of that investigative reporting that is occurring … there are services that can be provided from people who have legal expertise, understand judgments, understand how to find facts … both sides [in a recent matter] were quite satisfied with the process because they got … a report that explained why the findings have been made.[389]

Employers also told the Commission about the benefits of retaining an independent workplace investigator:

> [I]n some recent cases we actually have had the matters externally investigated and I think that's worked really well for us … in terms of being able to resolve the matter more quickly … it sort of gives that extra layer of it being thoroughly investigated but removes the biases or the connections [which arise when] people come to us … complaining about who they report to.[390]

One submission recommended that 'a well-resourced independent specialist body with specialist investigators' could 'oversee and investigate sexual harassment complaints' as well as 'assist with outcomes, make recommendations, and provide monitoring and oversight of the organisation after the investigation'.[391]

However, not all employers may have the means to retain independent workplace investigators. Where employers in this position are unable to resolve a sexual harassment report in-house, external sources of guidance such as the Fair Work Ombudsman's Workplace Advice Service or workplace advisory services run by professional or industry employer organisations may assist (see Section 7, 'Support, advice and advocacy').[392]

The Commission also notes that a comprehensive investigation may not be appropriate in every workplace sexual harassment matter. Further, workplace investigators may not always have a full understanding of the circumstances and dynamics of a particular relationship, workplace or even industry and not adopt a victim-centred, trauma-informed practice. Some workers told the Commission they had little faith in the independence or veracity of independent workplace investigations.[393]

(vi) Resolution, outcomes and consequences of reports

Guides produced by UN Women suggest that where sexual harassment is found to have occurred, responses should be prompt, proportionate and consistent with previous cases.[394] They should also be victim-centred, 'prioritising the rights, needs and wants of victims, their safety, autonomous decision-making and confidentiality'.[395]

In certain circumstances, however, such as when a harasser has multiple reports against them or the conduct concerned is a criminal act, an employer's duty of care may require action without consent of the victim.[396]

Sanctions against harassers

Remedial action usually involves sanctions against harassers which fall along a scale of seriousness. For example:

- a requirement to make an apology and ongoing supervision
- verbal or written warnings
- demotion or a requirement to forego a scheduled pay rise
- suspension or dismissal.[397]

As noted in Section 5.5(d), 'Unfair dismissal and serious misconduct', the Commission heard that employers were sometimes reluctant to dismiss workers who had engaged in sexual harassment as they were unsure whether the law would support their decision—specifically, they were concerned about the risk of the harasser succeeding in an unfair dismissal claim and either being reinstated to their role in the workplace, or being awarded compensation.[398]

The Commission also heard there was a sense that many harassers faced no consequences for their misconduct. For example, an Expert Advisory Group appointed by the Royal Australian College of Surgeons to consider discrimination, bullying and sexual harassment in the practice of surgery found a major reason for under-reporting was that, '[n]o action is seen to be taken even against those about whom allegations have been proven'.[399]

This was consistent with views expressed in the 2018 National Survey where one of the most common reasons given for not reporting workplace sexual harassment was a belief that it would not change things or that nothing would be done.[400] The 2018 National Survey found that where workers had made a formal complaint or report about sexual harassment, they indicated that in one in five cases there were no consequences for the harasser.[401]

Community legal centres told the Commission that people who engage in sexual harassment should be held accountable in a meaningful, appropriate and consistent manner through sanctions proportionate to behaviour, irrespective of a person's rank, level or position in the organisation.[402] UN Women guidance has stated that equality of treatment of harassers, in addition to those who report, should be a core element of any system for workplace response to sexual harassment.[403]

Many stakeholders called for tougher sanctions for people who engage in sexual harassment, to act as a disincentive.[404] Professors McDonald and Charlesworth submitted that, currently, '[w]here a choice of sanction for a harasser is available, it is common for the least stringent to be selected,' and that this can lead to a 'climate of tolerance'.[405]

Behavioural change

In addition to sanctioning wrongdoing, corrective action should aim to alter harassers' behaviour wherever possible, to help prevent future cases of sexual harassment. The Commission heard about cases where harassers were simply moved to different worksites or dismissed, without any attempt to address or alter their behaviour, and continued to engage in sexual harassment with impunity.[406]

Over the course of the Inquiry, the Commission did not identify many effective measures taken to change the behaviour of a person found to have engaged in sexual harassment. The Commission notes that there is scope for such initiatives to be developed.[407]

Measures to encourage behavioural change among relevant individuals may involve a requirement to attend coaching or some other form of education or awareness-raising activity. However, as noted in Section 6.2(d)(ii), narrow, mandatory training programs may in some cases result in further backlash and be counterproductive, so the nature and content of such educational programs must be carefully considered.

In the case of small businesses, behavioural change initiatives may involve managers mentoring or counselling their workers.

The Engaging Men Action Group program is one example of a program to encourage behavioural change (see case study in Section 6.2(c)(vi)). Programs aimed at changing harassers' behaviour should also be culturally appropriate to ensure they include and reach all potential harassers.[408]

The Commission sees merit in developing guidance and resources to assist employers to identify and offer appropriate behavioural change programs.

Systemic change

The Commission heard that outcomes should also aim to effect broader systemic reform across the workplace:

> [Many victims] are very loyal passionate employees who genuinely want to drive input in cultural change in the interests of the organisation. But through the process of making a complaint, they're marginalised … I think that's just the real shame of the whole process in that so many organisational cultures reinforce this kind of 'with us' or 'against us' mentality. Actually, that critical friend is really crucial in maintaining a good organisational culture.[409]

A sexual harassment complaint can be reframed as a positive first step to improve workplace culture—employers can encourage broader change by encouraging reporting and demonstrating an openness to improvement.

Measures taken by employers to foster systemic workplace change following a report of sexual harassment have included developing or updating policies, redistributing codes of conduct to all workers and providing training.[410] The aim of such measures should be to ensure that sexual harassment does not happen again.

Going forward, the new workplace framework recommended by the Commission will provide a guide to the steps that can be taken to encourage a more holistic approach to effecting systemic changes that will help reduce the prevalence of workplace sexual harassment and the harm it causes.

Learning from past complaints

The delivery of commensurate sanctions for harassers, and transparency within the workforce about these sanctions, can lead to shifts in perception across a workplace.

Subject to considerations of privacy and confidentiality, where employers impose such sanctions and inform their workforce of these actions, it can help reinforce behavioural standards and also give workers confidence that their leaders take complaints seriously. Over time, this can positively influence the culture of a workplace. For example, one worker said that where workers saw their employer taking action and sanctioning harassers, this was 'the greatest prevention, because that's where people go "oh, you're actually serious about this".'[411]

Another worker told the Commission:

> one of our very senior partners had an allegation of sexual harassment against him … It was investigated, and he was sacked. I had so many people come up to me and say, 'I didn't think that was going happen' … I think that set a really important cultural tone in our organisation that no one is above the law. No matter what level, we take this seriously and if you're in breach of it, you're out.[412]

Finally, as discussed above, the Commission heard that outcomes of reporting sexual harassment should be communicated to all relevant parties, but also, where possible, in a general or de-identified way to the broader workplace, respecting the privacy of the individuals involved.[413]

One victim told the Commission about the compounding detriment of not being told what happened to their report.[414]

Other workers told the Commission that 'if we don't hear an outcome then we think nothing's happened … so we don't bother complaining',[415] and that if an employer is 'being very vocal, saying "this person's been asked to leave our organisation because their behaviour is inconsistent with our values", that sort of permeates that culture of leave them be'.[416] Section 6.2(b)(ii) considers transparency in reporting on workplace sexual harassment.

(vii) Preventing victimisation

Research on workplace sexual harassment has consistently found that workers who report sexual harassment often experienced ongoing victimisation. It also found lower performance ratings, promotion and attendance rates, and higher rates of resignation, among people who reported workplace sexual harassment.[417] This is consistent with what the Commission heard from workers.[418]

To ensure worker wellbeing, it is vital that employers continue to support workers after a complaint has been made, and respond to the ongoing risks of harm that can arise from making or being involved in a complaint, by taking steps to prevent victimisation.

The Commission considers that employers can help protect workers who have made or been involved in a sexual harassment report from victimisation by taking simple, practical steps, for example:

- providing the worker with a nominated contact person, with whom they can discuss any concerns or report victimisation
- regularly monitoring the workplace to observe the way their co-workers are interacting with them
- continuing to 'check in' and communicate with workers at regular intervals after they have made or been involved in a report, to ask whether they are experiencing any victimisation
- looking for other signs that may indicate evidence of victimisation—for example workers having high levels of absenteeism or personal leave, or reduced performance—and discussing these with the workers involved
- reminding harassers and the workforce generally that victimisation is prohibited and sanctions will apply for those who engage in it
- disciplining any staff found to be engaging in victimisation and communicating appropriately with the workforce about this.

Protections against victimisation in the Sex Discrimination Act extend to reports of sexual harassment made through internal workplace complaints processes. People who report workplace sexual harassment may in some circumstances also be protected from victimisation under the recently expanded whistleblower provisions in the *Corporations Act 2001* (Cth) (see Section 5.4(h), 'Improving protections against victimisation').

(viii) Key learnings for employers

Taking a victim-centred, safety-driven approach to responding to workplace sexual harassment, that focuses on minimising harm to workers, can deliver significant benefits for both employers and victims.

Where procedures and practices in a workplace are developed and implemented with a victim-centred approach, this can give workers confidence in and improve the effectiveness of reporting systems and efforts to address workplace sexual harassment.

Good practice systems for reporting sexual harassment provide victims of sexual harassment with multiple avenues to get information and support, and raise their concerns within the workplace. Effective workplace reporting systems should:

- be victim-centred and prioritise the aim of supporting and causing no further harm to workers
- be administered by suitably skilled individuals
- provide access to external services
- offer workers multiple entry points and a range of reporting and response options
- protect workers from victimisation.

Where possible, employers should intervene in sexual harassment 'earlier' and provide victims with more flexible and informal options for responding to their reports, as alternatives to formal investigations.

Prevention and early intervention reduce, rather than create, legal risk and will contribute to a more respectful work culture. They can help reduce the prevalence of sexual harassment and increase workplace safety and productivity.

The Commission has observed that many employers do not appreciate that victims want informal, early response options—or that it can be appropriate, effective and less harmful to victims, to offer such options.

The Commission acknowledges concerns raised about the use of early intervention approaches. However, the Commission disagrees that the use of early intervention strategies necessarily results in 'unfair' processes for alleged harassers. Any decision to discipline or dismiss a worker for engaging in sexual harassment must be taken in a way that respects their legal rights.

However, offering victims the option to pursue less formal ways of addressing their concerns need not result in 'unfair' outcomes for alleged harassers or increased legal risk for employers.

Alongside proactive preventative measures, there needs to be a greater emphasis on early intervention to address workplace sexual harassment. An early intervention approach prioritises workers' welfare, will reduce prevalence of sexual harassment and aligns with an employer's duties to provide a safe and harassment-free workplace. All response options should apply a victim-centred approach.

Moreover, many employers are not aware of what informal, early intervention options are available to them, or how they can implement them in their workplaces. Subject to the size of the workplace, practical early intervention options that employers can adopt may include informal 'tap on the shoulder' peer-to-peer intervention programs, anonymous or informal reporting options, bystander intervention strategies by managers or co-workers and direct intervention by reporting workers.

In Section 5.5, 'The Fair Work system', the Commission also recommends the creation of a new option to address sexual harassment through the Fair Work Commission, by applying for a 'stop sexual harassment order'.

This is intended to provide employees who are experiencing workplace sexual harassment with an external avenue to seek engagement by their employer to take prompt action to stop the sexual harassment continuing, with the assistance of the Fair Work Commission.

The Commission acknowledges the need to provide practical information and guidance to help improve employers' understanding on these matters and recommends that such resources and information be provided via the *Respect@ Work* online platform (see Section 6.4).

While early action on sexual harassment is critical and may be suitable as an interim corrective measure, it remains essential for employers to provide victims with the option of using appropriate formal reporting processes, if they wish to do so.

Employers should adopt a victim-centred approach to complaint handling and investigation processes, in line with the best-practice principles identified by UN Women in Section 6.2(e)(i). Those responsible for responding to reports, including employers, should develop expertise and understanding of the gendered drivers of sexual harassment, the way it manifests and its impacts on different groups of workers, to reduce the risk of further harm.

Proportionate sanctions should be issued to harassers and there should be an emphasis on measures designed to change behaviour, not just 'penalise'. The Commission suggests further guidance be developed to assist employers to identify and implement suitable behaviour change interventions.

Responses to reports should include taking measures to effect systemic change in the workplace and monitor the workplace environment. Employers should use reports and investigation findings as an opportunity to learn more about risks and issues in their businesses and inform their practice and approaches moving forward.

(g) Measuring

The final domain in the workplace framework for addressing sexual harassment is measuring. To develop strategies to better address sexual harassment in Australian workplaces, it is vital to understand:

- the prevalence (amount or frequency) and nature of sexual harassment (when, where and how it occurs, who is involved and what form it takes) in workplaces and the impacts it has on workers, businesses, communities and society more broadly
- the nature and effectiveness of initiatives designed to prevent it.

Through the Inquiry, the Commission examined whether and how this type of information about workplace sexual harassment is being collected in Australia.

(i) Data collection at the industry, profession and sector level

Data and information about sexual harassment can be collected efficiently and effectively at an industry level. This is useful because workplaces across an industry often have similar working conditions and cultures, common workforce demographics and work environments. It is also useful because many workers are mobile within industries.

Industry-level data can provide a clear picture of what is happening in comparable workplaces across an industry or part of it.

Such data can then be used to identify and address industry-specific risks and issues.

In the 2018 National Survey, the Commission collected sexual harassment data on an industry basis for the first time.

Businesses of all sizes can use this industry data as a benchmark, to better understand and assess workplace sexual harassment in their industry. Where employers are not able to conduct sexual harassment surveys in their own organisations, industry data allows them to assess how they are 'performing' as an industry on sexual harassment.

In Section 3.2, the Commission recommends that it continue to conduct a national workplace sexual harassment survey every four years that reports on detailed industry data. This will better allow employers to understand where their businesses fit within the data sets, sexual harassment prevalence rates in their industry, and how their industry compares to others and tracks over time.

Australian industry and professional bodies, unions and organisations from different sectors are increasingly taking a lead in collecting their own data to better understand workplace sexual harassment across industries, professions and sectors.

Many have used data collected through surveys of their members to develop industry, profession or sector-wide strategies to combat sexual harassment and accompanying practical resources and initiatives to support their members to address it.[419] Details of these industry and profession-wide initiatives are explored further in Section 6.3.

The Commission also heard that collecting and publishing data about workplace sexual harassment could itself drive positive action by highlighting the prevalence of workplace sexual harassment as a systemic issue in a particular industry or profession.[420]

As the AMA submitted:

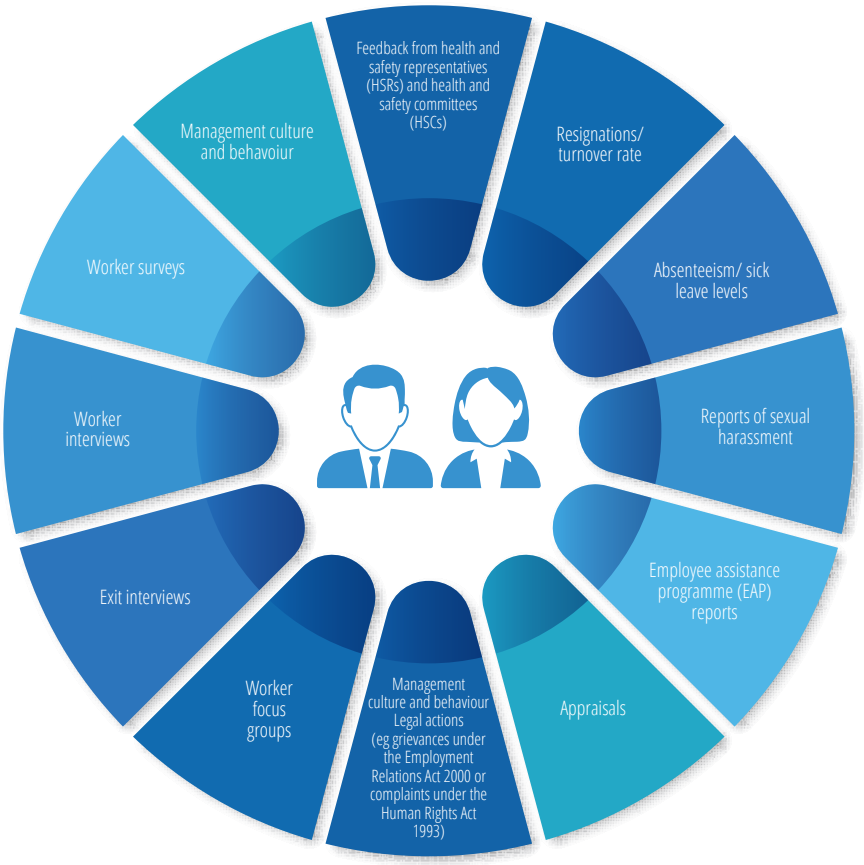
> Those willing to report their wins and acknowledge their shortcomings enhance trust, have a reference for continuous improvement and have evidence to design positive strategies. Those that prefer not to report will still have an incentive to match their competitors by doing so and are likely to be perceived with a degree of suspicion if they remain 'out of step'. In the healthcare sector, these perceptions relate not just to employer of choice characteristics but also to community trust and confidence in the quality and safety of care provided.[421]

(ii) Data collection at the workplace level

The Commission found that where employers do engage in data collection, they are likely to collect data on the prevalence of sexual harassment. While some information about activities taken by employers to address sexual harassment is also collected, there is less information collected about the effectiveness of such activities. This is mirrored in academic research, where there is limited evidence available on what activities successfully reduce or prevent sexual harassment in workplaces.[422]

The following diagram, produced by WorkSafe New Zealand, summarises the key sources that employers can look to, for evidence about the prevalence of workplace sexual harassment.

Figure 6.4: Sources of information about the prevalence of workplace sexual harassment[423]



In small businesses, the Commission heard that employers typically collected evidence about the prevalence, nature and reporting of sexual harassment informally, by talking with and observing workers' behaviour while working alongside them and fielding staff or customer complaints about workers' behaviour.[424]

The Commission heard that larger employers collected data about the prevalence, nature and reporting of sexual harassment in their workplaces from multiple sources, including:

- **Informal discussions with workers**—some employers said they sought to build relationships of trust and develop 'open lines of communication', so workers felt comfortable raising any workplace concerns, including about sexual harassment, promptly and directly.[425]

- **Staff and customer feedback**—information provided in customer complaints, staff exit interviews, staff performance feedback and social media posts could identify incidents of sexual harassment or a poor workplace culture that may indicate an increased risk of sexual harassment.
- **Business metrics that identify 'unhappy staff'**—some employers spoke about monitoring trends in business metrics, including staff attrition or turnover rates, absenteeism rates and collective or trend data from EAP counselling services, to identify areas within their business where staff were 'unhappy'. Employers noted that such trends could indicate teams with a poor work culture that may increase the risk of aberrant behaviours, including sexual harassment.[426]
- **Anonymous staff surveys**—many larger employers said that using anonymous staff surveys was a key method they used for collecting data about workplace sexual harassment, and that these surveys provided useful insights on workers' experiences of sexual harassment, that might not otherwise be identified.[427] Some employer surveys asked workers directly about their experiences of sexual harassment, while others asked more general questions (for example during site safety audits) that could help identify areas of the business in which there were environmental or cultural issues that may lead to increased risks of sexual harassment or other aberrant behaviour occurring.[428]
- **Staff complaints**—employers spoke about monitoring the number and content of sexual harassment complaints made by staff,[429] including those made informally and formally, and via digital and app-based reporting tools[430] or whistleblower reporting services.[431]

While the above methods constitute positive practice, the Commission notes some limitations. For example, while an analysis of the content of complaints may provide some data about the nature of sexual harassment in particular cases, the 'number of complaints' cannot be used as an accurate measure of prevalence, given the under-reporting of sexual harassment.[432]

Additionally, even where workers raise concerns about sexual harassment, these may not ultimately be recorded in complaint statistics. For example, some victims who said they disclosed allegations of sexual harassment to managers or human resources staff said they were deterred by those personnel from making 'formal complaints' (see Section 6.2(f)(i)), while others choose not to make a formal complaint. Others may make an informal report which is resolved, so their experiences are not captured in workplace complaints data.

Data on complaints must be analysed with care. As the EEOC noted:

> using the metric of the number of complaints must be nuanced. Positive organizational change can be reflected in an initial increase of complaints, followed by a decrease in complaints and information about the lack of harassment derived from climate surveys.[433]

The Commission observed a lack of understanding about measures to quantify and track the prevalence of workplace sexual harassment, other than relying on numbers of complaints.

The Commission's experience in conducting surveys on sexual harassment has demonstrated the importance of ensuring that methods of collecting such evidence must be safe and not put workers at risk of harm. For example, evidence must not be collected in a way that identifies victims or harassers, or that risks re-traumatisation of victims.

When conducting staff surveys, it is important for employers to think about the questions they ask their workforce. UN Women have noted that 'asking what participants have observed is a safer strategy than asking them to discuss what they have experienced'.[434] The Commission also heard that asking workers directly, 'Have you been a victim of sexual harassment?' assumes they understand the types of behaviour that constitute sexual harassment and could also risk re-traumatising victims.[435]

The Commission heard that it was more useful and appropriate for employers to ask general questions, designed to provide insight into how comfortable and likely workers are to raise concerns directly with their manager or employer. For example, it was suggested that employers ask 'How frequently does your manager meet with you to ask you about any concerns you have about work?' and 'how often does your manager talk to you about our workplace behaviour policy?'[436]

By asking such questions, the Commission heard that an employer could understand more about workers' experiences as well as factors that could contribute to a greater risk of sexual harassment occurring or going unreported. Such data could then be used by employers to modify the practical approaches they take in the workplace and increase the likelihood of workers promptly raising any workplace concerns, including concerns about sexual harassment.[437]

The Commission heard about the importance of employers collecting data regularly to allow them to monitor trends over time, identify emerging risks and measure the effectiveness of any actions they take to address sexual harassment (for example, the implementation of a sexual harassment policy or training at a workplace) and adjust or introduce new measures accordingly.[438]

Some large employers, such as Victoria Police,[439] the Australian Defence Force[440] and Australian Universities,[441] have sought to track and measure the effectiveness of activities they have introduced to address sexual harassment and assault. But there was otherwise little evidence of employers measuring their progress (or otherwise) on reducing sexual harassment in their workplaces—and there appeared to be a lack of awareness about how employers could measure such progress.

A recent US study suggested that employers may measure the effectiveness over time of initiatives designed to address sexual harassment, such as sexual harassment policies and training programs, by measuring whether there is an increase in gender diversity in management roles, following the introduction of these initiatives. This is premised on the basis that effective training on sexual harassment should reduce sexual harassment, which should stop women leaving organisations and ultimately increase the number of women in management roles within the organisation over time.[442]

(iii) Key learnings for employers

Collecting data on the prevalence, nature and reporting of sexual harassment and measuring the effectiveness of responses to it is essential to better understand and address it. As academic Iris Bohnet has observed 'what doesn't get measured doesn't count and what doesn't get measured … cannot be fixed'.[443]

Workplaces, industries, unions and relevant government agencies must prioritise ongoing and improved measurement and collection of evidence about workplace sexual harassment to achieve the goal of eliminating it.

Evidence about the prevalence and nature of sexual harassment can be used to understand the scope of the problem to identify priority areas for attention and action. Ongoing collection of data will allow for analysis and assessment of trends over time, and can be used to assess the effectiveness of initiatives.

It is important to ensure collection of evidence on workplace sexual harassment at the national level, the industry (or profession or sector) level and the workplace level.

Industry-wide evidence collection has increased in Australia in recent years and is a valuable way to identify high risk areas in particular industries, professions and sectors. This can be used to drive targeted programs to address sexual harassment and ensure the best use of finite resources.

Individual workplaces also need to measure the prevalence and nature of sexual harassment. However, caution is necessary to ensure that the collection of such evidence is done in a way that is safe and does not put workers at risk of harm. For example, anonymous evidence collection may not be possible in small workplaces or teams without revealing the identity of victims and harassers.

This may lead to victimisation or health or safety risks for these workers.[444] Further, the nature of questions asked when gathering evidence may be triggering for some workers and risk re-traumatisation.

Ongoing measuring and monitoring can also promote employers' accountability through transparency, both within the workplace and externally. These issues are discussed in Section 6.2(b)(ii).

The Commission considers there is an urgent need to increase understanding among employers and industry about how they can meaningfully measure and monitor workplace sexual harassment. There is merit in developing guidance materials and a base set of indicators to guide consistency in evidence collection in Australian workplaces. This will allow for more accurate comparisons of prevalence rates and monitoring of trends across workplaces and industries.

RECOMMENDATION 46:

The Commission in consultation with the Workplace Sexual Harassment Council develop a set of good practice indicators and methods for measuring and monitoring sexual harassment prevalence, prevention and response.

6.3 Industry-based approaches to addressing workplace sexual harassment

> The creation of resources for businesses, particularly SMEs [small and medium-enterprises] without dedicated [human resources] personnel, should be an important outcome of this Inquiry … SMEs are often time poor, with individual managers and owners wearing many 'hats' and responsibilities.[445]

While the 2018 National Survey showed that workers across all industries and sectors experience sexual harassment, those industries with the highest prevalence rates of sexual harassment are placing workers at higher risk and demand urgent attention.

(a) Support for industry, profession or sector-wide approaches

Industry, profession or sector-wide approaches to addressing sexual harassment can have many benefits. Such approaches may be better suited to the specific needs of small businesses, assist with targeting industry-specific drivers of sexual harassment, reduce cost through shared resources and help protect certain groups of at-risk workers.

ACCI recommended 'industry engagement initiatives as best practice for government when seeking to engage employers', noting their potential for 'promoting compliance and … improving behaviours/experiences', particularly within small businesses.[446] Ai Group noted the role of industry groups in showcasing and sharing 'innovative enterprise initiatives to reduce sexual harassment'.[447]

(b) Industry, sector or profession-wide data collection

As discussed in Section 6.2(g), the Commission heard that, increasingly, industries, professions and sectors are undertaking careful self-analysis to collect data to better understand the prevalence and nature of sexual harassment within their ranks, so they can then develop strategies to better address it. One submission suggested that industry bodies:

> become involved in analysing the results of the signatory workplaces within their industry to then gain insight into how their industry as a whole is tracking in relation to compliance with reducing sexual harassment … these types of incentives may encourage employers to take a more proactive approach to addressing sexual harassment in the workplace. In turn, this leads to more positive messages about sexual harassment at the local level being delivered to individual employees, which may discourage some of the behaviour.[448]

Recent examples of large-scale sector and industry-based data collection initiatives include a survey of the workers in the Victorian Public Service by the Victorian Auditor-General's Office[449] and the Commission's survey of members of the SDA.[450]

Case study:

SDA member survey on workplace sexual harassment[451]

The 2018 National Survey revealed a number of industries with workplace sexual harassment prevalence rates higher than the national rate, including retail trade, accommodation and food services.

The SDA is the union for retail, fast food and warehousing workers. Following the results of the 2018 National Survey, the SDA approached the Commission and requested that it conduct a comprehensive survey of its members, to collect further data on the prevalence, nature and reporting of workplace sexual harassment.

A public report on the results of this member survey was published in October 2019.

By publishing these results, the SDA showed leadership by empowering not only SDA representatives and members, but also all employers and workers in the retail, fast food and warehousing sectors with valuable information about specific challenges and opportunities for change.

(c) Industry, profession and sector-wide initiatives

VEOHRC recommended codes of practice and communications plans be developed across industries and sectors, as well as efforts to:

> identify industry-specific levers for systemic change (for example, tying steps to prevent sexual harassment, among other measurable gender equality goals, to accreditation, insurance or continuing professional development requirements).[452]

The Commission heard about several existing domestic initiatives to address workplace sexual harassment in a particular industry, profession or sector. These initiatives were generally situated within broader discrimination, harassment and bullying strategies and often included industry-specific research, policies, campaigns, training templates and complaint and support avenues. For example:

- the Royal Australasian College of Surgeons' Action Plan to address discrimination, bullying and sexual harassment in the practice of surgery[453]
- the 'Respect. Now. Always.' campaign by Universities Australia to prevent sexual violence in university communities and improve how universities respond to and support those who have been affected[454]

- the 'Respect is the rule' campaign developed by hospitality industry union, Hospo Voice, to end sexual harassment and abuse in hospitality[455]
- a program led by the NSW OLSC to change the culture relating to sexual harassment in the legal profession in NSW (see case study in Section 6.2(c)(ii))
- the International Bar Association's '#UsToo?' report into bullying and sexual harassment in the international legal profession[456]
- Male Champions of Change industry-based groups, including Architecture, Sport, Property, STEM (Science, Technology, Engineering and Maths), Consult Australia, Fire and Emergency, Health and Insurance[457]
- Live Performance Australia and Screen Producers Australia's Codes of Practice (see below).[458]

In addition, the Commission noted international examples of industry-based approaches to addressing workplace sexual harassment, including initiatives designed to support workers in the garment industry in Asia,[459] and farm workers in the agricultural industry in the United States.[460]

Case study:

Industry codes of practice—Live Performance Australia and Screen Producers Australia[461]

In 2018, Live Performance Australia (LPA) and Screen Producers Australia (SPA) released mirror codes of practice aimed at preventing workplace discrimination, harassment including sexual harassment and bullying. The codes aim to harmonise industry efforts in understanding and complying with federal, state and territory laws on prohibited conduct in the workplace, including sexual harassment. The codes apply to the LPA and SPA's combined 900-plus members and cover executives, workers, volunteers and contractors in the industry, as well as those who audition for roles.

The codes are organised into two parts, encompassing:

1. A guide for employers, an overview of their obligations in the relevant legislative framework, and best practice guidance on steps they can take to prevent and respond to workplace discrimination, harassment and bullying.
2. Templates and resources to assist employers develop and/or review policies and procedures. One of the templates included in the codes is a template Workplace Discrimination, Harassment, Sexual Harassment and Bullying Policy to assist employers to develop new policies. Recognising the difference in needs of businesses of different sizes, the codes and accompanying resources also include a checklist to assess current policies and procedures, for those with policies already in place.

(d) The benefit of industry-wide approaches for small business

The Commission heard that coordinated, industry-wide approaches may be of particular benefit to small and medium-sized business employers. These employers raised concerns during the Inquiry that they lacked the skills and resources to match the efforts of larger employers in developing sound policies and effective practices to prevent and respond to workplace sexual harassment.[462]

Industry-wide initiatives can also be useful in responding to the changing nature of work, where workers tend to work with an employer for shorter periods, but often remain in the same or similar industries over their working life. They are also an effective way to identify and address the systemic drivers of sexual harassment in an industry.

ACCI submitted:

> Government should support (perhaps by way of grants) industry and multi industry representative bodies to develop and implement voluntary industry driven codes of practice, independent complaint mechanisms, or other comparable initiatives to acknowledge, address and reduce sexual harassment at work in more workplaces, particularly [small businesses] lacking capacity to do so on a stand-alone basis.[463]

Some submissions provided examples of industry initiatives that could be of particular use to small businesses. These included:

- Unions NSW's recommendation that in the hospitality industry, sexual harassment by customers should be covered in responsible service of alcohol training, which should teach 'zero tolerance … and the removal of patrons who engage in that behaviour towards staff or other patrons'.[464]
- The SDA's suggestion of a cross-industry code of practice for the employment of minors in retail, hospitality and fast food, similar to what exists in the entertainment industry.[465]

(e) Professional registration, rules and codes

Many professionals in Australia are subject to professional registration, licensing or accreditation schemes. Professional registration schemes can be another effective avenue for setting industry or sector-wide expectations with regard to appropriate workplace behaviour, and for holding professionals to account if they engage in sexual harassment. As noted above, VEOHRC recommended that professional accreditation be linked to measurable gender equality goals.[466]

In some industries and sectors, professional rules and codes of conduct already regulate behaviour in relation to sexual harassment, or workplace discrimination, harassment and bullying more broadly.

For example, the Medical Board of Australia's *Good Medical Practice: A code of conduct for doctors in Australia* prohibits registered doctors from using their 'professional position to establish or pursue a sexual, exploitative or other inappropriate relationship' with anybody under their care.[467] This aspect of the code is supplemented by specific guidelines on sexual boundaries developed by the Medical Board of Australia.[468]

The Australian Psychological Society's Code of Ethics requires that psychologists 'not denigrate the character of people by engaging in conduct that demeans them as a person … or harasses them'.[469]

The Australian Solicitors Conduct Rules and the Legal Profession Uniform Conduct (Barristers) Rules 2015 specifically prohibit sexual harassment by lawyers in some Australian jurisdictions.[470] And, as noted in Section 6.2(c)(ii), the NSW OLSC has said that in its view, a NSW lawyer who has engaged in sexual harassment—whether in the course of their legal practice or otherwise—may have engaged in unsatisfactory professional conduct or professional misconduct, which could impact on their right to practise as a lawyer.[471]

The Commission also heard about groups in the seafood industry that were currently advocating for education and training on health and safety matters, including sexual harassment, to be included in industry-based professional licensing courses. This was seen as an effective way to disseminate important messages to all industry participants and to seek to affect cultural change.[472]

Case study:

Legal Professional Conduct Rules—Law Council of Australia and Australian Bar Association[473]

The Australian Solicitors Conduct Rules are model rules published by the Law Council and adopted by professional associations. They provide that a solicitor must not, in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying. The Rules have been adopted in South Australia, Queensland and the ACT, and have been adopted in NSW and Victoria as the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

Similarly, the Australian Bar Association developed the Legal Profession Uniform Conduct (Barristers) Rule 2015, which prohibits sexual harassment, and which have been adopted in NSW and Victoria.

These professional conduct rules are, in effect, codes of conduct which bind Australian legal practitioners and have consequences in the case of a breach. However, the rules have not been adopted in all jurisdictions in Australia.[474]

(i) Key learnings for employers

The Commission's view is that adopting industry, profession or sector-wide approaches is an effective and efficient way to address workplace sexual harassment and considers such approaches will be of particular benefit to small and medium-sized businesses.

With guidance from the Commission and the Workplace Sexual Harassment Council, there is scope for key industry and professional groups (including unions, employer associations, employers and other industry bodies) to collaborate and take the lead to develop industry-wide approaches to prevent and better respond to workplace sexual harassment and resources to assist employers and workers in the industry to understand their rights and obligations.

Registration requirements, rules and codes are another well-established means of holding practitioners in certain professions to account, and they have the potential to assist with addressing sexual harassment in Australian workplaces. There is scope for standards in relation to sexual harassment to be included in more professional registration requirements, rules and codes, and for requirements, rules and codes that already include sexual harassment to be strengthened and expanded across Australia.

The Commission's view is that industry, profession and sector-wide initiatives (including for example sexual harassment policies, procedures, campaigns, complaint and support mechanisms and pathways) are useful as they can help ensure:

- **Simplicity and efficiency**—Industries may create and use a single initiative that applies to all members of the industry and sets the standard and a common understanding across the industry. Having one initiative across an industry will make it simpler and easier for workers and employers to understand, access, apply and/or use the initiatives that apply to them.
- **Industry-wide systemic drivers are addressed**—The collective experience of industry employers can highlight prevalence trends and common drivers in a particular industry, and through sharing efforts can more quickly identify best practice.
- **Ease and cost efficiencies for employers**—Having a single, industry-based initiative reduces the cost and burden that employers may otherwise face if they are required to create their own business-specific initiatives. This is of particular benefit to small business employers who may not otherwise have the skills or resources to create or commission such initiatives for their workplace—they will have immediate access to the industry standard.

- **Better protection for employees who move among employers within an industry**—Industry-wide initiatives also better accommodate the changing nature of work and acknowledge the increasing likelihood of workers working for multiple employers over shorter periods in the 'gig economy'. As they move between employers within an industry, workers will maintain the same protections, arrangements or approaches offered by the industry initiatives and get the same messages.
- **A 'raising of the bar' industry-wide**—While implementation and enforcement of initiatives may vary by workplace, the introduction of industry-wide initiatives will 'raise the bar' across the industry and at least ensure that at a minimum, all employers have the same default initiatives in place. This also creates the opportunity to recognise and share good practice within industries.
- **Initiatives and accompanying resources can be tailored appropriately**, to reflect the work environment and issues relevant in a particular industry and provide a consistent approach across the industry.
- **Minimising the risk of media unfairly scandalising individual workplaces**—Industry initiatives recognise the systemic nature of sexual harassment, and can provide 'safety in numbers', helping to neutralise unhelpful demonising of one particular workplace in the media (which may lead for example to decreased transparency by workplaces, out of a fear of being singled out for adverse attention and suffering brand damage).

RECOMMENDATION 47:

Key industry and professional groups (unions, employer associations, employers and other industry bodies) collaborate to establish industry and profession-wide initiatives to address sexual harassment, for Australian workplaces of all sizes. Initiatives may include industry-wide prevalence surveys, awareness-raising campaigns on industry-specific issues or the development of industry-specific policies or accreditation requirements.

6.4 Resources for workers and employers

> [We need] industry-targeted, easy-to-use tools and resources. So, you know, something for the mining industry, something for the retail industry, but it's not a one size fits all—but easy to use and understand tools and resources.[475]

The Commission heard throughout the Inquiry that employers of all sizes want to take effective steps to eliminate sexual harassment. However, while large employers typically had access to a range of resources, smaller employers did not. Yet as this Inquiry has shown, sexual harassment is prevalent in both large and small organisations. Employers have asked the Commission to provide guidance on best practice through this Inquiry, and for direction to cost-effective and timely tools and resources to assist them.

At the same time, as noted below, the Commission identified a range of organisations and platforms that have tools, and resources and that work with employers to implement policies, procedures, training and, more recently, apps to address sexual harassment at work. Rather than establish new tools the Commission's recommendation is that these organisations should share expertise, collaborate and incorporate the learnings from this Inquiry to provide all Australian workplaces access to free, practical resources to address sexual harassment, delivered through an online platform.

The Commission recognises the importance of providing clear and practical resources in the seven domains covered in this section, to assist:

- workers to understand their legal rights, responsibilities and options in relation to workplace sexual harassment
- employers to understand the causes of sexual harassment, how to prevent it, and how to respond to it in a way that minimises harm to workers and ensures they meet their legal responsibilities.

(a) Recognising the needs of small businesses

The Commission acknowledges the calls from small business owners and their representatives for support and specifically designed resources to better equip and empower them to deal effectively and efficiently with workplace sexual harassment.[476]

The Commission heard that small employers were unsure where to go for cost-effective, practical support to handle incidents that arose and felt that current systems and publicly available resources and toolkits for managing workplace sexual harassment were usually designed for big businesses and were not appropriate for use in small workplaces.[477] However, the Commission was made aware of some resources designed specifically for small businesses.

The Commission also heard that small businesses lacked access to the professional diversity networks available to many larger employers, and so missed out on the valuable opportunity to contribute to, learn and advance from these networks.[478]

Drawing on feedback from their members, ACCI discussed the importance of tailoring resources to be relevant and useful to small and medium enterprises (SME) settings:

> While businesses are aware of sexual harassment legislation, many are not aware of particular specific examples that may constitute sexual harassment. Feedback emphasises the importance of providing practical examples / case studies to aid understanding of what someone running an SME needs to manage for. Concepts such as 'reasonableness' can be very difficult to translate into practice, and into what SME proprietors should and should not do.[479]

ACCI warned that support and resources for small businesses should not be 'through an avalanche of additional guidance materials or shortened or "dumbed down" documents'. Rather it argued that any resources and guidance 'should be designed in such a way that it is easy to access and use for those who are time poor'.[480]

As well as clear guidance, the Commission heard that practical materials, such as toolkits and checklists, may be particularly useful for smaller employers.[481] These should be easily applicable to the standard ways that small businesses operate. One example of such a toolkit that is appropriate and easily adopted by small businesses was created by VEOHRC.

Case study:

Raise It! VEOHRC Conversation starter toolkit[482]

VEOHRC's *Raise it!* initiative is designed to better educate workers about sexual harassment and discrimination and seeks to prevent and better respond to these issues in workplaces.

The *Raise It!* program involves a number of conversation starter toolkits to assist employers and their workers to have safe conversations about workplace sexual harassment, flexible working arrangements and parental leave. The toolkits are designed to help workers initiate conversations about these issues in a safe and informed way.

The toolkits provide employers and workers with information about workplace rights, entitlements and duties, including via access to chatbots. In relation to some workplace gender equality measures, such as flexible work arrangements, the toolkits allow employers to plan, and workers to practice, difficult conversations with each other.

Independent evaluation of the *Raise It!* program found that more than 85% of participants surveyed agreed or strongly agreed that the program had increased their awareness of the types of behaviour that can constitute sexual harassment, the impacts of sexual harassment on individuals and the workplace, the supports available for victims and how to make complaints. 97% of survey respondents found the sexual harassment support and response toolkits relevant to their situation and 65% said the program had an influence on staff talking about sexual harassment.

(b) Recognising the needs of big and medium-sized businesses

The Commission also heard that medium and big business would value access to better resources. The largest organisations and some medium-sized organisations employ people and/or pay external consultants specifically to manage their sexual harassment initiatives, including reviewing policies, designing and delivering training and handling complaints.

While there are a range of resources available, as a general rule these programs were regarded as compliance activities. Policies and training generally cover the same legal content and often rely on public resources such as those available from the Commission.

This Inquiry has identified that campaigns like *Stop it at the Start*, the Council of Australian Governments' anti-violence campaign, jointly funded by the federal, state and territory governments, which included advertisements broadcast through a range of channels nationally, have been well regarded and helpful for workers in businesses of all sizes (see Section 4.5(a), 'Social marketing and social change strategies').[483]

The Commission also identified real benefits of single-industry initiatives, as discussed in Section 6.3. The Commission identified no need for unique resources for every organisation across the country, given that many drivers of sexual harassment are common, no matter the size, industry or location. There is not a need for these resources to be produced multiple times, when the main priority is implementing policy, procedures, awareness and prevention and response initiatives at the grass roots level of organisations.

(c) Resources currently available

While there are currently a range of resources available for workers and employers on workplace sexual harassment (including some resources designed specifically for small and medium-sized businesses[484]), these resources are published by different bodies and found in a range of different locations.

For example, existing resources on sexual harassment are provided by bodies including the Commission[485] and state and territory human rights and anti-discrimination agencies,[486] unions,[487] industry and sector bodies[488] and the business.gov.au website.[489] This has led to confusion among workers and employers about what resources are available and where to access them, as well as duplication. Rather than starting over, the Commission's view is that combining the expertise of relevant agencies and organisations would enhance the quality and effectiveness of useful resources.

In addition to resources on sexual harassment, the Commission also heard about valuable resources available to assist employers to understand and address issues associated with workplace culture, workplace inclusion and gender equality.[490]

(d) A successful model for sharing resources and toolkits

The Commission identified a range of organisations delivering tailored resources on sexual harassment; however these organisations generally were not working together or sharing best practice. The Commission identified an organisation in the sports sector, Play by the Rules, that has been recognised as a successful and cost effective collaboration model to develop and share resources, toolkits, training and campaigns, targeted at grass roots sporting organisations across the country, which leverages existing expertise for the benefit of small, geographically dispersed sporting clubs.

Case study:

Play by the Rules[491]

The national 'Play by the Rules' (PBTR) online platform, provides information, resources, media campaigns and online learning about issues that impact on safe, fair and inclusive sport.[492]

PBTR was developed as the result of collaboration and cooperation between the Commission, the Australian Sports Commission and all state and territory human rights and anti-discrimination agencies responsible for sport and recreation, equal opportunity and anti-discrimination (the 'Partners').[493] Its target audience is grassroots sports, and in particular, administrators, coaches, players and parents, many of whom are actively involved with grassroots sporting clubs on a volunteer basis with limited time and funding. The objectives of PBTR are to:

- deliver education and training that supports environments that are safe, fair and inclusive for sport and recreation
- harness networks to deliver messages that promote and support environments that are safe, fair and inclusive for sport and recreation
- deliver resources that support environments that are safe, fair and inclusive for sport and recreation.[494]

PBTR is established under a Memorandum of Understanding (MOU) entered into by the Partners, governed by a Management Committee comprised of members drawn from the Partners and funded by annual contributions made by Partners as agreed in the MOU.

PBTR was recognised by the Royal Commission into Institutional Responses to Child Sexual Abuse[495] and the Review of Australia's Sports Integrity Arrangements[496] as an agile, innovative, cost-effective model to deliver important resources on child safety to poor, de-centralised grass roots organisations, and to gather critical evidence of trends and needs.[497]

(e) Key learnings for employers

There is a clear need to consolidate existing resources and create new resources on workplace sexual harassment for Australian workers and employers. These resources must be clear, practical, victim-centred, easily accessible from a central location and widely publicised. They must be flexible and appropriate for use in businesses of all sizes and in all industries—with particular effort required to ensure the resources support and are appropriate for use in small business.

The Commission recommends a collaborative approach to the creation and distribution of these resources—modelled on the successful PBTR initiative—to be a cost-effective, agile way to ensure the wide distribution and availability of high quality resources to individuals and de-centralised organisations of all sizes across Australia.

The Commission's view is that there is merit in unions, employers and employer associations working collaboratively, under the guidance and leadership of the Sexual Harassment Council, to support workplaces to better understand and address workplace sexual harassment by:

- identifying the most pressing needs
- reviewing and consolidating existing resources
- creating new resources where necessary
- being flexible and responsive to evolving workplace needs.

This collaboration, called *Respect@Work,* will deliver the practical guidance and resources required to improve the prevention of and responses to workplace sexual harassment, leveraging the vast amount of resources already in existence and the expertise that resides in the collaborating parties. *Respect@Work* will create a single online platform that all Australians can access for relevant information. There should be widespread national marketing of the platform as the key point of reference on workplace sexual harassment, to ensure that it is promoted to all workers and employers and to encourage broad access.

The *Respect@Work* platform will deliver a much needed improvement in the way that workplace sexual harassment resources and support are delivered across Australia, and facilitate increased awareness and guidance for workers and businesses of all sizes. Data collected from the use of the platform, as well as member feedback, can be used to identify trends and user needs.

RECOMMENDATION 48:

To support all workplaces to address sexual harassment, the Workplace Sexual Harassment Council will lead a new collaboration by unions, employers and employer associations called *Respect@Work*, which will deliver information, education and resources for workers and employers through an online platform.

1 Legal roundtable, Sydney.
2 A detailed analysis of the prevalence of sexual harassment in Australian workplaces is set out in Section 3.2, 'Prevalence of sexual harassment in the workplace'. Section 3.7, 'Workplace settings where sexual harassment occurs' considers particular features and practices of workplaces which may increase the risk of sexual harassment occurring.
3 Australian Industry Group, Submission 428, *Sexual Harassment Inquiry*, 4; Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*, 16; Australian Medical Association, Submission 205, *Sexual Harassment Inquiry*, 1; Diversity Council Australia, Submission 282, *Sexual Harassment Inquiry*, 1, 3–4.
4 See Section 3.4, 'Cultural and systemic drivers of sexual harassment in the workplace'.
5 Women NSW, Submission 268, *Sexual Harassment Inquiry*, 3.
6 Individual, Submission 59, *Sexual Harassment Inquiry*.
7 *Sex Discrimination Act 1984* (Cth) s 106(1)(b).
8 *Sex Discrimination Act 1984* (Cth) s 106(2).
9 Bain & Company, *Better Together: Increasing Male Engagement in Gender Equality Efforts in Australia* (2019) 11.
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27 NSW Women Lawyers Association, Submission 340, *Sexual Harassment Inquiry*, 49.
28 Unions NSW, Submission 354, *Sexual Harassment Inquiry*, recommendation 26.
29 Australian Institute of Company Directors, *Forward Governance Agenda* (April, 2019) 24.
30 For example, under the *Corporations Act 2001* (Cth) ss 180–3, directors of companies are obliged to exercise their powers and discharge their duties in good faith in the best interests of the company as a whole, for a proper purpose and with diligence. Similarly, directors of banks, building societies, insurance companies and superannuation funds must be 'fit and proper' to meet Australian Prudential Regulation Authority (APRA) standards. See Australian Prudential Regulation Authority, 'Prudential Standard CPS Fit and Proper (CPS 520)', *Prudential and Reporting Standards for Authorised Deposit-Taking Institutions* (Web Page) <www.apra.gov.au/fit-and-proper-0>.
31 *Corporations Act 2001* (Cth) ss 180–3.
32 *Corporations Act 2001* (Cth) pt 2D.6.
33 Australian Prudential Regulation Authority, 'Prudential Standard CPS Fit and Proper (CPS 520)', *Prudential and Reporting Standards for Authorised Deposit-Taking Institutions* (Web Page) <www.apra.gov.au/fit-and-proper-0>.
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261 [2017] 1 Qd R 337.
262 In that case, four managers were alleged to have engaged in bullying and harassment. The employer investigated these allegations and found them to be unsubstantiated. The managers claimed that they had suffered psychiatric injury because their employer failed to provide them with adequate support after the complaints were made against them and during the employer's investigation process. The court found that the employer had breached its duty of care to three of the managers, by failing to provide sufficient support to them after the complaints were made and while they were investigated. However, these managers ultimately did not succeed in their claims as they failed to establish that the injury they suffered had been caused by the employer's breach.
263 See, eg, Individual, Submission 133, *Sexual Harassment Inquiry*; Individual, Submission 83, *Sexual Harassment Inquiry*; Australian Council of Trade Unions, Submission 306, *Sexual Harassment Inquiry*, 8; Victorian Women Lawyers, Submission 337, *Sexual Harassment Inquiry*, 12; Prof P McDonald and Prof S Charlesworth, Submission 170, *Sexual Harassment Inquiry*, 20.
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365 Women's Health Victoria, Submission 342, *Sexual Harassment Inquiry*; Individual, Submission 353, *Sexual Harassment Inquiry*; St Kilda Legal Service, Submission 409, *Sexual Harassment Inquiry*. Reports are forwarded to the South Eastern Centre Against Sexual Assault (SECASA), which collects data before de-identifying each report and passing it on to police to help identify repeat offenders. Many users provide personal details, allowing SECASA to follow up and provide support.
366 Reports can include pictures and video evidence. Administrators can communicate with workers through a real-time, anonymous messaging app, to clarify details or provide follow-up support. The app also features an incident management system for employers to use in addressing reports. See 'About STOPit', *STOPit* (Web Page) <www.stopitsolutions.co.za/about-stopit>.
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368 Complaints are immediately registered in the database of the Civil Service Commission. Officers then assess each complaint and decide whether to initiate formal disciplinary proceedings against the harasser. See OtimizAI, 'Chatbot Rosa—Complaint Intake System for Civil Service Commission of Timor-Leste' (YouTube, 4 December 2018) <www.youtube.com/watch?v=xFiPhh-Urfo>.
369 The GoTogether feature allows a worker to submit a report in the knowledge they are not the first or only one affected. See 'Home Page', *Vault Platform* (Web Page) <vaultplatform.com/solution/>, and 'Our Solution', *Vault Platform* (Web Page) <vaultplatform.com/>.
370 Using a cognitive interviewing style, Spot responds to what the employee writes, asks meaningful questions and generates a confidential time-stamped report of the exchange which the employee can edit. Submitting the report to human resources is optional and employees can opt to remain anonymous. Human resources can ask follow-up questions and the worker can respond via the app. See: 'Document an Incident', *Talk to Spot* (App web page) <app.talktospot.com/>.
371 The Callisto Campus website allows university students to 'write' (secure evidence of an incident by making a time-stamped record), 'match' (report only if another victim names the same perpetrator) or 'report' experiencing sexual harassment (directly to campus administrators without waiting for a match). From 2018, Callisto was extended to professional environments. When a repeat offender is identified under the expanded system, a Callisto Legal Options Counsellor reaches out to each victim to advise them on their options. Individual, Submission 230, *Sexual Harassment Inquiry*; Brendan Nyhan, 'Reporting Sexual Assault Is Difficult, but a New Technology May Help', *The New York Times* (News Article, 2 December 2014) <www.nytimes.com/2014/12/03/upshot/reporting-sexual-assault-is-difficult-but-a-new-technology-may-help.html>; 'By Survivors, For Survivors', *Project Callisto* (Web Page) <www.projectcallisto.org/>.
372 Once they join, victims are asked to indicate where the abuse or harassment occurred and identify the perpetrator through a link to their Facebook account. The platform provides information about support services and gives victims the option to be contacted if their harasser is identified by another participant. See 'Home Page', *The Silent Choir Project* (Web page) <www.silentchoir.org/>.
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430 Digital and app-based reporting tools are considered further in Section 6.2(f)(iv).

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432 For example, the 2018 National Survey found that fewer than one in five people (17%) who said they experienced sexual harassment in the workplace in the last five years made a formal report or complaint: Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018), 67. See also, for example, Royal Australasian College of Surgeons, Submission 207, *Sexual Harassment Inquiry*, 5; Australian Council of Trade Unions, Submission 306, *Sexual Harassment Inquiry*, 1, 8; Elizabeth Broderick & Co, *Cultural Change: Gender Diversity and Inclusion in the Australian Federal Police* (2016), 94; Victorian Equal Opportunity & Human Rights Commission, *Independent Review into Sex Discrimination and Sexual Harassment, Including Predatory Behaviour, in Victoria Police* (Phase 3 Audit and Review, August 2019), 70.

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survey, to help assess how effective the strategies introduced following the 2015 survey had been in reducing sex discrimination and sexual harassment. See Victorian Equal Opportunity & Human Rights Commission, Submission 372, *Sexual Harassment Inquiry*, 31.

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SECTION 7:

Support, advice and advocacy

Despite greater attention being given to sexual harassment in the workplace in recent years … very little has changed 'on the ground' in terms of the information, supports and services available to victim-survivors. Support services for victim-survivors remain underdeveloped, under-resourced and difficult to navigate.[1]

SNAPSHOT

- Experiencing workplace sexual harassment and making a complaint can have significant health, career and financial impacts. Victims often need information and advice, and may have a range of other support needs, but are unsure of the avenues for seeking this.
- Other parties involved in an incident may also need support, including witnesses (who may experience bystander stress) as well as people who have had allegations made against them.
- Workers also need clear, up-to-date, relevant, easily accessible information to help them come to terms with their experiences and enforce their rights in relation to workplace sexual harassment.
- While there are services that provide support, advice and advocacy to victims of workplace sexual harassment, navigating the pathways to these services can be difficult, expensive and involve lengthy delays. There is currently no single point of contact or service that can provide comprehensive support and advice.
- Support, advice and advocacy for victims should be delivered through a holistic approach which provides a seamless experience for victims and others affected by workplace sexual harassment. This may be through smooth and speedy referrals between different services, or through access to organisations that provide an all-inclusive support, advice and advocacy service.
- Working women's centres (not-for-profit community organisations) are well placed to act as a central hub for this holistic approach.
- There should be investment in existing services with relevant experience and expertise, rather than creating a new information service which has the potential to add costs and increase complexity, including:
    - » The Workplace Sexual Harassment Council should develop guidelines and resources to support the standardisation and enhancement of information and referral services already delivered by existing organisations.
    - » Legal aid commissions, Aboriginal and Torres Strait Islander Legal Services and community legal centres should be resourced to ensure that advice and representation is available to all victims of workplace sexual harassment.
    - » Ensuring victims have free and timely access to specialist counselling services is important for recovery. The current 1800RESPECT helpline should be resourced to provide this, and victims who require further support should be provided with access to this through a referral network.
    - » Increased and recurrent funding to working women's centres, and consideration given to establishing these centres in jurisdictions where they do not currently exist.
- Strengthening the support, advice and advocacy provided, and providing this sooner, will assist in minimising the financial impact of sexual harassment.

7.1 Overview

Earlier sections of this report have focused on recommendations to prevent workplace sexual harassment, and respond to it quickly and effectively when it occurs. While these may be the most effective ways of reducing the harm associated with sexual harassment, workers also need assistance to minimise harm after an incident has occurred.

This section outlines what the Commission heard about the kinds of support, advice and advocacy that people affected by workplace sexual harassment may need to promote recovery and resilience.

Ideally, support, advice and advocacy should be delivered through a holistic approach that provides as seamless an experience as possible for victims and other people affected by workplace sexual harassment. In this section, the Commission recommends the resourcing, streamlining and in some cases expansion of existing services to help address the wide-reaching and often devastating impacts on people affected by workplace sexual harassment, including:

- a holistic service which meets a range of needs of victims (Section 7.2)
- information about rights and referral to appropriate supports and services (Section 7.3)
- advice and representation to navigate complex complaint and legal processes (Section 7.4)
- support to promote recovery, including psychosocial support to deal with the trauma of experiencing sexual harassment and impacts on wellbeing, and support to assist with the financial difficulties associated with career interruption, reduced earning capacity, healthcare costs and legal expenses which can result from experiencing or reporting sexual harassment (Section 7.5).

(a) The need to improve access to support, advice and advocacy for people affected by workplace sexual harassment

Throughout this Inquiry, the Commission heard that sexual harassment often has a detrimental impact on victims' career, health, finances, family and social life (see Section 3.8, 'Impacts of sexual harassment in the workplace'). The Commission was told that victims often 'need specialist, expert support to help them deal with the impact of their experiences, navigate relevant service systems and access legal redress'.[2]

Other people involved in an incident of sexual harassment may also be affected and require support. These include bystanders who may have witnessed, or may be involved in the reporting or investigation of an incident—including employers and managers—and who may be affected by bystander stress.[3] People who have had allegations of sexual harassment made against them may require support to deal with the impact of this and associated investigation or complaint processes, or as they undergo a process of behavioural change following an incident of sexual harassment. Further, co-workers, partners, family members and friends can be indirectly affected by a victim's experiences and may benefit from external support.

Overall, the Commission found that the support needs of victims and others affected by workplace sexual harassment were varied and often complex.

Despite the broad-reaching detrimental impacts of sexual harassment, many people affected by it do not seek support. The 2018 National Survey found that fewer than one in five people (18%) who said they experienced workplace sexual harassment in the last five years sought support or advice in relation to the most recent incident.[4]

Where people did seek support or advice, most commonly they turned to family or friends (61%).[5] Other people sought support from a range of sources inside and outside the workplace:

- About one third (31%) spoke to a co-worker or peer.
- Just over one in five (22%) spoke to their manager or supervisor.
- Fewer than one in five sought support from a counsellor or psychologist (18%), spoke to a more senior co-worker (16%) or the head of their workplace (14%).
- Only a small proportion of people sought support from their union (7%), a lawyer (6%), or saw a doctor or nurse (3%).[6]

While the 2018 National Survey showed that workplaces were an important source of support for victims, as noted in Section 6.2(f), 'Reporting', the Commission also heard in submissions and consultations about barriers which prevent many workers from reporting sexual harassment and seeking support from their employer.

However, during this Inquiry, the Commission heard that support services outside the workplace were often unavailable or inaccessible to people affected by sexual harassment. Several submissions described that avenues for seeking support, advice and advocacy were difficult to identify and navigate, too expensive or affected by lengthy delays.[7]

When victims feel unable to access justice or relevant support services, or those services do not deliver the support they need, they may turn to informal avenues such as social media to raise allegations, share their experiences and find solidarity with other victims of sexual harassment.

As discussed in Section 2.5, 'Increasing transparency around sexual harassment', social media can give victims a voice when they feel unheard through traditional channels. However, this approach carries the risk of detrimental outcomes for the victim, the employer and the alleged harasser. A comprehensive system of support, advice and advocacy may assist in restoring victims' faith in traditional processes and deliver fairer, more restorative outcomes for all parties.

Several submissions called for increased resourcing and availability of services to support people affected by sexual harassment.[8] For example, Gippsland Women's Health recommended:

> Improv[ing] coordinated specialist support and resources for victims to enable them to access and navigate reporting and support options so that they may gain legal advice and services such as counselling from experts in the field.[9]

Stakeholders also called for support, advice and advocacy specifically for workers facing intersectional discrimination. Victoria Legal Aid and Women's Health Victoria recommended that tailored information and supports be developed to assist 'women at higher risk', or those 'who experience intersecting forms of inequality', to be aware of their options and access support.[10] The Commission heard that services need to be accessible and relevant to diverse groups of workers, including through specialist services to provide support to workers facing intersectional discrimination or by making adjustments to general services.

7.2 A holistic approach to support, advice and advocacy

> [W]hen it comes to supporting victims/survivors, not only legal responses are essential but other forms of support including counselling and if appropriate case management that can link victims/survivors to other services. The existing specialist women's services sector is well placed to provide this type of support.[11]

Victims and other people affected by workplace sexual harassment may need to access a range of services providing support, advice and advocacy in order to minimise harm and decrease the likelihood and severity of negative social, financial and psychological outcomes (see Section 3.8, 'Impacts of workplace sexual harassment'). However, the Commission heard that services to address the harm associated with workplace sexual harassment were often difficult to access and delivered in a disjointed way.[12]

National Working Women's Centres (NWWC) submitted that providing people affected by workplace sexual harassment with the support, advice and advocacy they need requires a multifaceted and holistic approach.[13] Such an approach may be of particular benefit for workers facing intersectional discrimination, for whom difficulties accessing services may compound other barriers to seeking support such as 'mistrust and fear of retribution'.[14]

The Commission agrees that support, advice and advocacy should be delivered through a holistic approach, providing as seamless an experience as possible for victims and other people affected by workplace sexual harassment.

A holistic approach will include smooth and speedy referrals between services which provide information, support, advice and advocacy. For example, some agencies such as the Commission and the Fair Work Commission already make 'warm' (or mediated) referrals to other organisations where appropriate.[15] These services are discussed further in the sections below.

Additionally, a holistic approach is provided through access to organisations that provide an all-inclusive support, advice and advocacy service, such as working women's centres. This type of holistic model can better address the diverse needs of victims.

(a) Working women's centres

Working women's centres are not-for-profit community organisations that provide free, confidential advice and support to women employees on all work-related issues, and provide an effective holistic model for providing support, advice and advocacy to women affected by workplace sexual harassment.

NWWC, in its submission, described its approach as client-centred and feminist, usually starting with 'the creation of a space in which the woman tells us her story'.[16] When describing the range of services they provide, NWWC said:

> Our view is that sexual harassment survivors require advice, support, advocacy and counselling. Whilst Working Women's Centres are not funded to provide formal therapeutic counselling sessions, our clients come to us for advice, information and advocacy on the range of their legal and non-legal rights and options, and to discuss their preferred outcomes. They come to us for supported referrals to counselling and support services. They come to us for our client-centred and specialist approach to their issue, and perhaps most importantly, they come for advocacy.[17]

A focus on a service specifically for women is appropriate in the context of workplace sexual harassment, which disproportionately affects women in Australian workplaces. Some victims of workplace sexual harassment are 'entirely reliant' on the services that working women's centres provide, highlighting 'the fundamental importance of pro bono legal assistance offered by [working women's centres] in informing vulnerable workers of their legal rights and providing advocacy and representation on their behalf'.[18]

NWWC told the Commission that many women who come to them for advice and support express a generally low level of wellbeing, symptoms of anxiety or depression. As a result, NWWC noted their staff 'often end up as "accidental counsellors" although this is not our primary role'.[19]

The Commission heard that working women's centres were a particularly valuable source of support, advice and advocacy for workers experiencing intersectional discrimination,[20] partly because of their all-inclusive nature. NWWC's submission shared the experience of a client known as Elenor.

Elenor's story[21]

Elenor experienced severe and sustained sexual harassment from a male colleague that led to a sexual assault outside of work hours. Elenor contacted the Working Women's Centre (WWC) for help. During this call Elenor was referred to her local specialist sexual assault counselling service and provided with some introductory information about her rights, so that she knew she had some options.

At her appointment, the WWC provided Elenor with further information about legal avenues for making a complaint and seeking workers' compensation. The WWC also assisted Elenor in accessing counselling, first through her employers EAP [Employee Assistance Program] (which was unsuccessful) and then through her local free specialist sexual assault service. The WWC successfully advocated for Elenor to be seen by the service as a priority.

Elenor continued working for her employer; however, her mental health deteriorated to the point that she attempted to take her own life. With the support of the WWC and mental health services, Elenor recovered and went back to work. Elenor did not want to make a complaint under discrimination law, but with continued support and advice from the WWC over several months, Elenor decided to make a workers' compensation claim. The WWC supported Elenor in accessing legal advice. Elenor reached a confidential settlement with her employer.

Working women's centres have been defunded in some jurisdictions, and their funding has been significantly reduced in others. Currently, there are only three working women's centres in the country—in South Australia, the Northern Territory and Queensland. The Commission heard that centres are unable to keep up with demand, and that 'many women who have experienced sexual harassment and who require support have been turned away due to our lack of resources'.[22] These women can find themselves without access to assistance:

There is no other appropriate service for them. Counsellors cannot provide industrial advice. Lawyers are beyond the means of most women in this situation, and many are seeking … non-legal solutions in any case.[23]

Some submissions raised the need for increased funding for working women's centres. For example, the Women, Work and Leadership Research Group at the University of Sydney Business School told the Commission:

Presently the work these organisations do in this area is enormously underfunded, especially when considered in relation to the scale of the problem and the potential impact of such services.[24]

(b) Unions

The Commission heard about the important function that unions can play in addressing workplace sexual harassment, particularly given their broad reach across industries and workplaces in Australia. At the time of the last Australian census, 16% of full-time and 12% of part-time workers were trade union members in their main job.[25] Union members worked across industries including agriculture, forestry and fishing; mining; manufacturing; electricity, water, gas and waste services; construction; wholesale and retail trade; transport, postal and warehousing; accommodation and food services; public administration and safety; education and training; health care and social assistance; and arts and recreation services.[26]

The submission from Radical Women observed:

> Unions have a key role to play … First, sexual harassment crosses industries. Second, unions have the collective industrial power to hold employers to account and to create an environment of respect and solidarity in the workplace.[27]

Workers told the Commission about the support they gained from unions in relation to sexual harassment incidents, ranging from providing information and emotional support, to assistance with lodging a complaint, to representation through an investigation process:

> I think having good active unions in the workplace is also a pretty helpful aspect … it gives you another pathway to take your complaints if they're not being taken seriously in the internal processes.[28]

> You always felt like someone had your back, that they're there to help you out.[29]

> The union also supported me and put me in touch with someone who had had a similar experience with this individual and they reassured me that I hadn't done anything wrong.[30]

Unions and other organisations also told the Commission about the varied role that unions play in relation to workplace sexual harassment. Unions can provide advice and advocacy to a range of workers involved in an incident of sexual harassment, including victims, bystanders and workers who are subject to allegations, and generally have systems in place to manage potential conflicts of interest when they are assisting two of their members who are in dispute with one another.

Some unions focused on their role in providing emotional support or 'de facto counselling':

> [A] lot of what we do is supporting members, peer support … with sexual harassment in particular, because women and men don't want to report it or make a complaint, often the furthest it will go is a phone call, where the member will [say] … 'I just wanted to talk to someone about it.'[31]

Others discussed the role of union representatives in investigating workplace culture,[32] and still others in shaping policies and procedures in enterprise agreements and awards.[33] UN Women has also specifically noted the significant function of unions in 'helping to design and support internal complaints procedures' within a particular workplace or industry:

> [W]hen union representatives show a serious and supportive attitude towards complainants and witnesses, this can build confidence amongst the workers. Furthermore, unions can cooperate with the employer to ensure a fair complaint and dispute resolution process for both victims and accused perpetrators.[34]

Despite the variety of roles that unions can play in supporting victims and others affected by workplace sexual harassment, as well as in helping to address workplace sexual harassment more generally, their membership is declining.

The number of union members in Australia has fallen from around 2.5 million in 1976 to 1.5 million in 2016.[35] This translates to a decline in the proportion of union members as a share of all Australian workers from 51% to 14%.[36] Younger workers are far less likely to be union members than older workers, with only 4% of employed people aged 15–19, and 7% of employed people aged 20–24, who are a union member in their main job.[37]

Currently, like working women's centres, union support is not easily accessible to all workers across Australia. The Commission heard that a lack of information about the existence of unions and their role was a key reason for this. For example, one young worker told the Commission:

> [The] union is kind of not really spoken about. It feels like it's kind of like this secret underground business. You know, I didn't even know that you could get a delegate to go to the office with you to support you and if I had of known that, I would have reported stuff years ago.[38]

Some submissions called for an expanded role for unions in addressing workplace sexual harassment.[39] The Women, Work and Leadership Research Group at the University of Sydney Business School also called for additional resourcing for unions to enable them 'to provide independent, free and accessible advice to victims of sexual harassment and other people (such as witnesses) in the workplace'.[40]

The Commission's view

Support, advice and advocacy should be delivered through a holistic approach, providing as seamless an experience as possible for victims and other people affected by workplace sexual harassment. A holistic approach involves smooth and speedy referrals between services or access to organisations that provide an all-inclusive support, advice and advocacy service.

The targeted support and unique mix of services that working women's centres provide makes them a valuable source of holistic assistance for victims of workplace sexual harassment. The Commission considers that they should be available across the country and adequately resourced to provide victims with support, advice and advocacy.

Unions are a source of support for workers, and those who wish to call on them should be able to do so readily. Union representatives should be equipped with the skill and knowledge to support workers affected by sexual harassment. Section 6.2(e), "Support', discusses the role of employers in assisting workers affected by sexual harassment through the provision of information on sources of support and assistance, including unions.

RECOMMENDATION 49:

Australian governments provide increased and recurrent funding to working women's centres to provide information, advice and assistance to vulnerable workers who experience sexual harassment, taking into account particular needs of workers facing intersectional discrimination. Australian governments should consider establishing or re-establishing working women's centres in jurisdictions where they do not currently exist.

7.3 Information and referral

> Providing victim-survivors with clear information about the various reporting options available to them and how to access specialist psychosocial support (eg, counselling) in a timely manner are urgent priorities.[41]

(a) The need for clear and accessible information

During this Inquiry, the Commission frequently heard that workers' need for clear, relevant, easily accessible information to help them come to terms with their experiences and enforce their rights in relation to workplace sexual harassment was not being met.[42]

The Commission heard that a lack of information meant that many victims could not identify their experiences as sexual harassment. One victim told the Commission, 'I was so confused as to what was happening and why this was happening to me'.[43]

Workers facing intersectional discrimination can face additional challenges in accessing information about workplace sexual harassment. For example, the Commission heard that migrant workers may have particular difficulty navigating unfamiliar systems to access information or referral services.[44]

Several workers told the Commission that access to information about their rights and sources of support relating to sexual harassment would empower victims and assist with changing workplace culture.[45] Small businesses and their representatives, too, told the Commission that clear, accessible information on workplace sexual harassment could assist them to respond effectively to incidents and reduce stress for all involved.[46]

Women's Health Victoria suggested establishing and resourcing 'a dedicated, specialist national sexual harassment phoneline and information service',[47] as did Women Lawyers' Association of NSW.[48]

(b) Existing information and referral services

In Section 6.2(e), "Support', the Commission discussed the responsibility of employers to ensure that all workers affected by sexual harassment have access to information about their options for recourse, support and advice. This information should be accurate and up to date, as inaccurate or incomplete information can compound harm to workers. The Commission heard about one victim who sought support from within her industry and was referred to a generalist counselling service, only later to discover that there was a state-based sexual assault service that could have provided her with more targeted support.[49]

The Commission's National Information Service (NIS) provides information about a range of human rights and discrimination issues, including sexual harassment.[50] The service is free and confidential. It can provide expert, timely information and make referrals to relevant services. It also collects data to assist with systemic efforts to address sexual harassment.

Other agencies also administer websites, hotlines and services relating to workplace sexual harassment.

State and territory human rights and anti-discrimination agencies provide independent information by telephone and email.[51] Likewise, state and territory work health and safety bodies have telephone lines for enquiries about the operation of work health and safety laws.[52]

However, each of these state and territory services is limited to providing information about its own jurisdiction. The Fair Work Commission facilitates the Workplace Advice Service, a free legal assistance program, under which eligible workers and small business employers in some states can access limited independent legal advice on issues related to dismissal, workplace bullying or general protections under the *Fair Work Act 2009* (Cth).[53]

Stakeholders highlighted additional sources of information on workplace sexual harassment, including industry or sector-based information online.[54] For example, the NSW Office of the Legal Services Commissioner's website now contains an information sheet on how to notify it 'about inappropriate personal conduct by someone in a law practice' including sexual harassment. The webpage declares the 'guiding principle' 'to never cause [victims] further trauma'.[55]

Unions, working women's centres, community legal centres, Aboriginal and Torres Strait Islander Legal Services and legal aid services can also provide information to workers about what constitutes sexual harassment, and what can be done about it.

The Commission also heard about a variety of specialist support services that exist for victims of workplace sexual harassment facing intersectional discrimination.

For example, the NSW Council for Intellectual Disability, in its submission, advised victims to, 'Go to Intellectual Disability Rights Service, they will fight for your rights. They can write a letter to your company, to Human Resources.'[56]

One employer told the Commission that it set up a hotline to support LGBTQI staff during the marriage equality debate.[57]

Additionally, the Commission's National Information Service (NIS) routinely refers people to specialist legal, counselling and support services across the nation. These include services for refugees, migrants and members of culturally and linguistically diverse communities;[58] Aboriginal and Torres Strait Islander peoples;[59] people with disability;[60] members of LGBTQI communities;[61] older people[62] and young people.[63]

The Commission's view

Victims and others affected by workplace sexual harassment should have access to information and referral services to help them make sense of their experiences and navigate their options.

The Commission recommends investment in existing services with relevant experience and expertise, rather than creating a new information service which has the potential to add costs and increase complexity.

Considering its track record in providing a comprehensive range of information and referral services, the Commission's NIS is in a strong position to support workers affected by sexual harassment, and the Commission considers that it should be adequately resourced and promoted as the central contact point for information on workplace sexual harassment rights and responsibilities.

The Commission acknowledges that there are a range of other bodies which also provide some information relating to workplace sexual harassment, including unions, working women's centres, community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid. The Commission recommends that along with the NIS, services offered by other relevant agencies and organisations should be adequately funded to ensure they can provide high-quality information in relation to workplace sexual harassment, options for actions and referral to alternative regulatory schemes, and support.

In Section 6.4, 'Resources for workers and employers', the Commission has also recommended that unions, employers and relevant government agencies collaborate to create a platform to deliver resources and education for workers and employers on sexual harassment, called *Respect@ Work*.

The Workplace Sexual Harassment Council should work with relevant services to develop guidelines and resources with a view to standardising and enhancing the information and referral services provided to workers affected by sexual harassment, consistent with the Commission's recommended new legal and regulatory model. Over time, a streamlined approach to providing information and referral services in relation to workplace sexual harassment may prove warranted—the Workplace Sexual Harassment Council should consider the need for a centralised, accessible service after three years.

RECOMMENDATION 50:

The Commission be promoted as the central contact point for information on workplace sexual harassment rights and responsibilities, including information about options for action and referral to alternative regulatory schemes, and referral to a range of victim support services.

RECOMMENDATION 51:

Hotlines and similar services provided by other agencies and regulatory bodies under the Commission's proposed new regulatory model (see Section 5) provide information and referral services in relation to workplace sexual harassment, in a gender-responsive manner, including:

a. **detailed information about workplace sexual harassment under their regulatory schemes**
b. **information about options for action and referral to alternative regulatory schemes**
c. **referral to a range of victim support services.**

RECOMMENDATION 52:

The Workplace Sexual Harassment Council:

a. **provide high-level advice on development of guidelines and resources to ensure that all services providing information, advice and support in relation to sexual harassment can provide accurate information, make appropriate cross-referrals, and collect consistent data**
b. **after three years, consider the need for a centralised, accessible service to provide information and advice in relation to workplace sexual harassment.**

7.4 Legal advice and advocacy

> Bringing a sexual harassment complaint is an often stressful, re-traumatising, time-consuming and complex exercise for individuals. Access to justice for victims of sexual harassment necessitates access to expert free legal advice and representation, delivered within a trauma-informed approach and framework.[64]

Information and referral services and psychological support services go some way towards assisting sexual harassment victims by promoting recovery and resilience. However, victims may also need legal advice, representation and advocacy to make formal complaints and navigate the legal system.

The Commission heard that victims may have difficulty navigating their options for taking action on sexual harassment, whether in the workplace, with external agencies or through the courts.[65] Section 5, 'The legal and regulatory framework', describes some of the complexities workers face in pursuing sexual harassment complaints, including overlapping legal regimes, jurisdictional differences between agencies, and issues regarding multiple claims.

Maurice Blackburn described existing complaints processes as 'burdensome and difficult to navigate without legal advice' as well as 'daunting for victims who are emotionally distressed, unfamiliar with legal processes, fearful of reprisal, and who are unsure of their legal rights'.[66] The Australian Council of Trade Unions (ACTU) observed that:

> individuals wanting to pursue sexual harassment complaints must navigate a complex and technical area of law … and compete with well-resourced, well-informed and experienced respondents.[67]

As the United Kingdom House of Commons Women and Equalities Committee noted in its Inquiry into Sexual Harassment in the Workplace:

> It is expensive to secure legal representation, but it is very difficult to win a [sexual harassment] claim without it.[68]

The Commission heard from a number of stakeholders that services that provide legal advice and representation, including community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid commissions, may assist with navigating the challenges and reduce the harms associated with legal processes following sexual harassment.[69] The Commission commonly heard, however, that high demand and limited resources make providing quality services increasingly difficult.[70]

(a) Community legal centres, Aboriginal and Torres Strait Islander Legal Services and legal aid

Victims' entitlement and ability to access legal advice and representation may depend on several factors, including location and jurisdiction. The Commission and some state and territory anti-discrimination agencies, for instance, have a presumption against granting leave for legal representation in a conciliation conference.[71] Conversely, in some circumstances, anti-discrimination agencies (including the Commission) and the Fair Work Commission provide complainants with information on their options for legal assistance or facilitate a 'warm referral' for legal advice and/or representation.[72]

For many victims, the costs associated with securing legal representation in workplace sexual harassment matters are prohibitive. Professors Charlesworth and McDonald pointed out that victims often bear significant financial burdens even when their matter is successful, given the relatively small scale of financial remedies available to many victims and the fact that in state and territory jurisdictions claimants normally bear their own legal costs.[73]

Some victims told the Commission that they did not pursue a complaint through the court system because of the cost of legal fees, with one saying, 'no chance I would win against a multinational company even if I had evidence, they can afford good lawyers, I can't'.[74] Several submissions suggested that free legal representation should be accessible to all victims of workplace sexual harassment.[75]

For victims who cannot afford the services of a private lawyer, community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid commissions are essential if victims are to achieve access to justice. Some specialist and generalist legal centres already support victims of workplace sexual harassment. The National Association of Community Legal Centres, Caxton Legal Centre, St Kilda Legal Service, Women's Legal Service NSW, Kingsford Legal Centre, Redfern Legal Centre and Springvale Monash Legal Service all told the Commission they see clients in relation to sexual harassment in the workplace.[76]

Independent, not-for-profit, employment rights community legal centre JobWatch reported that between 2014 and 2018, its telephone service saw a more than 100% increase in the number of calls relating to sexual harassment (from 54 to 114).[77] Meanwhile, Legal Aid NSW submitted:

> Advice about sexual harassment forms a significant part of Legal Aid NSW's employment law work. Since 2014, Legal Aid NSW has provided over 350 advice and representation services about sexual harassment. Legal services in relation to sexual harassment represent approximately 22% of all our discrimination advice services. We advise victims of sexual harassment and workers whose employment is in jeopardy because they are alleged to have engaged in sexual harassment.[78]

Victoria Legal Aid told the Commission that its Equality Law Program provides advice and representation for people who have experienced sexual harassment:

> In the last five years, the Equality Law Program provided over 6,500 legal advices regarding discrimination and sexual harassment matters.[79]

Top End Women's Legal Services (TEWLS) submitted that:

> In the Northern Territory, acknowledging the gendered reality of sexual harassment, the three Women's Legal Services (TEWLS, Katherine Women's Information Legal Service and Central Australian Women's Legal Service) and the Northern Territory Working Women's Centre are the primary points of reference for employees seeking advice and/or support in respect of sexual harassment in the workplace. Currently, all services are operating outside of capacity to try and meet community need, with turn-aways due to a lack of resources remaining and ever-present reality.[80]

The Women's Legal Centre (ACT & Region) said it was contacted by few women solely in relation to workplace sexual harassment, but noted this was consistent with the 2018 National Survey findings that most victims did not report or seek support or advice.[81] The LGBTI Legal Service, too, told the Commission that it 'has handled few cases that directly concern sexual harassment in the workplace' but intimated that 'the fear, stigma and chronic under-reporting that plagues LGBTI victims of sexual harassment' was a major reason for this.[82]

The Commission's view

The Commission acknowledges the challenges that victims and other people affected by workplace sexual harassment face in navigating their options for action when an incident of workplace sexual harassment occurs, whether through the workplace, external complaints processes or legal proceedings. In Section 5, 'The legal and regulatory framework', the Commission has recommended a new regulatory model to promote coordination, consistency and clarity between the key legal schemes relating to workplace sexual harassment. This is aimed at reducing duplication, ambiguity and undue burden on victims to navigate complex complaint processes, and placing more focus on the obligations of employers to take preventative action.

Within this system, legal aid commissions, Aboriginal and Torres Strait Islander Legal Services, and community legal centres continue to have an important role in advising workers on the relative merits of their options, providing guidance on which might be best suited to their circumstances, and giving support to redress power imbalances and avoid further trauma. In court proceedings or in statutory conciliation, legal representation may result in a fairer, more efficient process.

Legal advice and representation should be available to all victims of sexual harassment navigating legal and external complaint processes, including those who do not have the means to pay lawyers' fees. Legal aid commissions, Aboriginal and Torres Strait Islander Legal Services, and community legal centres should be adequately resourced to enable them to provide quality advice and representation in sexual harassment matters. Pro bono lawyers may also play an increasing role in advising and advocating for victims of workplace sexual harassment through legal processes.

RECOMMENDATION 53:

All Australian governments provide increased and recurrent funding to community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid commissions to provide legal advice and assistance to vulnerable workers who experience sexual harassment, taking into account the particular needs of workers facing intersectional discrimination.

7.5 Support to promote recovery

> Victims of sexual harassment should have access to appropriate and timely specialist support when they need it, including access to information and counselling that is appropriately resourced and coordinated.[83]

(a) Psychosocial support

The Commission heard repeatedly of the importance of timely access to specialist counselling for victims of sexual harassment.[84]

As noted above in Section 3.8, 'Impacts of sexual harassment in the workplace', experiencing sexual harassment can be deeply affecting and psychosocial support can be vital to victims' recovery. Victoria Legal Aid shared accounts from workers in their submission that illustrated the negative impact of not receiving counselling and support:

> My employer failed to support me in the traumatic incidents that I experienced [at work], as I was expected to deal with whatever came my way … If I had received support and psychological counselling, I would not have resigned and would have been able to work through to my retirement age. My employer prevented me from reaching my potential by not providing a safe work environment for me.[85]

> It would be good if, after speaking to a lawyer, there was an option to be transferred through to a counsellor to debrief about it afterwards. This would've helped me as it was triggering speaking about it and I felt alone after hanging up on the phone. I would have liked to have someone tell me that I haven't done anything wrong and to let me know what I could have done for self-care and referral to some doctors. Kind words are appreciated as it was hard to survive.[86]

Bystanders, alleged harassers and others involved in an incident of workplace sexual harassment may also be affected by their experiences and benefit from psychosocial support (see Section 3.8, 'Impacts of sexual harassment in the workplace').

(i) Emotional and psychosocial support in the workplace

As noted above, victims and others affected by sexual harassment will often turn to employers, managers or others in the workplace for support.[87] Sections 6.2(e), 'Support', and 6.2(f) 'Reporting', discussed the need for managers and other relevant personnel in the workplace to be adequately equipped to provide appropriate support to those who approach them for it. Some organisations provide training on responding appropriately to victims—for example, Universities Australia, in its guidelines for university responses to sexual assault and sexual harassment, recommended that contact officers be trained in responding to trauma.[88]

(ii) Employee Assistance Programs (EAPs)

EAPs are another avenue through which workers affected by sexual harassment can seek support. EAPs are independent, free and confidential services offered and funded by some employers, that allow staff and their families to access counselling over the telephone and in person.

EAPs can benefit both workers and employers by providing 'a vital staff support, cost effective in managing risk and an industry expectation'.[89] For victims, bystanders and perpetrators, EAPs can provide an avenue for confidential discussion and independent, objective support. For some workers, this may be sufficient, and for others this may be a step towards making a formal complaint or seeking other forms of assistance.

Many submissions mentioned EAPs as a source of support for workers who have experienced sexual harassment.[90] In its report on the findings from the 2008 National Survey, the Commission recommended that employers who provide EAPs offer the programs to workers who have experienced sexual harassment in the workplace.[91]

Despite their clear benefits, EAPs are not a universal feature of Australian workplaces—in particular, small businesses are less likely to have them in place than large businesses. Where they do exist, EAPs may not always provide the level of support that people affected by workplace sexual harassment need. As some stakeholders pointed out to the Commission, Australia does not have a dedicated EAP service for sexual harassment, and EAP expertise in this area is likely to vary.[92] Additionally, the number of counselling sessions per year available through EAPs is usually limited, and victims can exhaust these before their need for support has passed, as this worker explained:

> I have already had my allocated six sessions and the counselling service had requested another six sessions from the company which I was advised takes two weeks but it was ten weeks and no one had got back to me.[93]

(iii) Other psychosocial support services outside the workplace

Australia currently has no free and widely available counselling service tailored to the needs of people affected by sexual harassment.[94] The national sexual assault, domestic and family violence counselling, information service, the 1800RESPECT hotline, is a valuable first point of contact and already provides support to some victims of workplace sexual harassment, especially those who have been the victims of sexual assault. One victim who said she was sexually assaulted in connection with her work told the Commission about the support that she was offered by the hotline:

> I finally received counselling from 1800RESPECT. I was able to telephone them at 3 am when I would receive flashbacks of the incidents, in particular, the men's faces.[95]

While 1800RESPECT provides a valuable service, the Commission notes that with increasing demand and resourcing issues, some victims of sexual harassment who have experienced sexual assault may have difficulty accessing it, and the hotline may be unable to provide the ongoing, personalised psychological support that some victims need. Moreover, the Commission notes that 1800RESPECT is unlikely to have the capacity to provide specialist support to all victims of workplace sexual harassment. The Commission welcomes the Australian Government's commitments to additional funding for 18000RESPECT in 2018 and 2019, noting the upcoming review by the Department of Social Services of the hotline.[96]

Other independent agencies, such as the Victorian Centres Against Sexual Assault (CASAs), provide counselling to victims of sexual assault but prioritise their waiting lists on the basis of a number of psychological and operational factors.[97]

Consequently, as Victoria Legal Aid pointed out, the primary option for psychological support for many victims of sexual harassment outside their workplace is to visit their GP, be granted a mental health plan, and find a psychologist either whom they can afford or who is willing to bulk bill for sessions and has availability within an accessible distance.[98] This effectively makes counselling inaccessible to many who would benefit from it.

Workers who have experienced sexual harassment often need the support and encouragement of their employer to be able to access psychosocial services. Springvale Monash Legal Service suggested that '[r]eferrals to counselling services should be facilitated by the workplace with time allowed to attend such counselling', describing this as 'a system that reduces the burden on victims'.[99]

Some organisations may have other independent support services, similar to EAPs, in place to support victims of sexual harassment. For example, the Commission heard about Victoria Police's Safe Space hotline, created in response to the Victorian Equal Opportunity and Human Rights Commission Review, which provides victim-centred, confidential advice, support and advocacy for victims of workplace harm.

It is available statewide, 24 hours a day, every day, and is independent of the EAP and Victoria Police. Safe Space will not disclose information to Victoria Police which might identify a victim or target without their express consent, but it analyses and uses de-identified data to inform workplace initiatives.[100]

Rape & Domestic Violence Services Australia recommended a national telephone counselling service to provide specialist support to people impacted by sexual harassment.[101] Alternatively, the CASA Forum recommended:

> A national network of advocacy and support services is established and/or identified to provide a visible point of contact for survivors, and that these provide specialist, appropriate, skilled support by professionals who understand the gendered nature of sexual harassment and sexual assault.[102]

The Commission's view

Victims and others affected by workplace sexual harassment should have timely access to free specialist psychosocial support to promote recovery and resilience. In Section 6.2(e), 'Support', the Commission discussed the need for managers and other relevant personnel to facilitate access to psychological support to workers affected by sexual harassment.

The Commission acknowledges that a national telephone counselling service for people affected by sexual harassment may assist workers to overcome many of the barriers they currently face to obtaining support. However, the Commission notes the practicalities, time and resources that would be required to establish such a service, and the potential for it to add an additional layer of complexity to an already complex system.

Given the prominence and existing expertise of the 1800RESPECT hotline, the Commission recommends the Australian Government ensure it is sufficiently funded and expanded to support sexual harassment victims. 1800RESPECT should also be resourced to collect de-identified data on the number of people who contact the service in relation to workplace sexual harassment, which may help to inform the development of prevention and response initiatives (see recommendations on data collection in Section 3.2, 'Prevalence of sexual harassment in the workplace').

Victims who require support beyond what 1800RESPECT can offer should have access to a well-resourced national network of other relevant services including EAPs, sexual assault support services, mental health helplines, and healthcare providers with the expertise to respond appropriately to workplace sexual harassment.

RECOMMENDATION 54:

The Australian Government promote the 1800RESPECT hotline and ensure it is adequately resourced to expand its services to provide appropriate psychological support and referral to people affected by workplace sexual harassment, and collect and maintain de-identified and disaggregated data on contacts regarding workplace sexual harassment.

RECOMMENDATION 55:

Psychosocial support for people affected by workplace sexual harassment be provided through a national network of services, including specialist sexual assault support services, mental health helplines, and healthcare providers with the expertise to respond appropriately to the gendered nature of sexual harassment. All Australian governments should prioritise funding to these services to ensure accessibility and capacity.

(b) Financial and career support

Victims who experience and/or report sexual harassment are often beset by financial difficulties associated with career interruption, reduced earning capacity, healthcare costs and legal expenses, as described in Section 3.8(a), 'Impacts on victims'.

The Commission, Fair Work Commission and state and territory human rights and anti-discrimination commissions provide free or low-cost avenues to help ensure access to justice for people from all socioeconomic backgrounds.[103] Additionally, as noted above, free legal advice and representation is available to some victims through legal aid, community legal centres or Aboriginal and Torres Strait Islander Legal Services.

However, victims who retain private lawyers for advice and representation may be liable for court fees and their lawyers' bills, as well as the respondent's costs if they are unsuccessful. One victim told the Commission that the out-of-court settlement she received 'didn't go anywhere near covering all the costs I had incurred'.[104] Another victim told the Commission about the impact of the expense involved in her legal matter:

> I know that I spent $90k on my legal battles. I don't know how much [my employer] spent to viciously fight me all that time. Imagine if [my employer] had just decided to pay me instead of all the lawyers.[105]

The Commission heard about the significant costs for victims associated with ongoing psychological support throughout emotionally taxing processes.[106] Many victims who experienced financial detriment as a result of sexual harassment were not properly compensated for their loss, because they did not pursue a complaint or claim for redress or workers' compensation, or because their complaint or claim was unsuccessful.[107]

The expenses and financial losses which accompany victims' experiences of sexual harassment may be compounded for those whose employment is terminated, who feel forced to resign or whose earning capacity is reduced as a result of their experiences.[108] Interruption to career progression as a result of sexual harassment has emotional and psychological impacts on victims, as well as financial impacts.[109] Some submissions called for stronger support for victims in resuming their careers following an incident of sexual harassment, with one victim submitting that 'women's careers should not be damaged by this behaviour. Once retraumatised, it is very hard to have the confidence to progress one's career.'[110]

Centrelink can assist jobseekers by referring them to employment services providers in their local area. Employment services providers can help jobseekers to look for work, and provide access to training as well as computers and phones for this purpose.[111] For example, the Australian Government's Jobactive program can assist with writing a résumé, looking for work, preparing for interviews, acquiring skills that local employers need, and ultimately finding and keeping a job.[112]

Centrelink has an Employment Services Information Line and the Australian Government's Jobactive website has resources, tools, interactive features and tips to assist with finding work.[113] There are a number of eligibility criteria for Jobactive services, but eligible people can access them for free.[114]

Career counselling and support with finding and keeping a job are services that working women's centres are also well placed to provide, but currently do not have the capacity for.[115] Unions, too, may provide career advice and practical support with returning to the workforce, in collaboration with other stakeholders, but such assistance is outside their official mandate and many are too overstretched to help in such a way.

In Section 6.2(e) 'Support', the Commission encourages employers to consider paid leave or other financial support for victims who need to take time off work following an incident of workplace sexual harassment. For example, the AFL's Respect and Responsibility Policy pledges to ensure that 'individuals who have been subjected to disrespectful conduct [including] sexual harassment … are supported by best practice services focused on their individual needs,' with these costs 'to be absorbed by the AFL'.[116]

When workplace sexual harassment amounts to a crime, victims may access financial support through a victims' support scheme. In New South Wales, victims of violent crime and their families can access a victims' support package of counselling, financial support and a recognition payment.[117]

Similar schemes providing compensation to victims of crime exist in all other states and territories.[118] However, for the majority of workplace sexual harassment that does not meet the criminal threshold, there is no comparable scheme in place.

The Commission's view

The harm to victims from an incident of workplace sexual harassment should not be compounded by financial difficulties when accessing advice or support or from the disruption to their employment or career. The Commission's recommendations to enhance information, referral, advice, advocacy and psychosocial support services for people affected by workplace sexual harassment will better support victims to access the redress and compensation they may need to address the often significant financial impacts of experiencing harassment.

Returning to work in a safe and meaningful position can protect victims against financial hardship and promote recovery. Unions, working women's centres and other relevant community organisations can provide a valuable source of career advice and support for victims to return to work. In Sections 6.2(e), 'Support' and 6.2(f), 'Reporting', the Commission also considers the importance of employers ensuring that victims who wish to stay in or return to the workplace following an incident of sexual harassment are protected from victimisation by their employers, so that they can continue to work safely in their role.

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14 St Kilda Legal Service, Submission 409, *Sexual Harassment Inquiry*, 18. See also Women with Disabilities Victoria, Submission 312, *Sexual Harassment Inquiry*, 7; Consultation with policy stakeholders, Hobart.
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62 Nationally, these include: the National Aged Care Advocacy Program and the Rights of Older People website. State and territory-based services include the Older Person's Legal Service in the ACT; the Senior Rights Service and Older Women's Network in NSW; the Aged Care Advocacy Service in the NT; Seniors Legal and Support Service in Queensland; Senior Rights, Seniors Law and Elder Rights Advocacy in Victoria; the Older People's Legal Service in Tasmania; the Aged Rights Advocacy Service and Seniors Information Service in SA; and AdvoCare in WA.

63 National services for children and young people include Youth Law Australia, the Office of the eSafety Commissioner and Legal Aid's Youth Hotline. State and territory-based services include the Youth Law Centre in the ACT, Shopfront Youth Legal Centre in NSW, Youth Advocacy Centre in Queensland, Young Workers Legal Service in SA, Young Workers Centre in Victoria, Youthlaw also in Victoria; and the Youth Legal Service in WA.

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Appendices

APPENDIX 1:

Glossary, acronyms and abbreviations

(a) Glossary

Bystander	A person who observes sexual harassment in the workplace firsthand or hears about it subsequently.
Complaint	Where a person reports workplace sexual harassment either within their workplace or to an external body outside their workplace.
Discrimination	When a person is treated less favourably than another person because of a particular attribute (for example, sex, gender identity, age) or when an unreasonable rule or policy applies to everyone but has the effect of disadvantaging that person because of their attribute.
Intersectional discrimination	When a person is subjected to multiple and/or interrelated forms of discrimination or harassment.
Sexual harassment	An unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances.
Technology-facilitated abuse and harassment	Encompasses a wide range of behaviours where a person uses technology to control, harass, threaten or humiliate another person. Sexual harassment involving the use of technology can include sexually explicit emails, SMS or social media, indecent phone calls, repeated or inappropriate advances online, or sharing or threatening to share intimate images or film without consent.
Victimisation	Retaliatory action, or the threat of such action, against a person due to a complaint of sexual harassment or because they took action in support of a complaint.
Worker	A person who undertakes works in any capacity, including work that is paid, unpaid or self-employed, full-time, part-time, casual, permanent or temporary.

(b) Common acronyms and abbreviations

2018 National Survey	The Commission's 2018 report, *Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces*
ABS	Australian Bureau of Statistics
ANROWS	Australia's National Research Organisation for Women's Safety
CAG	Council of Attorneys-General
CALD	Culturally and linguistically diverse
Change the Story	The national shared framework, developed by Our Watch, for the primary prevention of violence against women and their children in Australia.
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
COAG	Council of Australian Governments
Commission	Australian Human Rights Commission
EAP	Employee assistance program
ILO	International Labour Organization
ILO Convention 190	International Labour Organization Convention Concerning the Elimination of Violence and Harassment in the World of Work (No 190)
LGBTQI	Lesbian, gay, bisexual, transgender, queer/questioning and intersex
National Plan	National Plan to Reduce Violence Against Women and their Children 2010–2022
NDA	Non-disclosure agreement
NCAS	National Community Attitudes towards Violence against Women Survey
PCBU	Person conducting business or undertaking
UN	United Nations
WGEA	Workplace Gender Equality Agency
WHS	Work health and safety

APPENDIX 2:

Submissions

Author	Number
Individual	1
Individual	2
Individual	3
Individual	4
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Individual	8
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Individual	10
Individual	11
Individual	12
Individual	13
Individual	14
Organisation	15
Individual	16
Dr S Moston and Dr T Engelberg	17
Individual	18

Author	Number
Individual	19
Individual	20
Individual	21
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Author	Number
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Author	Number
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Author	Number
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Individual	107
Dr A Mackay	108
Individual	109
Individual	110
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Individual	113
Individual	114

Author	Number
Individual	115
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Individual	130
Individual	131
Individual	132
Individual	133
Group of individuals	134
Individual	135
Individual	136
Individual	137
Individual	138

Author	Number
Individual	139
Individual	140
Individual	141
Individual	142
Individual	143
Individual	144
Individual	145
Group of individuals	146
VicHealth (Victorian Health Promotion Foundation)	147
Individual	148
Individual	149
Individual	150
Individual	151
Individual	152
Individual	153
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Individual	155
Individual	156
Individual	157
Individual	158
Individual	159
Individual	160
Individual	161
Organisation	162

Author	Number
Individual	163
Individual	164
Individual	165
Individual	166
Individual	167
Individual	168
Young Women's Christian Association (YWCA) Canberra	169
Prof P McDonald and Prof S Charlesworth	170
Alice Springs Town Council	171
Individual	172
Individual	173
Individual	174
Individual	175
Individual	176
Individual	177
Individual	178
Individual	179
Individual	180
Organisation	181
Individual	182
Individual	183
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Individual	185
Individual	186

Author	Number
Individual	187
Prof J Bessant	188
Individual	189
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Individual	197
Individual	198
Individual	199
Individual	200
Individual	201
WilliamsonBarwick Lawyers	202
Individual	203
WorkSafe Western Australia	204
Australian Medical Association (AMA)	205
Individual	206
Royal Australasian College of Surgeons	207
Individual	208
Individual	209
Individual	210

Author	Number
Individual	211
Individual	212
Individual	213
Individual	214
Individual	215
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Individual	217
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Individual	219
South Australia Police (SAPOL)	220
Women's Health in the South East (WHISE)	221
Individual	222
City of Mitcham	223
Individual	224
Individual	225
Individual	226
Individual	227
Individual	228
Individual	229
Group of individuals	230
Individual	231
Individual	232
Individual	233
Workplace Safety Services Pty Ltd	234

Author	Number
Individual	235
Individual	236
Individual	237
Individual	238
Screen Australia	239
Pride and Diversity (ACON)	240
Individual	241
Dr D Allen	242
Individual	243
Individual	244
Individual	245
Individual	246
Individual	247
Organisation	248
Law Council of Australia	249
Individual	250
Northern Territory Women Lawyers Association Inc. (NTWLA)	251
Individual	252
Office of the eSafety Commissioner	253
Office of the NSW Legal Services Commissioner (OLSC)	254
National Council of Women of NSW Inc.	255
NSW Council for Intellectual Disability	256
Individual	257
Individual	258

Author	Number
Restaurant & Catering Industry Association	259
Women, Work and Leadership Research Group, University of Sydney Business School, The University of Sydney	260
Individual	261
Chiefs for Gender Equity	262
A. Prof Hewitt, Prof Owens, Prof Stewart and A. Prof Howe	263
Organisation	264
Tasmanian Women in Agriculture (TWiA)	265
Individual	266
Not in My Workplace	267
Women NSW	268
Individual	269
Individual	270
Individual	271
Organisation	272
Individual	273
Individual	274
Australian Women Against Violence Alliance (AWAVA)	275
Radical Women	276
Organisation	277
Springvale Monash Legal Service	278
Individual	279
Northern Territory Anti-Discrimination Commission	280
Our Watch	281
Diversity Council Australia (DCA)	282

Author	Number
Victoria Legal Aid	283
Organisation	284
CASA Forum	285
Women's Health East	286
Individual	287
Australian Women Lawyers Ltd	288
Collective Shout	289
Gippsland Women's Health	290
The Australian Federation of Business & Professional Women Inc (BPW Australia)	291
Individual	292
Prof Lisa Heap	293
Individual	294
Individual	295
Individual	296
Women's Electoral Lobby Australia	297
Individual	298
Individual	299
Australian Institute of Employment Rights (AIER)	300
Organisation	301
Individual	302
Organisation	303
Individual	304
Rape & Domestic Violence Services Australia	305
Australian Council of Trade Unions (ACTU)	306

Author	Number
Maurice Blackburn Lawyers	307
NSW Young Lawyers	308
Organisation	309
Volunteering Australia and Justice Connect	310
Individual	311
Women with Disabilities Victoria	312
Community and Public Sector Union/State Public Service Federation (CPSU SPSF)	313
Individual	314
Individual	315
Queensland Nurses and Midwives' Union	316
Organisation	317
Electrical Trades Union	318
Individual	319
NSW Society of Labor Lawyers	320
National Association for the Visual Arts (NAVA)	321
Individual	322
Women Lawyers Association of the ACT	323
Individual	324
National Tertiary Education Union (NTEU)	325
Individual	326
Science & Technology Australia	327
Individual	328
Victorian Trades Hall Council	329
Individual	330

Author	Number
Individual	331
Australian Education Union	332
Individual	333
Organisation	334
Women Barristers Association	335
Australian Manufacturing Workers Union (AMWU) (NSW and ACT branch)	336
Victorian Women Lawyers	337
Prof S Bertone and A. Prof L Colley	338
Individual	339
Women Lawyers Association of NSW	340
Individual	341
Women's Health Victoria	342
Individual	343
CARE Australia	344
Organisation	345
Level Medicine	346
Sex Workers Outreach Project	347
Individual	348
Australian Chamber of Commerce and Industry (ACCI)	349
Queensland Chamber of Commerce and Industry (CCIQ)	350
Dr S Ailwood and J Diedricks	351
Individual	352
Young Women's Advisory Group to Equality Rights Alliance and Harmony Alliance	353
Unions NSW	354

Author	Number
Flight Attendants' Association of Australia (FAAA)	355
Individual	356
The University of Sydney	357
Employment and Equal Opportunity (EEO) Committee of the Law Society of Tasmania	358
Individual	359
Women's Legal Centre ACT and Region Inc	360
Employment Law Centre of WA Inc	361
Organisation	362
The Rural, Regional, Remote Women's Network of Western Australia	363
Dr S Saunders and F S Tenna	364
National Union of Workers (NUW)	365
Harmers Workplace Lawyers	366
Organisation	367
Project Respect	368
Organisation	369
Individual	370
Individual	371
Victorian Equal Opportunity & Human Rights Commission (VEOHRC)	372
Susan Price	373
Young Women's Christian Association (YWCA) Australia	374
V Sojo, R Wood and A Genat	375
Australian Mines and Metals Association (AMMA) (now Australian Resources & Energy Group)	376
Individual	377

Author	Number
Individual	378
Australian Local Government Women's Association (ALGWA) Victoria	379
Gordon Legal	380
Individual	381
Caxton Legal Centre	382
National Working Women's Centres (NWWC)	383
Top End Women's Legal Service Inc.	384
Australian Medical Association (AMA) Western Australia	385
Individual	386
Individual	387
Catholic Women's League of Australia (CWLA)	388
Individual	389
Australian Salaried Medical Officers' Federation (ASMOF)	390
Organisation	391
Jenna Price	392
Individual	393
Individual	394
Individual	395
Jesuit Refugee Service (JRS) Australia	396
WEstjustice	397
Individual	398
Individual	399
Individual	400
Individual	401

Author	Number
Individual	402
Organisation	403
Individual	404
Individual	405
Organisation	406
Transport Workers' Union of Australia (TWU)	407
Organisation	408
St Kilda Legal Service	409
Individual	410
Australian Small Business and Family Enterprise Ombudsman (ASBFEO)	411
Individual	412
Australian Bar Association (ABA)	413
Federation of Ethnic Communities' Councils of Australia (FECCA)	414
International Women's Development Agency (IWDA)	415
Individual	416
Premier's Council for Women	417
Australian Education Union NSW Teachers Federation	418
Individual	419
Municipal Association of Victoria	420
Victorian Women's Trust	421
Australian Nursing and Midwifery Federation	422
Australian Discrimination Law Experts Group (ADLEG)	423
Individual	424
City of Melbourne	425

Author	Number
National Union of Students (NUS)	426
Organisation	427
Ai Group (AiG)	428
Individual	429
NSW Nursing and Midwives' Association	430
Individual	431
Organisation	432
Council of Australian Postgraduate Associations	433
Individual	434
Individual	435
Individual	436
Tasmanian State Service	437
Gender Equity Victoria (GEN VIC)	438
NOW Australia	439
Women in Film & Television (WIFT) Australia	440
LGBTI Legal Service	441
NSW Legal Aid	442
Individual	443
Individual	444
Individual	445
Safe Work Australia	446
Individual	447
Group of individuals	448
JobWatch	449

Author	Number
Kingsford Legal Centre, Redfern Legal Centre, Women's Legal Service NSW and the National Association of Community Legal Centres	450
Individual	451
Academic	452
Australian Government Department of Jobs and Small Business	453
Individual	454
Shop, Distributive and Allied Employees' Association (SDA) National	455
Deloitte Australia	456
Individual	457
Individual	458
Individual	459
Lorenzo Bresciani	460

APPENDIX 3:

Consultations

#	Location	Consultation type	Date
1	Sydney	Workshop (Human Rights and Technology)	25 July 2018
2	Hobart	Policy stakeholders	26 September 2018
3	Hobart	Public	26 September 2018
4	Hobart	Employers	27 September 2018
5	Hobart	Government stakeholders	27 September 2018
6	Perth	Policy stakeholders	9 October 2018
7	Perth	Women (male dominated industries)	9 October 2018
8	Perth	Public	9 October 2018
9	Perth	Employers	10 October 2018
10	Geraldton	Policy stakeholders	11 October 2018
11	Geraldton	Employers	11 October 2018
12	Adelaide	Policy stakeholders	16 October 2018
13	Adelaide	Public	16 October 2018
14	Adelaide	Employers	17 October 2018
15	Darwin	Women	29 October 2018
16	Darwin	Employers	30 October 2018
17	Darwin	Policy stakeholders	30 October 2018
18	Darwin	Public	30 October 2018

#	Location	Consultation type	Date
19	Darwin	Women (engineering sector)	31 October 2018
20	Darwin	Women (Aboriginal and Torres Strait Islander workers)	31 October 2018
21	Canberra	Policy stakeholders	12 November 2018
22	Canberra	Public	12 November 2018
23	Canberra	Government stakeholders	13 November 2018
24	Canberra	Aboriginal and Torres Strait Islander workers	13 November 2018
25	Melbourne	Policy stakeholders	21 November 2018
26	Melbourne	Policy stakeholders	21 November 2018
27	Melbourne	Employers (male dominated industries)	22 November 2018
28	Melbourne	Employers (services industry)	22 November 2018
29	Melbourne	Employers (hospitality and retail industries)	22 November 2018
30	Melbourne	Public	22 November 2018
31	Melbourne	Policy stakeholders (LGBTQI community)	23 November 2018
32	Melbourne	Union roundtable	23 November 2018
33	Melbourne	Policy stakeholders (CALD women and girls)	26 November 2018
34	Melbourne	Medical professionals	26 November 2018
35	Melbourne	Sporting associations	27 November 2018
36	Melbourne	Government stakeholders	27 November 2018
37	Brisbane	Policy stakeholders	4 December 2018
38	Brisbane	Public	4 December 2018
39	Townsville	Policy stakeholders (via teleconference)	5 December 2018

#	Location	Consultation type	Date
40	Brisbane	Employers (human resource professionals)	6 December 2018
41	Sydney	Policy stakeholders (media, arts and entertainment industry)	10 December 2018
42	Sydney	Academic roundtable	6 February 2019
43	Sydney	Women (legal professionals)	11 February 2019
44	Sydney	Employers (small businesses)	11 February 2019
45	Sydney	Public	11 February 2019
46	Sydney	Policy stakeholders (LGBTQI community)	12 February 2019
47	Sydney	Young workers	12 February 2019
48	Sydney	Legal roundtable	13 February 2019
49	Albury Wodonga	Employers (manufacturing and agricultural industries)	14 February 2019
50	Albury Wodonga	Policy stakeholders	14 February 2019
51	Albury Wodonga	Men (male dominated industries)	14 February 2019
52	Sydney (Ashfield)	Policy stakeholders (temporary visa holders)	15 February 2019
53	Sydney (Ashfield)	Women (CALD workers)	15 February 2019
54	Sydney (Parramatta)	Policy stakeholders (health and social services sector)	15 February 2019
55	Sydney	Policy stakeholders (disability sector)	18 February 2019
56	Newcastle	Employers (manufacturing and mining industries)	20 February 2019
57	Melbourne	Women (CEOs)	21 February 2019
58	Melbourne	Men (CEOs)	4 March 2019
59	Melbourne	Men (STEM sector)	9 March 2019
60	Melbourne	Men (STEM sector)	9 March 2019

APPENDIX 4:

Key meetings

Individual/Organisation	Date
The Hon Kelly O'Dwyer MP, former Minister for Women	17 January 2018
The Hon Prudence Goward, former NSW Minister for Family and Community Services, Social Housing, and the Prevention of Domestic Violence and Sexual Assault	2 August 2018
The Hon Tanya Plibersek MP, former Minister for Women and Minister for Education and Training	2 August 2018
Cathy McGowan AO, former MP	13 September 2018
Sarah Bolt, Tasmanian Anti-Discrimination Commissioner	25 September 2018
The Hon Will Hodgman MP, Premier of Tasmania	25 September 2018
The Hon Jacquie Petrusma MP, former Minister for Women Tasmania	25 September 2018
Robin Banks, Former Anti-Discrimination Commissioner Tasmania, University of Tasmania Post-doctoral candidate	27 September 2018
Professor Rufus Black, Vice-Chancellor University of Tasmania	28 September 2018
Dr John Byrne, Commissioner for Equal Opportunity Western Australia	9 October 2018
The Hon Mark McGowan MLA, Premier of Western Australia	9 October 2018
The Hon Simone McGurk MLA, Minister for Women's Interests, Prevention of Family and Domestic Violence and Community Services Western Australia	9 October 2018
The Hon David Pisoni MP, Minister for Innovation and Skills, former Minister for Human Services South Australia	16 October 2018
The Hon Michelle Lensink MLC, Minister for Human Services South Australia	16 October 2018

Individual/Organisation	Date
Dr Niki Vincent, South Australian Commissioner for Equal Opportunity	16 October 2018
The Hon Dale Wakefield MLA, Minister for Territory Families Northern Territory	29 October 2018
Sally Sievers, Northern Territory Anti-Discrimination Commissioner	30 October 2018
Kingsford Legal Centre	8 November 2018
Senator Larissa Waters, Senator for Queensland	12 November 2018
Dr Helen Watchirs OAM, Australian Capital Territory Human Rights Commissioner	12 November 2018
Karen Toohey, Australian Capital Territory Discrimination, Health Services, and Disability & Community Services Commissioner	12 November 2018
Attorney-General's Department, Australian Government	13 November 2018
Yvette Berry MLA, ACT Minister for Women	13 November 2018
Rachel Stephen Smith, ACT Minister for Health, former ACT Minister for Employment and Workplace Safety	13 November 2018
Workplace Gender Equality Agency	14 November 2018
Kristen Hilton, Victorian Equal Opportunity and Human Rights Commissioner	23 November 2018
Sandra Parker PSM, Fair Work Ombudsman	26 November 2018
Natalie James, Partner, Deloitte Australia and former Fair Work Ombudsman	26 November 2018
Victorian Auditor-General's Office	27 November 2018
Sharyn O'Neill, Western Australian Public Sector Commissioner	29 November 2018
Julie Inman-Grant, Australian eSafety Commissioner	30 November 2018
Australian Chamber of Commerce and Industry	4 December 2018
Dr Terry Fitzsimmons, University of Queensland Business School	5 December 2018
Scott McDougall, Queensland Anti-Discrimination Commissioner	5 December 2018

Individual/Organisation	Date
The Hon Dianne Farmer MP, Minister for Women Queensland	6 December 2018
Associate Professor Michael Flood and Professor Paula McDonald, Queensland University of Technology	6 December 2018
The Hon Justice Iain Ross AO, President, and Commissioner Peter Hampton, Fair Work Commission	11 December 2018
Fair Work Commission	13 December 2018
The Behavioural Insights Team	29 January 2019
Australian Council of Trade Unions	5 February 2019
The Hon Gabrielle Williams MP, Minister for Women, Prevention of Family Violence and Youth Victoria	11 February 2019
The Hon Justice Chris Maxwell AC, President of the Court of Appeal, Victoria	8 February 2019
Associate Professor Karen O'Connell, Faculty of Law, University of Technology Sydney and Associate Professor Belinda Smith, Program Coordinator Master of Labour Law and Relations, Sydney Law School, The University of Sydney	20 February 2019
Fiona McLeay, Victorian Legal Services Board CEO and Commissioner	25 February 2019
Accenture	26 February 2019
WorkSafe Victoria	3 March 2019
Dr Matthew Collins AM QC	13 March 2019
Kristin Janson, First Secretary (Political Affairs), Permanent Mission of Canada to the UN	12 March 2019
Dr Purna Sen, Executive Coordinator and Spokesperson on Addressing Sexual Harassment and Discrimination, UN Women	14 March 2019
The Behavioural Insights Team North America	15 March 2019
Jane Connors, Assistant Secretary-General, United Nations Victims' Rights Advocate	19 March 2019
Jan Beagle, Under-Secretary-General, Chair of the Chief Executives Board Task Force on Addressing Sexual Harassment within the UN System	20 March 2019

Individual/Organisation	Date
Vinícius Carvalho Pinheiro, Special Representative to the UN and Director ILO Office for the United Nations	20 March 2019
Roberta Clarke, Regional Director Asia-Pacific, UN Women	28 March 2019
Office of Industrial Relations Queensland	4 April 2019
Todd Warner, Like Minds Advisory	30 April 2019
Office for Women, Australian Government	1 May 2019
New Zealand Ministry of Business, Innovation and Employment	3 May 2019
WORK180	14 May 2019
Our Watch	15 May 2019
Sandra Parker PSM, Fair Work Ombudsman	30 May 2019
Australian Institute of Company Directors	31 May 2019
Department of Social Services, Australian Government	3 June 2019
Office for Women, Australian Government	2 June 2019
Australian Institute of Company Directors	4 June 2019
Australian Securities Exchange	11 June 2019
Australian Chamber of Commerce and Industry	11 June 2019
Council of Small Business Organisations Australia	11 June 2019
Australian Council of Trade Unions	11 June 2019
The Australian Industry Group	12 June 2019
Australian Securities and Investments Commission	14 June 2019
Fair Work Ombudsman and Safe Work Australia	17 June 2019
Governance Institute of Australia	18 June 2019
White Ribbon Australia	20 June 2019
Workplace Gender Equality Agency	20 June 2019
The Department of the Prime Minister and Cabinet	24 June 2019

Individual/Organisation	Date
Attorney-General's Department, Australian Government	24 June 2019
Fair Work Commission and Fair Work Ombudsman	1 July 2019
Professor Marian Baird, University of Sydney Business School	3 July 2019
Department of Social Services, Australian Government	4 July 2019
Australian Small Business and Family Enterprise Ombudsman	4 July 2019
Attorney General's Department, Australian Government	10 July 2019
Safe Work Australia	10 July 2019
Australian Chamber of Commerce and Industry	18 July 2019
Kristen Hilton, Victorian Equal Opportunity and Human Rights Commissioner	19 July 2019
Office for Women, Australian Government	29 July 2019
Heads of Workplace Safety Authorities	30 July 2019
Judicial College of Victoria	7 August 2019
Judicial Commission of NSW	7 August 2019
National Judicial College of Australia	8 August 2019
Safe Work Australia	8 August 2019
Our Watch	8 August 2019
Council of Australasian Tribunals	28 August 2019
Purna Sen, UN Women, Executive Coordinator and Spokesperson on Addressing Sexual Harassment and Discrimination	25 September 2019
Australian Council of Human Rights Authorities	2 October 2019
Heads of Workers' Compensation Authorities	3 October 2019
Attorney General's Department, Australian Government	19 November 2019
The Hon Julie Collins MP, Shadow Minister for Ageing and Seniors, Shadow Minister for Women	21 November 2019
Department of Social Services, Australian Government	22 November 2019

Individual/Organisation	Date
Australian Chamber of Commerce and Industry	12 and 16 December 2019
Australian Small Business and Family Enterprise Ombudsman	12 December 2019
Council of Small Business Organisations Australia	12 December 2019
Senator the Hon Marise Payne, Minister for Women and Minister for Foreign Affairs	19 December 2019
Business Council of Australia	19 December 2019
Ai Group	19 December 2019
Fair Work Ombudsman	20 December 2019

APPENDIX 5:

Enquiries and complaints data from human rights and anti-discrimination agencies

(a) Overview

The Commission requested relevant data on enquiries and complaints received by the Commission and state and territory human rights and anti-discrimination agencies relating to workplace sexual harassment for the previous three financial years (2015–16, 2016–17 and 2017–18).

The tables below present the data that agencies provided in response to this request. For some jurisdictions, data was not provided because it was not known, not recorded or not collected. To ensure sufficient de-identification of the data, where fewer than five enquiries or complaints were recorded, these numbers have not been published in the tables below.

The following explanations apply to the enquiries data:

- Enquiries are defined as contacts (written or other form) that were not accepted as complaints. Each contact should be counted as one enquiry.
- One enquiry may have multiple grounds and areas.

- The area of 'employment' included: paid employment, recruitment, employment agencies, contract workers, discriminatory requests for information, volunteering and advertising.

The following explanations apply to the complaints data:

- The number of complaints is counted by complainant. Each complainant may make allegations in relation to more than one respondent and more than one ground and area.
- The data presented here may differ from the data published in annual reports for some State and Territory jurisdictions which count the number of complaints by ground, area or respondent, rather than by complainant.
- The area of 'employment' included: paid employment, recruitment, employment agencies, contract workers, discriminatory requests for information, volunteers and advertising. One complaint may relate to more than one period of employment.
- Only one outcome was recorded for each complainant.

(b) Australian Human Rights Commission

(i) Enquiries and complaints data

Table A1: Number of enquiries received by the Australian Human Rights Commission

	2015–16	2016–17	2017–18
Total number of enquiries received (on any ground or area of discrimination)	16,836	14,911	14,164
Number of enquiries received about sex discrimination	2,853	2,412	2,349
Number of enquiries received about sexual harassment	775	736	747
Number of enquiries received about sexual harassment in area of employment	624	599	567

Table A2: Number of complaints received by the Australian Human Rights Commission

Data about total number of complaints received	2015–16	2016–17	2017–18
Total number of complaints received about any ground of discrimination	2,013	1,939	2,046
Number of complaints received about sex discrimination	409	465	552
Number of complaints received about sexual harassment	217	247	321
Number of complaints received about sexual harassment in the area of employment	213	232	300

Table A3: Stage of employment complaint relates to (for complaints received about sexual harassment in the area of employment)

In relation to complaints received about sexual harassment in employment – the stage of employment the complaint relates to	2015–16	2016–17	2017–18
While looking for employment	5	*	*
During employment	212	232	298
End of employment/termination	88	116	157

* Indicates fewer than five complaints received

Table A4: Outcomes of complaints finalised in period (for complaints received about sexual harassment in the area of employment)

	2015–16	2016–17	2017–18
Number of complaints about sexual harassment in employment finalised in period	185	221	304
Outcomes of complaints about sexual harassment in employment finalised in period			
Conciliated	104	101	166
Terminated—No reasonable prospect of conciliation	29	38	50
Terminated/Dismissed—other grounds such as no substance	*	*	*
Withdrawn	21	34	35
Deemed does not wish to pursue/Lost contact	15	35	31
Outcomes of conciliated complaints about sexual harassment in employment			
Respondent agreed to provide an apology to the complainant	18	18	26
Respondent agreed to create/review anti-discrimination policy	14	7	13
Respondent agreed to conduct anti-discrimination training	18	7	24
Complaints about sexual harassment in employment where compensation paid to complainant			
Number of complaints where compensation was paid to complainant	75	58	53
Average amount of compensation paid to complainant	$13,855	$26,333	$14,750

* Indicates fewer than five complaints received

Table A5: Time taken to finalise complaint (for complaints received about sexual harassment in the area of employment)

Time taken to finalise complaints about sexual harassment in employment	2015–16	2016–17	2017–18
Number of complaints finalised in 0–3 months	78	98	89
Number of complaints finalised in 3–6 months	78	71	89
Number of complaints finalised in 6–9 months	21	43	48
Number of complaints finalised in 9–12 months	7	8	72
Number of complaints finalised in 1–2 years	*	*	6

* Indicates fewer than five complaints received

(i) Characteristics of complainants (for complaints received about sexual harassment in the area of employment)

Table A6: Gender of complainant

Gender	2015–16	2016–17	2017–18
Female	179	191	204
Male	33	41	96
Other (Indeterminate/ intersex/ unknown)	*	0	0

* Indicates fewer than five complaints received

Table A7: Whether the complainant identifies as having a disability

Disability	2015–16	2016–17	2017–18
Yes	85	47	55
No	0	86	76
Unknown	128	99	169

Table A8: Country of birth of complainant

Country of birth	2015–16	2016–17	2017–18
Born in Australia	59	49	45
Born outside Australia	24	35	29
Unknown	130	148	226

Table A9: Age group of the complainant

Age group	2015–16	2016–17	2017–18
15–17	*	*	9
18–24	38	34	33
25–34	31	29	39
35–44	18	29	18
45–54	18	17	9
55 and above	6	*	8
Unknown	98	120	184

* Indicates fewer than five complaints received

Table A10: Employment status of the complainant

Employment status	2015–16	2016–17	2017–18
Full-time/part-time	147	168	233
Contract/casual	50	48	51
Unemployed	*	*	*
Unknown	11	15	15

* Indicates fewer than five complaints received

Note: The Commission collects data based on full-time/part-time and casual/contract and is unable to provide this data separately.

Table A11: Whether the complainant had legal representation

Did the complainant have legal representation?	2015–16	2016–17	2017–18
Yes	117	119	170
No	96	113	130

(ii) Characteristics of respondents (for complaints received about sexual harassment in the area of employment)

Table A12: Respondent industry type

Industry group	2015–16	2016–17	2017–18
Agriculture, Forestry and Fishing	*	*	*
Mining	*	*	*
Manufacturing	13	7	10
Electricity, Gas, Water and Waste Services	*	6	5
Construction	*	10	6
Wholesale Trade	5	*	5
Retail Trade	45	43	37
Accommodation and Food Services	18	11	24
Transport, Postal and Warehousing	11	10	*
Information Media and Telecommunications	6	5	*
Financial and Insurance Services	12	11	14
Rental, Hiring and Real Estate Services	7	6	*
Professional, Scientific and Technical Services	8	15	10
Administrative and Support Services	7	7	13
Public Administration and Safety	13	12	8
Education and Training	*	7	17
Health Care and Social Assistance	8	20	21
Arts and Recreation Services	13	10	11
Unknown/Not applicable	34	42	104

* Indicates fewer than five complaints received

Table A13: Respondent organisation size

Size of organisation	2015–16	2016–17	2017–18
1 to 19	23	20	22
20 to 99	23	46	28
100 to 499	15	19	23
500 and over	42	38	28
Unknown/Not applicable	110	109	199

Table A14: Whether respondent had legal representation

Did the respondent have legal representation?	2015–16	2016–17	2017–18
Yes	78	82	126
No	135	150	174

(c) ACT Human Rights Commission

(i) Complaints data

Table B1: Number of complaints received by the ACT Human Rights Commission

Data about total number of complaints received	2015–16	2016–17	2017–18
Total number of complaints received about any ground of discrimination	169	121	211
Number of complaints received about sex discrimination	7	13	18
Number of complaints received about sexual harassment	6	6	7
Number of complaints received about sexual harassment in the area of employment	*	6	13

* Indicates fewer than five complaints received

(d) Anti-Discrimination New South Wales

(i) Enquiries and complaints data

Table C1: Number of enquiries received by Anti-Discrimination NSW

	2015–16	2016–17	2017–18
Total number of enquiries received (on any ground or area of discrimination)	3,602	3,424	3,540
Number of enquiries received about sex discrimination	262	272	286
Number of enquiries received about sexual harassment	134	124	132
Number of enquiries received about sexual harassment in area of employment	113	101	119

Table C2: Number of complaints received by Anti-Discrimination NSW

Data about total number of complaints received	2015–16	2016–17	2017–18
Total number of complaints received about any ground of discrimination	911	891	974
Number of complaints received about sex discrimination	87	104	99
Number of complaints received about sexual harassment	53	79	110
Number of complaints received about sexual harassment in the area of employment	51	72	98

Table C3: Outcomes of complaints finalised in period (for complaints received about sexual harassment in the area of employment)

	2015–16	2016–17	2017–18
Number of complaints about sexual harassment in employment finalised in period	49	72	98
Outcomes of complaints about sexual harassment in employment finalised in period			
Abandoned	8	6	*
Declined	*	9	10
Referred to NCAT (under ss 92A, 93B, and 93C of the ADA)	15	25	7
Settled/Resolved (under s 92A of the ADA)	16	25	53
Withdrawn	8	7	23

	2015–16	2016–17	2017–18
Outcomes of conciliated complaints about sexual harassment in employment			
Respondent agreed to provide financial compensation	13	15	34
Respondent agreed to provide an apology	*	*	9
Other (including training, employment options)	*	*	8

* Indicates fewer than five complaints received

Table C4: Time taken to finalise complaint (for complaints received about sexual harassment in the area of employment)

Time taken to finalise complaints about sexual harassment in employment	2015–16	2016–17	2017–18
Number of complaints finalised in less than 3 months	14	24	35
Number of complaints finalised in less than 6 months	19	27	61
Number of complaints finalised in less than 12 months	42	62	95
Number of complaints finalised in more than 18 months	49	72	0

(ii) Characteristics of the complainant (for complaints received about sexual harassment in the area of employment)

Table C5: Employment status of the complainant

Employment status	2015–16	2016–17	2017–18
Full-time	45	63	85
Part-time	*	0	0
Contract	0	*	*
Casual	*	*	9
Unemployed	0	0	0
Unknown	0	0	0
Other	0	*	*

* Indicates fewer than five complaints received

(e) Northern Territory Anti-Discrimination Commission

(i) Enquiries and complaints data

Table D1: Number of enquiries received by the Northern Territory Anti-Discrimination Commission

	2015–16	2016–17	2017–18
Total number of enquiries received (on any ground or area of discrimination)	330	304	291
Number of enquiries received about sex discrimination	17	34	31
Number of enquiries received about sexual harassment	15	18	11
Number of enquiries received about sexual harassment in area of employment	13	18	9

Table D2: Number of complaints received by the Northern Territory Anti-Discrimination Commission

Data about total number of complaints received	2015–16	2016–17	2017–18
Total number of complaints received about any ground of discrimination	105	124	103
Number of complaints received about sex discrimination	15	14	22
Number of complaints received about sexual harassment	12	7	12
Number of complaints received about sexual harassment in the area of employment	10	8	10

(f) Queensland Human Rights Commission

(i) Enquiries and complaints data

Table E1: Number of enquiries received by the Queensland Human Rights Commission

	2015–16	2016–17	2017–18
Total number of enquiries received (on any ground or area of discrimination)	2,909	3,038	2,739
Number of enquiries received about sex discrimination	106	112	94
Number of enquiries received about sexual harassment	130	122	132
Number of enquiries received about sexual harassment in area of employment	87	76	81

Table E2: Number of complaints received by the Queensland Human Rights Commission

Data about total number of complaints received	2015–16	2016–17	2017–18
Total number of complaints received about any ground of discrimination	636	716	810
Total number of complaints accepted about any ground of discrimination	336	426	464
Number of complaints received and accepted about sex discrimination	49	47	63
Number of complaints received and accepted about sexual harassment	73	76	78
Number of complaints received and accepted about sexual harassment in the area of employment	64	59	58

Table E3: Stage of employment complaint relates to (for complaints received about sexual harassment in the area of employment)

Complaints about sexual harassment received in the area of employment	2015–16	2016–17	2017–18
While looking for employment	*	*	*
During employment	76	74	71
End of employment/termination	0	0	0

* Indicates fewer than five complaints received

Table E4: Outcomes of complaints finalised in period (for complaints received about sexual harassment in the area of employment)

Complaints about sexual harassment received in the area of employment	2015–16	2016–17	2017–18
Number of complaints about sexual harassment in employment finalised in period	75	73	71
Outcomes of complaints about sexual harassment in employment finalised in period			
Conciliated	34	29	41
Terminated—No reasonable prospect of conciliation	*	*	8
Terminated—Referred to tribunal	22	23	15
Terminated/Dismissed—other grounds such as no substance (NUA)	8	13	3
Withdrawn	6	6	*
Deemed does not wish to pursue/Lost contact	*	0	0
Complaints about sexual harassment in employment where compensation paid to complainant			
Number of complaints where compensation was paid to complainant	20	20	21
Average amount of compensation paid to complainant	$4,752	$4,247	$5,205

* Indicates fewer than five complaints received

Table E5: Time taken to finalise complaint (for complaints received about sexual harassment in the area of employment)

Time taken to finalise complaints about sexual harassment in employment	2015–16	2016–17	2017–18
Number of complaints finalised in 1–3 months	29	28	44
Number of complaints finalised in 4–6 months	29	30	26
Number of complaints finalised in 6–9 months	12	7	10
Number of complaints finalised in 9–12 months	*	*	*
Number of complaints finalised in 1–2 years	0	*	0

* Indicates fewer than five complaints received

(g) Equal Opportunity Commission (South Australia)

(i) Enquiries and complaints data

Table F1: Number of enquiries received by the Equal Opportunity Commission (South Australia)

	2015–16	2016–17	2017–18
Total number of enquiries received (on any ground or area of discrimination)	952	683	672
Number of enquiries received about sex discrimination	71	56	51
Number of enquiries received about sexual harassment	55	29	38
Number of enquiries received about sexual harassment in area of employment	46	24	30

Table F2: Number of complaints received by Equal Opportunity Commission (South Australia)

Data about total number of complaints received	2015–16	2016–17	2017–18
Total number of complaints accepted about any ground of discrimination	125	160	113
Number of complaints accepted about sex discrimination	12	12	6
Number of complaints accepted about sexual harassment	19	21	30
Number of complaints accepted about sexual harassment in the area of employment	14	17	30

Table F3: Stage of employment complaint relates to for complaints received about sexual harassment in the area of employment

In relation to complaints received about sexual harassment in employment – the stage of employment the complaint relates to	2015–16	2016–17	2017–18
While looking for employment	0	0	*
During employment	12	18	29
End of employment/termination	*	*	*

* Indicates fewer than five complaints received

Table F4: Outcomes of complaints finalised in period (for complaints received about sexual harassment in the area of employment)

Complaints about sexual harassment received in the area of employment	2015–16	2016–17	2017–18
Number of complaints about sexual harassment in employment finalised in period	16	18	33
Outcomes of complaints about sexual harassment in employment finalised in period			
Conciliated	10	15	7
Terminated—No reasonable prospect of conciliation	*	0	*
Terminated—Referred to tribunal	*	0	17
Terminated/Dismissed—other grounds such as no substance	0	0	0
Withdrawn	*	*	7
Outcomes of conciliated complaints about sexual harassment in employment (does not include private agreements)			
Respondent agreed to provide an apology to the complainant	*	9	*
Respondent agreed to create/review anti-discrimination policy	0	0	0
Respondent agreed to conduct anti-discrimination training	*	*	*
Complaints about sexual harassment in employment where compensation paid to complainant			
Number of complaints where compensation was paid to complainant	*	5	*
Average amount of compensation paid to complainant	$4,833	$9,103	$4,000

* Indicates fewer than five complaints received

Table F5: Time taken to finalise complaint (for complaints received about sexual harassment in the area of employment)

Time taken to finalise complaints about sexual harassment in employment	2015–16	2016–17	2017–18
Number of complaints finalised in 1–3 months	*	5	*
Number of complaints finalised in 4–6 months	*	5	19
Number of complaints finalised in 6–9 months	*	5	*
Number of complaints finalised in 9–12 months	*	*	*
Number of complaints finalised in 1–2 years	7	*	8

* Indicates fewer than five complaints received

(ii) Characteristics of the complainant (for complaints received about sexual harassment in the area of employment)

Table F6: Gender of complainant

Gender	2015–16	2016–17	2017–18
Female	11	17	16
Male	*	0	14

* Indicates fewer than five complaints received

(h) Victorian Equal Opportunity and Human Rights Commission

(i) Enquiries and complaints data

Table G1: Number of enquiries received by the Victorian Equal Opportunity and Human Rights Commission

	2015–16	2016–17	2017–18
Total number of enquiries received (on any ground or area of discrimination)	8,170	8,278	8,585
Number of enquiries received about sex discrimination	398	478	360
Number of enquiries received about sexual harassment	361	319	374
Number of enquiries received about sexual harassment in area of employment	295	254	326

Table G2: Number of complaints received by the Victorian Equal Opportunity and Human Rights Commission

Data about total number of complaints received	2015–16	2016–17	2017–18
Total number of complaints received about any ground of discrimination	865	748	908
Number of complaints received about sex discrimination	141	113	131
Number of complaints received about sexual harassment	103	76	90
Number of complaints received about sexual harassment in the area of employment	87	66	86

Table G3: Stage of employment complaint relates to for complaints received about sexual harassment in the area of employment

The stage of employment the complaint relates to	2015–16	2016–17	2017–18
While looking for employment	0	*	*
During employment	37	31	35
End of employment/termination	50	33	50

* Indicates fewer than five complaints received

Table G4: Outcomes of complaints finalised in period (for complaints received about sexual harassment in the area of employment)

Complaints about sexual harassment received in the area of employment	2015–16	2016–17	2017–18
Number of complaints about sexual harassment in employment finalised in period	59	43	54
Outcomes of complaints about sexual harassment in employment finalised in period			
Conciliated	25	13	18
Complaint terminated	13	6	8
Complaint dismissed	5	9	8
Respondent withdrawn from dispute resolution	*	*	5
Complainant withdrawn from dispute resolution	12	13	15

Complaints about sexual harassment received in the area of employment	2015–16	2016–17	2017–18
Outcomes of conciliated complaints about sexual harassment in employment			
Respondent agreed to provide an apology to the complainant	7	*	*
Respondent agreed to create/review anti-discrimination policy	6	0	*
Respondent agreed to conduct anti-discrimination training	7	0	*
Complaints about sexual harassment in employment where compensation paid to complainant			
Number of complaints where compensation was paid to complainant	13	5	15
Average amount of compensation paid to complainant	$24,000	$12,500	$20,000

* Indicates fewer than five complaints received

Table G5: Time taken to finalise complaint (for complaints received about sexual harassment in the area of employment)

Time taken to finalise complaints about sexual harassment in employment	2015–16	2016–17	2017–18
Number of complaints finalised in 1–3 months	30	24	34
Number of complaints finalised in 4–6 months	36	23	37
Number of complaints finalised in 6–9 months	16	12	11
Number of complaints finalised in 9–12 months	*	*	*
Number of complaints finalised in 1–2 years	*	*	*

* Indicates fewer than five complaints received

(ii) Characteristics of the complainant (for complaints received about sexual harassment in the area of employment)

Table G6: Gender of complainant

Gender	2015–16	2016–17	2017–18
Female	67	47	70
Male	20	19	16

Table G7: Whether the complainant identifies as having a disability

Disability	2015–16	2016–17	2017–18
Yes	9	9	14
No/ Unknown	78	57	72

Table G8: Whether the complainant has legal representation

Did the complainant have legal representation?	2015–16	2016–17	2017–18
Yes	13	9	15
No	74	57	71

(iii) Characteristics of respondent (for complaints received about sexual harassment in the area of employment)

Table G9: Respondent industry type

Industry group	2015–16	2016–17	2017–18
Agriculture, Forestry and Fishing	0	0	*
Mining	0	*	0
Manufacturing	6	5	10
Electricity, Gas, Water and Waste Services	*	*	*
Construction	7	*	*
Wholesale Trade	*	*	*
Retail Trade	23	19	27
Accommodation and Food Services	*	*	0
Transport, Postal and Warehousing	*	*	*
Information Media and Telecommunications	*	*	*
Financial and Insurance Services	*	6	*
Rental, Hiring and Real Estate Services	*	-	*
Professional, Scientific and Technical Services	*	14	8
Administrative and Support Services	*	0	0
Public Administration and Safety	18	5	13
Education and Training	*	*	*
Health Care and Social Assistance	7	*	6
Arts and Recreation Services	9	*	*

* Indicates fewer than five complaints received

Table G10: Respondent organisation size

Size of organisation	2015–16	2016–17	2017–18
1 to 19	9	9	15
20 to 99	31	23	20
100 to 499	18	19	31
500 and over	29	15	20

Table G11: Whether respondent had legal representation

Did the respondent have legal representation?	2015–16	2016–17	2017–18
Yes	27	14	33
No	60	52	53

(i) Equal Opportunity Commission (Western Australia)

(i) Enquiries and complaints data

Table H1: Number of enquiries received by the Equal Opportunity Commission (Western Australia)

	2015–16	2016–17	2017–18
Total number of enquiries received (on any ground or area of discrimination)*	1,745	1,589	1,546
Number of enquiries received about sex discrimination	92	98	77
Number of enquiries received about sexual harassment	81	62	73
Number of enquiries received about sexual harassment in area of employment	71	51	61

* This number includes enquiries made to outside the jurisdiction of the Equal Opportunity Commission (Western Australia).

Table H2: Number of complaints received by the Equal Opportunity Commission (Western Australia)

Data about total number of complaints received	2015–16	2016–17	2017–18
Total number of complaints received about any ground of discrimination	244	239	283
Number of complaints received about sex discrimination	29	18	30
Number of complaints received about sexual harassment	30	13	26
Number of complaints received about sexual harassment in the area of employment	29	13	26

Table H3: Outcomes of complaints finalised in period (for complaints received about sexual harassment in the area of employment)

Complaints about sexual harassment received in the area of employment	2015–16	2016–17	2017–18
Number of complaints about sexual harassment in employment finalised in period	23	16	17
Outcomes of complaints about sexual harassment in employment finalised in period			
Conciliated	8	9	8
Terminated	*	0	*
Withdrawn	7	5	5
Deemed does not wish to pursue/Lost contact	6	*	*
Complaints about sexual harassment in employment where compensation paid to complainant			
Number of complaints where compensation was paid to complainant	6	5	6
Average amount of compensation paid to complainant	$10,800	$9,700	$7,900

* Indicates fewer than five complaints received

Table H4: Time taken to finalise complaint (for complaints received about sexual harassment in the area of employment)

Time taken to finalise complaints about sexual harassment in employment	2015–16	2016–17	2017–18
Number of complaints finalised in 1–3 months	21	10	8
Number of complaints finalised in 4–6 months	*	*	6
Number of complaints finalised in 6–9 months	0	*	*

* Indicates fewer than five complaints received

(ii) Characteristics of the complainant (for complaints received about sexual harassment in the area of employment)

Table H5: Gender of complainant

Gender	2015–16	2016–17	2017–18
Female	24	10	23
Male	5	*	*

* Indicates fewer than five complaints received

Table H6: Whether the complainant has legal representation

Did the complainant have legal representation?	2015–16	2016–17	2017–18
Yes	*	*	*
No	27	11	23

* Indicates fewer than five complaints received

(iii) Characteristics of respondent (for complaints received about sexual harassment in the area of employment)

Table H7: Whether respondent had legal representation

Did the respondent have legal representation?	2015–16	2016–17	2017–18
Yes	*	*	*
No	25	12	23

* Indicates fewer than five complaints received

(j) Equal Opportunity Tasmania

(i) Enquiries and complaints data

Table I1: Number of enquiries received by Equal Opportunity Tasmania

	2015–16	2016–17	2017–18
Total number of enquiries received (on any ground or area of discrimination)	577	418	427
Number of enquiries received about sex discrimination	100	70	88
Number of enquiries received about sexual harassment	16	27	39
Number of enquiries received about sexual harassment in area of employment	9	16	35

Table I2: Number of complaints received by Equal Opportunity Tasmania

Data about total number of complaints received	2015–16	2016–17	2017–18
Total number of complaints received about any ground of discrimination	139	137	138
Number of complaints received about sex discrimination	45	49	47
Number of complaints received about sexual harassment	12	14	21
Number of complaints received about sexual harassment in the area of employment	*	10	13

* Indicates fewer than five complaints received

Table I3: Outcomes of complaints finalised in period (for complaints received about sexual harassment in the area of employment)

Complaints about sexual harassment received in the area of employment	2015–16	2016–17	2017–18
Number of complaints about sexual harassment in employment finalised in period	*	11	13
Complaints about sexual harassment in employment where compensation paid to complainant			
Number of complaints where compensation was paid to complainant	*	*	*
Average amount of compensation paid to complainant (*outlier excluded)	$5,000	$20,000	$23,500*

* Indicates fewer than five complaints received

APPENDIX 6:

Overview of sexual harassment provisions by jurisdiction

The following table provides an overview of the differences between federal, state and territory sexual harassment provisions. The state and territory jurisdictions are listed in alphabetical order after the federal jurisdiction. The key is intuitive: white shows where the provisions are the same as the purple left hand column; yellow shows where the provisions diverge in terms of wording and, possibly, operation; and grey shows where a piece of legislation does not include the component discussed. There are both major and minor discrepancies between jurisdictions. The biggest outlier is Western Australia, which requires the sexually harassed person to suffer disadvantage as a mandatory element of meeting the definition of sexual harassment.

Source: The Law Council of Australia, Submission 249, Sexual Harassment Inquiry, Table.1

Legislation	**CTH** ***Sex Discrimination Act 1984* (Cth)**	**ACT** ***Discrimination Act 1991* (ACT)**	**NSW** ***Anti-Discrimination Act 1977* (NSW)**
Meaning of sexual harassment – elements of 'unwelcome' and 'sexual'			
A person sexually harasses another person if the person makes or engages in …			
… an unwelcome sexual advance	s 28A(1)(a)	s 58(1)	s 22A(a)
… an unwelcome request for sexual favours	s 28A(1)(a)	s 58(1)	s 22A(a)
… other unwelcome conduct of a sexual nature	s 28A(1)(b)	s 58(1)	s 22A(b)
… an unwelcome act of physical intimacy	✖	✖	✖
… an unwelcome remark with sexual connotations	✖	✖	✖
… any unwelcome gesture, action or comment of a sexual nature	✖	✖	✖
The statute provides specific examples of sexual harassment?	✖	✖	✖
Where 'conduct of a sexual nature' is defined as including …			
… making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing	s 28A(1)(2)	s 58(2)	✖
… subjecting a person to any act of physical intimacy	✖	✖	✖
… making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence	✖	✖	✖
… making any gesture, action or comment of a sexual nature in a person's presence	✖	✖	✖

NT	QLD	SA	TAS	VIC	WA
***Anti-Discrimination Act 1996* (NT)**	***Anti-Discrimination Act 1991* (Qld)**	***Equal Opportunity Act 1984* (SA)**	***Anti-Discrimination Act 1998* (Tas)**	***Equal Opportunity Act 2010* (Vic)**	***Equal Opportunity Act 1984* (WA)**
✖	✖	s 87(9)(a)(i)	s 17(3)(b)	s 92(1)(a)	ss 24(3), 25(2), 26(2)
s 22(2)(b)	s 119(b)	s 87(9)(a)(i)	s 17(3)(b)	s 92(1)(a)	ss 24(3), 25(2), 26(2)
s 22(2)(d)	s 119(d)	s 87(9)(a)(ii)	s 17(3)(e)	s 92(1)(b)	ss 24(3), 25(2), 26(2)
s 22(2)(a)	s 119(a)	✖	s 17(3)(a)	✖	✖
s 22(2)(c)	s 119(c)	✖	s 17(3)(c)	✖	✖
✖	✖	✖	s 17(3)(d)	✖	✖
✖	s 119	✖	✖	✖	✖
✖	✖	s 87(9)(b)	s 3 (definition of 'conduct of a sexual nature' para (a))	✖	s 24(4), 25(3), 26(3)
✖	✖	✖	✖	s 92(2)(a)	✖
✖	✖	✖	✖	s 92(2)(b)	✖
✖	✖	✖	✖	s 92(2)(c)	✖

Legislation	CTH *Sex Discrimination Act 1984* (Cth)	ACT *Discrimination Act 1991* (ACT)	NSW *Anti-Discrimination Act 1977* (NSW)
Meaning of sexual harassment – element of 'reasonableness'			
In circumstances in which ...			
... a reasonable person	s 28A(1)	s 58(1)	s 22A
... having regard to all the circumstances	s 28A(1)	✖	s 22A
... would have anticipated the **possibility** that the person harassed would be	s 28A(1)	✖	✖
... offended	s 28A(1)	s 58(1)	s 22A
... humiliated	s 28A(1)	s 58(1)	s 22A
... intimidated	s 28A(1)	s 58(1)	s 22A
... insulted	✖	✖	✖
... ridiculed	✖	✖	✖
Where the circumstances to be taken into account by the reasonable person include the following circumstances of the person harassed:			
Age	s 28A(1A)(a)	✖	✖
Sex	s 28A(1A)(a)	✖	✖
Sexual orientation	s 28A(1A)(a)	✖	✖
Gender identity	s 28A(1A)(a)	✖	✖
Intersex status	s 28A(1A)(a)	✖	✖
Marital or relationship status	s 28A(1A)(a)	✖	✖
Religious belief	s 28A(1A)(a)	✖	✖
Race	s 28A(1A)(a)	✖	✖
Colour	s 28A(1A)(a)	✖	✖
National or ethnic origin	s 28A(1A)(a)	✖	✖

NT	QLD	SA	TAS	VIC	WA
***Anti-Discrimination Act 1996* (NT)**	***Anti-Discrimination Act 1991* (Qld)**	***Equal Opportunity Act 1984* (SA)**	***Anti-Discrimination Act 1998* (Tas)**	***Equal Opportunity Act 2010* (Vic)**	***Equal Opportunity Act 1984* (WA)**
s 22(2)(e)(ii)	s 119(f)	s 87(9)(a)	s 17(3)	s 92(1)	✖
✖	✖	s 87(9)(a)	s 17(3)	s 92(1)	✖
s 22(2)(e)(ii)	s 119(f)	✖	✖	✖	✖
s 22(2)(e)(ii)	s 119(f)	s 87(9)(a)	s 17(3)	s 92(1)	✖
s 22(2)(e)(ii)	s 119(f)	s 87(9)(a)	s 17(3)	s 92(1)	✖
s 22(2)(e)(ii)	s 119(f)	s 87(9)(a)	s 17(3)	s 92(1)	✖
✖	✖	✖	s 17(3)	✖	✖
✖	✖	✖	s 17(3)	✖	✖
s 22(3)(a)	s 120(b)	✖	✖	✖	✖
s 22(3)(a)	s 120(a)	✖	✖	✖	✖
✖	✖	✖	✖	✖	✖
✖	✖	✖	✖	✖	✖
✖	✖	✖	✖	✖	✖
✖	✖	✖	✖	✖	✖
✖	✖	✖	✖	✖	✖
s 22(3)(a)	s 120(c)	✖	✖	✖	✖
✖	✖	✖	✖	✖	✖
✖	✖	✖	✖	✖	✖

Legislation	CTH *Sex Discrimination Act 1984* (Cth)	ACT *Discrimination Act 1991* (ACT)	NSW *Anti-Discrimination Act 1977* (NSW)
Disability	s 28A(1A)(c)	✖	✖
The relationship between the person harassed and the person	s 28A(1A)(b)	✖	✖
Any other relevant circumstance	s 28A(1A)(d)	✖	✖
Meaning of *sexual harassment* – intention of the perpetrator			
The statute includes as a **mandatory** element, the intention of the perpetrator?	✖	✖	✖
The statute includes as a **discretionary** element, the intention of the perpetrator?	✖	✖	✖
Meaning of sexual harassment – disadvantage			
The statute includes as a mandatory element, that the sexually harassed person suffer actual or believed detriment if they object?	✖	✖	✖
The statute includes as a discretionary element, that the sexually harassed person suffer actual or believed detriment if they object?	✖	✖	✖
Vicarious liability			
The statute provides for an employer or principal to be vicariously liable for an act done by an employee or agent?	s 106(1)	s 121A(1), (2), (4)	s 53(1) only if, before or after the act, they expressly or impliedly authorise the act

NT	QLD	SA	TAS	VIC	WA
***Anti-Discrimination Act 1996* (NT)**	***Anti-Discrimination Act 1991* (Qld)**	***Equal Opportunity Act 1984* (SA)**	***Anti-Discrimination Act 1998* (Tas)**	***Equal Opportunity Act 2010* (Vic)**	***Equal Opportunity Act 1984* (WA)**
s 22(3)(b)	s 120(d)	✖	✖	✖	✖
s 22(3)(c)	s 120(e)	✖	✖	✖	✖
s 22(3)(d)	s 120(f)	✖	✖	✖	✖
✖	✖	✖	✖	✖	✖
s 22(2)(e)(i)	s 119(e)	✖	✖	✖	✖
✖	✖	✖	✖	✖	ss 24(3)(a)-(b), 25(2)(a)-(b), 26(2)(a)-(b)
s 22(2)(f)	✖	✖	✖	✖	✖
s 105(1)	s 133(1) 'jointly and severally civilly liable'	s 91(1 also s 87(7) makes it unlawful for employers to fail to take 'reasonable steps' to prevent further sexual harassment after a report is made	s 104(3) places obligations on organisations, including 'reasonable steps', and organisations will be liable where they do not comply	s 109	s 161(1)

Legislation	CTH ***Sex Discrimination Act 1984* (Cth)**	ACT ***Discrimination Act 1991* (ACT)**	NSW ***Anti-Discrimination Act 1977* (NSW)**
The act done by the employee or agent must have been done 'in connection with' the employee's employment or agent's duties?	s 106(1) 'in connection with'	s 121A(2) 'within the scope of' the representative's 'actual or apparent authority'	✖
The statute provides for an employer or agent to claim the defence of 'all reasonable steps'?	s 106(2) 'all reasonable steps'	s 121A(3) 'all reasonable steps'	s 53(3) 'all reasonable steps'
The statute provides a list of matters to be taken into account in determining 'reasonable steps'?	✖	✖	✖
Damages			
The statute sets a cap on damages?	✖	✖	s 108(2)(a) 'not exceeding $100,000'
Unlawfulness of sexual harassment			
The statute includes a general provision that sexual harassment is unlawful?	✖	✖	✖
The statute makes sexual harassment unlawful in certain areas or circumstances?	ss 28B-28L	ss 59-64	ss 22B-22J

NT	QLD	SA	TAS	VIC	WA
***Anti-Discrimination Act 1996* (NT)**	***Anti-Discrimination Act 1991* (Qld)**	***Equal Opportunity Act 1984* (SA)**	***Anti-Discrimination Act 1998* (Tas)**	***Equal Opportunity Act 2010* (Vic)**	***Equal Opportunity Act 1984* (WA)**
s 105(1) (a)-(b)'in connection with'	s 133(1) 'in the course of'	s 91(1) 'in the course of'	✖	s 109 'in the course of'	s 161(1) 'in connection with'
s 105(2) 'all reasonable steps'	s 133(2) 'reasonable steps'	s 91(2) 'reasonable steps'	✖	s 110 'reasonable precautions'	s 161(2) 'all reasonable steps'
s 105(3)	✖	s 91(3)	✖	✖	✖
✖ But s 105(4) requires that the 'steps taken' by the employer or agent be taken into account when calculating damages for vicarious liability	✖	✖	✖	✖	s 127(b)(i) 'not exceeding $40,000'
✖	s 118	✖	s 17(2)	✖	✖
ss 22(1), 28(a)-(f)	✖	s 87(1)-(6g)	s 22(1)(a)-(g)	ss 93-102	ss 24(1)-(2), 25(1), 26(1)

APPENDIX 7:

Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, February 2019)

Deloitte.
Access Economics

The economic costs of sexual harassment in the workplace

Final report

March 2019

Contents

Glossary 1

Executive summary 3

1 Introduction 7

2 Conceptual framework 10

2.1 Overview of the methodology 10
2.2 Defining workplace sexual harassment 13
2.3 Time aspects 13
2.4 Impacts framework 14

3 Methodology and data 21

3.1 Prevalence of workplace sexual harassment 24
3.2 Productivity costs 27
3.3 Other costs 38
3.4 Lost wellbeing 43
3.5 Sub-group analysis 44

4 Results 46

4.1 The economic costs of workplace sexual harassment 46
4.2 Sub-group analysis 48

5 Limitations of the analysis 58

References 60

Appendix A Additional survey analysis 64

A.1 Intimidation and offence 64
A.2 Influence of perpetrator on reports and complaints 64
A.3 Duration of case 65

Appendix B Detailed methodology and model inputs 67

Limitation of our work 73

Charts

Chart 3.1 Prevalence of workplace sexual harassment by gender 24
Chart 3.2 Distribution of the workforce in each impact category, by gender 25
Chart 3.3 Distribution of the workforce in each impact category, by age 25
Chart 3.4 Prevalence of workplace sexual harassment in the previous four AHRC reports 27
Chart 3.5 Histogram of hours of sick leave, for each impact category 30
Chart 3.6 Histogram of hours of annual leave, for each impact category 31
Chart 3.7 Histogram of hours of unpaid leave, for each impact category 31
Chart 3.8 Histogram of productivity reduction, for each impact category 34
Chart 3.9 Histogram of length of productivity reduction, for each impact category 34
Chart 4.1 Productivity losses per person compared to average weekly earnings per person 48

Chart 4.2 Total productivity losses compared to employment, by industry 51
Chart 4.3 Total productivity losses compared to gross value added, by industry 51

Tables

Table i Costs of workplace sexual harassment 6
Table 1.1 Sample of prior studies on the costs of sexual assault 9
Table 2.1 Proportion of respondents who agreed that each behaviour constituted workplace sexual harassment 16
Table 2.2 Classification of behaviours 17
Table 3.1 Costs of workplace sexual harassment 22
Table 3.2 Hours of leave, for each impact category 28
Table 3.3 Interquartile ranges for hours of leave, for each impact category 30
Table 3.4 Productivity reduction due to workplace sexual harassment, for each impact category 32
Table 3.5 Interquartile ranges for productivity reduction, for each impact category 33
Table 3.6 Employee resignations and termination of employment, for each impact category 35
Table 3.7 Proportion of cases resulting in complaints to manager/supervisor, for each impact category 37
Table 3.8 Health system utilisation for each case of workplace sexual harassment, for each impact category 39
Table 3.9 Justice system utilisation, for each impact category 41
Table 4.1 Costs of workplace sexual harassment 46
Table 4.2 Costs of workplace sexual harassment in 2018, by impact category 47
Table 4.3 Economic costs of workplace sexual harassment in 2018, by payer 48
Table 4.4 Cost of workplace sexual harassment in 2018, by age and gender 49
Table 4.5 Cost of workplace sexual harassment in 2018, by industry 50
Table 4.6 Cost of workplace sexual harassment in 2018, by type of employment 52
Table 4.7 Cost of workplace sexual harassment in 2018, by employee characteristics 53
Table 4.8 Cost of workplace sexual harassment in 2018, by SEIFA quintile 53
Table 4.9 Lost wellbeing due to workplace sexual harassment in 2018, by age and gender 54
Table 4.10 Lost wellbeing due to workplace sexual harassment in 2018, by industry 55
Table 4.11 Lost wellbeing due to workplace sexual harassment in 2018, by type of employment 56
Table 4.12 Lost wellbeing due to workplace sexual harassment in 2018, by employee characteristics 57
Table 4.13 Lost wellbeing due to workplace sexual harassment in 2018, by SEIFA quintile 57
Table A.1 Intimidation and offence scores for each impact category 64
Table A.2 Level of intimidation and offence for respondents who made a formal report or complaint 64
Table A.3 Influence of perpetrator on reports and complaints 65
Table A.4 Duration of cases in AHRC and MSPB surveys 65
Table B.1 Methodological notes for calculating of AWE inputs 68
Table B.2 Prevalence and AWE for each sub-group 69
Table B.3 Impact category distribution for each sub-group 70

Figures

Figure 2.1 Modelling approach 12
Figure 2.2 Conceptual differences between incidence and prevalence approaches to measurement of costs 14
Figure 2.3 Framework for estimating the impact of a case of workplace sexual harassment 19

Glossary

Acronym	Full name
ABS	Australian Bureau of Statistics
AHRC	Australian Human Rights Commission
AWE	average weekly earnings
BEACH	Bettering the Evaluation and Care of Health
CALD	culturally and linguistically diverse
DALY	disability-adjusted life year
GP	general practitioner
HILDA	Household, Income and Labour Dynamics in Australia
MSPB	Merit Systems Protection Board
SEIFA	Socioeconomic Indexes for Areas
WHO	World Health Organization

The following terms are used throughout the report:

- **Absenteeism** and **presenteeism**: this is a measure of the lost output due to employees taking paid and unpaid leave from work due to work workplace sexual harassment. It is costed using a **friction methodology**, which reflects the short-run disruption to production until output is restored to its former level. While absenteeism measures the lost output from employees taking time off work, presenteeism captures the lost output from employees who are at work but who are operating at reduced efficiency due to workplace sexual harassment. It is measured using a **human capital approach** that captures the lost employee income in the long run.
- **Cost of illness**: This is the standard terminology for a study which estimates the costs of a particular health condition or a negative social activity (for example, sexual harassment).
- **Deadweight losses**: These are estimates of the societal inefficiencies that occur when taxes are raised above the level that they would otherwise have been, for example to pay for additional health services as a result of workplace sexual harassment. These inefficiencies arise because the imposition of taxes can change the way in which people work, consume and invest, leading to an allocation of economic resources and activity that is less efficient than it would have been in the absence of taxes.
- **Disability-adjusted life year (DALY):** DALYs are used to measure a reduction in an individual's wellbeing resulting from workplace sexual harassment. The DALY is a non-financial approach (reported in years) to measuring the reduction in wellbeing, which is comprised of **years of life lost due to premature death (YLLs)** and **years of healthy life lost due to morbidity (YLDs)**. YLLs measure the loss of future years of life where an individual dies earlier than expected, while YLDs measure the reduction in wellbeing while an individual lives in a non-perfect health state. The **disability weight** is a key input to estimate YLDs, which is a standardised measure that reflects the relative reduction in health-related quality of life that is measured on a scale from zero (perfect health) to one (worst health state). Measuring the reduction in wellbeing using DALYs overcomes issues of comparability between individuals and nations.
- **Gross domestic product** and **gross value added**. The size of the economy is measured using gross domestic product, which is the sum of all spending in the economy by individuals, government, and business, plus income from exports and minus spending on imports. The **productivity costs** which are estimated in the report represent a reduction in gross domestic product. The **gross value added** of an industry is the industry's contribution to gross domestic product.
- **Prevalence and incidence**: the prevalence approach measures the number of people who have been sexually harassed in the workplace over a period of time, and estimates the costs that were incurred in

that period (typically one year). The incidence approach measures the number of people who have been sexually harassed in the workplace in a given year, and estimates the future costs due to the harassment.

- **Productivity costs.** In this report productivity costs include **absenteeism** and **presenteeism, increased staff turnover,** and **manager time**, which arise from workplace sexual harassment. Productivity costs reduce gross domestic product as they disrupt production from its normal level, reducing society's overall ability to produce goods and services. For example, presenteeism due to harassment reduces gross domestic product as a worker may spend time on making an official complaint about the harassment, which is time that is lost from their usual labour.
- **Severity and impact**: This report includes a framework for estimating the costs of workplace sexual harassment. In the framework, "severity" refers to the nature of the behaviour that has occurred, while "impact" refers to the overall impact from the harassment.
- **Value of a statistical life year:** The reduction in wellbeing, as measured in DALYs, can be converted into a dollar figure using an estimate of the **value of a statistical life**. The value of a statistical life is an estimate of the value society places on an anonymous life, and thus, does not reflect any particular person's life. The value of a statistical life is typically measured using a willingness to pay approach, which uses preferences of individuals (stated or revealed) to measure the value of enhancing health, or conversely, the willingness to accept worse health outcomes.

Executive summary

This report estimates the economic costs of workplace sexual harassment in Australia. Estimating the cost of workplace sexual harassment to the Australian economy is intended to increase awareness of the issue and its impacts by bringing new evidence to light regarding its various costs and who bears them.

Overview

Workplace sexual harassment imposes a range of costs that impact on individuals – including victims, perpetrators, and bystanders – employers, the government, and society. These costs include lost productivity (that reduce gross domestic product); other costs such as for healthcare, complaints and investigations (that do not reduce gross domestic product); and lost wellbeing of victims.

There has been little prior research into the economic costs of workplace sexual harassment, i.e. the extent to which economic output is lower, and economic resources are allocated sub-optimally, due to workplace sexual harassment. A targeted literature search has not identified any prior studies that have estimated the cost of workplace sexual harassment in Australia. A search of the international literature has identified a small number of studies that have articulated a range of costs.

This report is a world-first, noting that it builds on and extends previous work in the United States by the Merit Systems Protection Board (MSPB). The data used in the modelling were the best available, however, were not collected for the purposes of estimating the economic costs of workplace sexual harassment in Australia. No new primary data were collected for this project. Given this context, there are additional costs from workplace sexual harassment that were not able to be included in the modelling. These include longer-term impacts on income, career progression and workforce participation, the impact of individuals moving to another job that is less well-aligned with their skills and interests, and the cost to business of internal investigations.

A model was constructed to estimate the costs of workplace sexual harassment. The model used a bottom-up approach, by first establishing the number of people who have been sexually harassed in the workplace, and then estimating a range of costs for these people. The primary data source used in the modelling was the Australian Human Rights Commission's (AHRC's) 2018 *Fourth national survey on sexual harassment in Australian workplaces* (the AHRC survey). This survey, conducted in early 2018, surveyed approximately 10,000 people to investigate the prevalence, nature, and reporting of sexual harassment in Australian workplaces, and in the community more broadly. The other main source of data was from the MSPB's survey of Federal Government employees in the United States, which provided inputs for some of the costs.

The model estimated the economic costs of workplace sexual harassment over two years: costs that were incurred in 2018; and also costs in 2019 for harassment that has occurred in 2018. Due to limitations in the available evidence, it was not possible to include costs beyond this two-year period, noting that for some people the costs of workplace sexual harassment will extend for longer than two years.[1] There were also additional short-term costs, such as lost income from being demoted, that were not possible to model given the available information.

Each case of workplace sexual harassment is different. Some cases impose a larger cost, and some cases impose a smaller cost. To capture the differences between each case, an impacts framework was developed which allowed each case of workplace sexual harassment to be categorised into one of four categories, ranging from Category One (least impact) through to Category Four (most impact).

This framework was developed with reference to findings from the academic literature, which identified the following domains as influencing the impact of each case:

- The severity[2] of the behaviour that was experienced in the case – for example, unwelcome sexually suggestive comments are considered to impose fewer costs compared to sexual assault.

[1] For example, delayed career progression, reduced participation in the workforce, and/or long-term impacts on income.
[2] In this report, "severity" is used to refer to the nature of the behaviour experienced in the case, while "impact" is used to refer to the overall impact of the case.

- If the perpetrator of the harassment was in a supervisory position to the victim.
- Whether the case was a one-off occurrence, or whether it persisted for a shorter time (up to six months) or a longer time (over six months).

The categories reflect the average impact for all people in the category. As such, there will be people in each category who are more severely (or less severely) impacted than the average impact for the category.

Model inputs

As specified in the *Sex Discrimination Act 1984,* a person sexually harasses another person if: (1) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or (2) engages in other unwelcome conduct of a sexual nature in relation to the person harassed. The description applies in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The results from the AHRC's survey showed that 20% of the Australian workforce has been the victim of workplace sexual harassment in the past year. This rate is higher for women (23%) compared to men (16%). Deloitte Access Economics extrapolated these results to the estimated number of people employed in 2018. In total, 2.5 million people were estimated to have been sexually harassed in the workplace in the past twelve months, which includes 1.0 million men and 1.5 million women. The distribution of cases into each of the impact categories was similar for men and women, albeit women were slightly more likely to experience higher impact cases than men were.

The productivity costs of workplace sexual harassment that were included in the model were as follows. Inputs for estimating these costs were sourced from the AHRC and MSPB surveys:

- Short-term absences from work (annual leave, sick leave, and unpaid leave) for victims, referred to as "absenteeism". On average, a victim of workplace sexual harassment was estimated to take 0.8 days of leave due to the harassment. This average reflects that a high proportion of victims (>90%) reported taking no leave, while a small proportion of victims took large amounts of leave (for example, >80 hours). There were significant differences between the impact categories, with victims in Category 1 taking an average of 0.7 hours of leave, and victims in Category 4 taking an average of 36 hours of leave.
- Reduced productivity while at work, known as "presenteeism". On average, a victim of workplace sexual harassment was estimated to have presenteeism of 3.2%, with this reduction persisting for 2.4 weeks. This average reflects that almost 80% of victims reported no presenteeism, while less than 1% reported their presenteeism to be over 50%. As with absenteeism, the productivity loss in each category was different, ranging from less than 2% in Category 1 through to almost 13% in Category 4.
- Increased staff turnover – for victims, bystanders, and perpetrators – either through an employee resigning, or having their employment terminated. In 10% of cases, somebody associated with the harassment – a victim, bystander, or perpetrator – leaves the organisation. Two thirds of these cases are resignations, with the remaining third being a termination of employment. Terminations can occur for all three types of people associated with the case. While all staff will leave an organisation eventually and thus impose costs on the organisation, the harassment "brings forward" these costs from when they would otherwise have occurred.
- The opportunity cost of manager time from responding to complaints, but not including other costs to business of internal investigations. On average, 10% of victims lodged a formal complaint with their organisation.

Other costs of workplace sexual harassment that were included in the model, which do not represent a loss to gross domestic product,[3] include the following items:

- Use of the health system, such as by visits to GPs, psychiatrists, psychologists, and counsellors; the costs of pharmaceuticals prescribed to treat mental health conditions; the costs of employer-funded Employee Assistance Programs, and the costs of treating injuries for sexual assault victims. From the AHRC Survey,

[3] Many of these costs, such as spending on healthcare, or legal fees, may increase economic activity compared to a world where workplace sexual harassment does not exist. For example, a visit to a health professional represents a service, which has been provided to the individual who was harassed. Thus, these other costs do not represent a loss to gross domestic product. However, spending on these services may represent a sub-optimal use of money, and in the absence of workplace sexual harassment this money could have been spent on other goods and services.

fewer than 1% of victims accessed GP services. On average, 3% of victims accessed counsellor or psychologist services.
- The costs of complaints lodged with the AHRC or jurisdictional anti-discrimination agencies, and for court cases.
- For sexual assault cases that proceeded to court, a police investigation was assumed to occur, and based on Australian Institute of Criminology analysis 38% of sexual assault defendants were judged to be guilty.
- There were also deadweight losses, that are increased when taxes are raised above the level that they would otherwise have been in the absence of workplace sexual harassment. Tax rates are higher than they would otherwise have been under the assumption that governments maintain a budget neutral position, despite the decreased tax revenue and increased government spending due to workplace sexual harassment.

The final cost element was lost wellbeing to the victim. This category captures the loss of healthy life, which can be measured using disability-adjusted life years (DALYs), and monetised using the value of a statistical life year (as stipulated by the Department of the Prime Minister and Cabinet.[4]) The DALY is a non-financial approach (reported in years) to measuring the reduction in an individual's wellbeing, which in this report includes the years of healthy life lost due to morbidity (YLDs). The value of a statistical life year is an estimate of the value society places on saving the loss of an anonymous year of life. The value of a statistical life year does not reflect any particular person's life.

Due to limitations in the available evidence, the modelled loss of wellbeing was limited to victims of actual or attempted sexual assault only. Victims in other impact categories will also experience a loss of wellbeing, but as the evidence to-date is only cross sectional it is not possible to include lost wellbeing costs for the other impact categories.

The model separately identified the costs of workplace sexual harassment for different sub groups defined by age and gender, industry, public/private sector, employer size, employment relationship, culturally and linguistically diverse employees, Aboriginal and Torres Strait Islander employees, employees with a disability, sexual orientation of employees, and socioeconomic status of employees. This was done by varying the prevalence of workplace sexual harassment in each sub group, the income levels in each sub group, and the impact category distribution for each sub group.

Results

In 2018, workplace sexual harassment imposed a number of costs. The costs included in the model were:

- $2.6 billion in lost productivity, or $1,053 on average per victim.
- $0.9 billion in other costs, or $375 on average per victim.

At an average weekly wage of $1,244 across the economy, each case of workplace sexual harassment represents approximately 4 working days of lost output. The largest loss of productivity – staff turnover, 32% of costs – results in lost income to individuals, lost profits to employers, and reduced tax paid to government. Significant losses also result from absenteeism (28% of costs), and manager time (24% of costs). The results from the model are shown in Table i.

Finally, the model estimated lost wellbeing for victims of actual or attempted sexual assault at a total of $249.6 million in lost wellbeing, or $4,989 on average per victim.

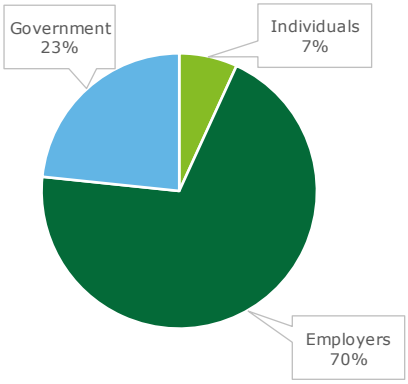
[4] Available at https://www.pmc.gov.au/sites/default/files/publications/Value_of_Statistical_Life_guidance_note.pdf. In 2018 dollars, the value of a statistical life year is almost $200,000.

Table i Costs of workplace sexual harassment

Component	Cost in 2018 ($m)	Cost per person in 2018 ($)
Productivity	**2,622.2**	**1,053**
Absenteeism	741.8	297
Presenteeism	426.4	171
Staff turnover	830.6	336
Manager time	623.4	250
Other costs	**936.5**	**375**
Health system	63.4	25
AHRC/jurisdictional agency investigations	0.8	0
Individual legal fees	290.4	116
Government justice system costs	158.4	63
Deadweight losses	423.5	170

Source: Deloitte Access Economics analysis. Totals may not add due to rounding.

The economic costs of workplace sexual harassment are shared by individuals, their employers, government, and society. Approximately two thirds of lost productivity (70%) is borne by employers, with government (23%) losing tax revenue, and individuals (7%) losing income. Between the sub-groups, most of the per person productivity losses are due to differences in income in each group. However, the largest share of lost productivity was experienced in the 25-34 years female age group. This is due to the high rates of harassment experienced by individuals in this group, and occurs despite the average weekly earnings in this group being lower than the national average. Detailed results for each sub group are shown in Section 4.2.



Discussion

This report is a world-first – noting that it builds on and extends previous work in the United States by the MSPB – and the modelling has been conducted using the evidence available at the time. The results of the analysis should be interpreted within this context, and with reference to the caveats and limitations presented in the report. Future data collection efforts may assist with refining the estimated costs of workplace sexual harassment.

1 Introduction

Deloitte Access Economics was engaged by the Treasury to estimate the economic costs of sexual harassment in the workplace, to inform the Australian Human Rights Commission's (AHRC's) *National inquiry into sexual harassment in Australian workplaces.*

Estimating the cost of workplace sexual harassment to the Australian economy is intended to increase awareness of the issue and its impacts by bringing new evidence to light regarding its various costs and who bears them. Estimating the economic cost also provides a basis for estimating the cost-effectiveness of interventions to address the problem, which can in turn be used alongside recommendations to reduce workplace sexual harassment and provide an economic catalyst for change, in addition to moral and ethical arguments.

The report has been structured as follows:

- *Section 1* provides a summary of relevant literature on the costs of workplace sexual harassment.
- *Section 2* explains the conceptual framework used for the analysis, including the definition of workplace sexual harassment, time aspects of the model, and the framework that was developed for estimating the impact of each case of workplace sexual harassment.
- *Section 3* outlines the methodology and data sources that were used for each cost element.
- *Section 4* presents the results of the analysis.
- *Section 5* discusses limitations of the analysis, and presents additional survey analysis.
- *Appendix A* contains supplementary data analysis.
- *Appendix B* provides additional methodological detail.

There has been little prior research into the economic costs of workplace sexual harassment. A targeted literature search has not identified any prior studies that have estimated the cost of workplace sexual harassment in Australia. A search of the international literature has identified a small number of studies that have articulated a range of costs.

Two common approaches to assessing sexual harassment in surveys are the direct approach and behavioural approach. The direct approach asks participants some variant of "have you ever been sexually harassed?" and is largely influenced by whether survey participants label their experiences as sexual harassment (Chan et al., 2008). The behavioural approach uses specific descriptions of behaviours, for example "have you experienced uninvited and deliberate touching, leaning over, cornering or pinching?" (Merit Systems Protection Board, 1981) which allows for the range of experiences that can constitute sexual harassment to be better considered by the participant.

The largest and most complete study into workplace sexual harassment has been undertaken by the United States Merit Systems Protection Board (MSPB). The first study was undertaken in 1981, with subsequent studies undertaken in 1988, 1995 and 2018.[5] The first study created a bespoke survey in consultation with academic researchers, which returned over 20,000 responses, and asked respondents to identify whether they had experienced certain behaviours. Subsequent studies refined the initial set of questions.

The surveys collected a range of information from US Federal Government employees that focused on the productivity impacts of workplace sexual harassment, such as the proportion of employees who were absent from work and the number of days absent, the proportion of employees who experienced reduced productivity, and the percentage by which their baseline productivity was reduced. From the 1981 survey, the MSPB estimated the cost of sexual harassment in the US Federal Government to be US$189 million over the

[5] Merit Systems Protection Board. (1981). *Sexual harassment in the federal workplace is it a problem?*; Merit Systems Protection Board. (1988). *Sexual harassment in the federal Government: An Update*; Merit Systems Protection Board. (1995). *Sexual harassment in the federal workplace Trends, Progress, Continuing Challenges*; Merit Systems Protection Board. (2018). *Update on Sexual Harassment in the Federal Workplace.*

two years between 1978 and 1980.[6] This figure included the cost of replacing staff who left their job due to sexual harassment, insurance claims for medical services, and productivity costs. In the original survey, a number of cost estimates relied on assumptions, for example, the number of days each employee was absent from work, however subsequent surveys asked employees to specify greater levels of detail. In 1995, the cost to government had increased to $327 million over a two-year period (noting that methodological changes contributed to this increase, in addition to increases in salaries).[7] The MSPB's 2018 update on sexual harassment in the Federal workplace did not estimate the cost.

Another set of studies covering a wide range of impacts were undertaken by Faley et al (1982; 1999; 2006), estimating the cost of workplace sexual harassment in the United States Army.[8] These studies asked respondents whether they had experienced uninvited and unwanted sexual attention. The 2006 study addressed the cost of same-sex workplace sexual harassment. In the 1999 study, the authors used a military survey to estimate the costs of sexual harassment in 1988 to be $250 million.[9] Three broad categories of costs were identified: productivity related costs, administrative costs and other costs. These included costs for replacing staff who leave or transfer due to sexual harassment, absenteeism and the costs of staff working less productively due to sexual harassment.

Sandroff (1988) surveyed individuals across 160 Fortune-500 companies to estimate the organisational costs of workplace sexual harassment.[10] The study estimated the costs to be $6.7 million per company per year, and included increased absenteeism and turnover, and well as reduced productivity. However, as noted by Faley et al (1999), limited reliance should be placed on these results, as the study methodology is not publicly available.

In late 2018, the International Centre for Research on Women released a publication on the costs to business of workplace sexual harassment.[11] This publication summarised the findings from a systematic literature search on studies which had quantified various aspects of the costs of workplace sexual harassment. These included:

- Individual productivity losses: $22,500 per individual, in 2007 dollars. This figure is from a 2007 meta-analysis[12] which identified a negative correlation between sexual harassment and productivity. It is important to note that this figure is intended to be illustrative.[13] As such, Deloitte Access Economics considers that it should not be viewed as a modelled estimate of the productivity losses. Section 3.2 presents Deloitte Access Economics' methodology for estimating individual productivity losses.
- Reductions in team performance: results from the 1995 MSPB study (see above), which estimated these losses to be almost US$200 million over 1992-1994. However, in arriving at this figure the MSPB study asked respondents to identify whether the sexual harassment they had experienced negatively impacted on their team's productivity, and then assumed this decrease to be 1%. As such, Deloitte Access Economics considers that this estimate should be viewed with caution. As no evidence is available to robustly estimate this impact, this cost category was not included in the model.

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[6] At the time, this was approximately equivalent to the total annual salaries of all 465 agency heads, and half the salary costs for all 7,000 members of the Senior Executive Service. On a per person basis, across 462,000 victims this is approximately US$409 per victim. Adjusted for historical inflation and for purchasing power parity between the US and Australia, this is approximately AUD$1,800 in 2018.
[7] Insufficient information was provided in the 1995 report to enable a per person cost to be calculated.
[8] Faley, R. H. (1982). Sexual harassment: Critical review of legal cases with general principles and preventive measures. *Personnel Psychology*, 35(3), 583-600.
Faley, R. H., Knapp, D. E., Kustis, G. A., Dubois, C. L., Young, J., & Polin, B. (2006). Estimating the organizational costs of same-sex sexual harassment: The case of the US Army. *International Journal of Intercultural Relations*, 30(5), 557-577.
Faley, R. H., Knapp, D. E., Kustis, G. A., & Dubois, C. L. (1999). Estimating the organizational costs of sexual harassment: The case of the US Army. *Journal of Business and Psychology*, 13(4), 461-484.
[9] Insufficient information was provided in the study to enable a per person cost to be calculated.
[10] Sandroff, R. (1988). Sexual harassment in the Fortune 500. *Working Woman*. 13, no. 12: 69-73.
[11] Rizzo, T., Stevanovic-Fenn, N., Smith, G., Glinksi, A., O'Brien-Milne, L., Gammage, S. 2018. *The costs of sex-based harassment to business.* International Centre for Research on Women. Available from https://www.icrw.org/publications/the-costs-of-sex-based-harassment-to-businesses/ [accessed February 2019].
[12] Willness, C. R., Steel, P., & Lee, K. (2007). A meta-analysis of the antecedents and consequences of workplace sexual harassment. *Personnel psychology*, 60(1), 127-162.
[13] Personal communication, Dr. C. R. Willness, 14 February 2019.

- Turnover and transfer costs: these were expressed on a per employee basis, with a range of $5,000-$211,000 depending on the employee's industry and level. Section 3.2.3 outlines Deloitte Access Economics' methodology for estimating these costs. As noted in Section 3.2.3, all employees will eventually leave an organisation, and so job turnover related to workplace sexual harassment merely brings forward turnover that would have occurred anyway. As such, the true costs of turnover due to workplace sexual harassment are likely much lower than those cited in the International Centre for Research on Women publication.
- Litigation: US$75,000-US$217,000. These US-specific figures were specified on a website for insurance agents[14]. Deloitte Access Economics was not able to identify the source for these figures. Section 3.3.3 outlines the approach that Deloitte Access Economics used for estimating the value of compensation paid to victims in Australia.
- Insurance. US$1,000-$1 million per claim. These figures were provided in a Washington Post article[15]. However, these costs are for "retention", which is effectively the litigation costs that are covered by the employer, rather than the insurer. As such, these costs would be covered in the litigation costs in the previous dot point. Deloitte Access Economics was not able to identify reliable data on the insurance costs for Australian businesses to protect against discrimination claims, which include sexual harassment claims. These costs are noted in Section 3, but were not included in the model.

While the costs of workplace sexual harassment have not been extensively studied, more research has been conducted into the costs of sexual assault, which is one type of workplace sexual harassment as well as occurring outside the workplace. A sample of this work is summarised in Table 1.1.

Table 1.1 Sample of prior studies on the costs of sexual assault

Study	Cost per person	Inclusions
Post et al (2002)[16]	US$108,447 – annual cost (1996)	Lost productivity, medical services, and lost quality of life
Peterson et al (2017)[17]	US$122,461 (2014) – lifetime cost	Lost productivity (victim and perpetrator), medical costs, justice system costs, and victim property loss and damage
Smyth (2011)[18]	AUD$11,013 (2011) – annual cost	Lost output, medical costs, and intangible costs[19].

Source: As noted in table.

[14] https://www.trustedchoice.com/business-insurance/liability/epli/
[15] https://www.washingtonpost.com/business/economy/more-companies-are-buying-insurance-against-sexual-harassment-complaints/2017/11/02/a7297f9a-bd69-11e7-959c-fe2b598d8c00_story.html?noredirect=on&utm_term=.3882c228fd05
[16] Post, L. A., Mezey, N. J., Maxwell, C., & Wibert, W. N. (2002). The rape tax: Tangible and intangible costs of sexual violence. *Journal of Interpersonal Violence*, *17*(7), 773-782.
[17] Peterson, C., DeGue, S., Florence, C., & Lokey, C. N. (2017). Lifetime economic burden of rape among US adults. *American journal of preventive medicine*, *52*(6), 691-701.
[18] Smyth, R. (2011). Costs of crime in Victoria. *Criminal Justice*, *2689*, 27-36.
[19] Intangible costs are used by the Australian Institute of Criminology to reflect fear, pain and suffering, and lost quality of life. Smyth identifies that the cost of rape is likely to be higher relative to other types of sexual assault, however, notes that there is no guide as to the cost of rape relative to other forms of sexual assault.

2 Conceptual framework

This section outlines the methodology that was followed, and the data sources that were used, in undertaking the analysis.

2.1 Overview of the methodology

Workplace sexual harassment imposes a range of costs that impact on individuals – including victims, perpetrators, and bystanders – employers, the government, and society. These costs include lost productivity, increased spending on healthcare, costs of complaints and investigations, and lost wellbeing of victims.

A model was constructed to estimate the economic costs of workplace sexual harassment. The model leveraged a proprietary Deloitte Access Economics "cost of illness" model[20], which has been used previously to estimate the costs from a range of activities such as physical and sexual violence, child abuse, domestic violence, depression and anxiety, and the costs of physical and mental workplace injuries.

It is important to note that the data used in the modelling were the best available, however, were not collected for the purposes of estimating the economic costs of workplace sexual harassment in Australia. No new primary data were collected for this project. As with any data, there are limitations in the data that were used. These limitations are discussed throughout the report, and Section 5 discusses recommendations for future data collection efforts.

The model used a bottom-up approach, by first establishing the number of people who have been sexually harassed in the workplace, and then estimating a range of costs for these people. The primary data source used in the modelling was the AHRC's 2018 *Fourth national survey on sexual harassment in Australian workplaces* (the AHRC survey[21]). This survey, conducted in early 2018, surveyed approximately 10,000 people to investigate the prevalence, nature, and reporting of sexual harassment in Australian workplaces, and in the community more broadly. Deloitte Access Economics used the survey's de-identified, confidentialised unit record file to generate many inputs for the modelling, such as the prevalence of workplace sexual harassment, staff turnover, healthcare usage, and the rate at which complaints were lodged. Many other sources from the peer reviewed and grey literature were used in the model, which are discussed throughout this report.

There were several key components that were used to construct the model:

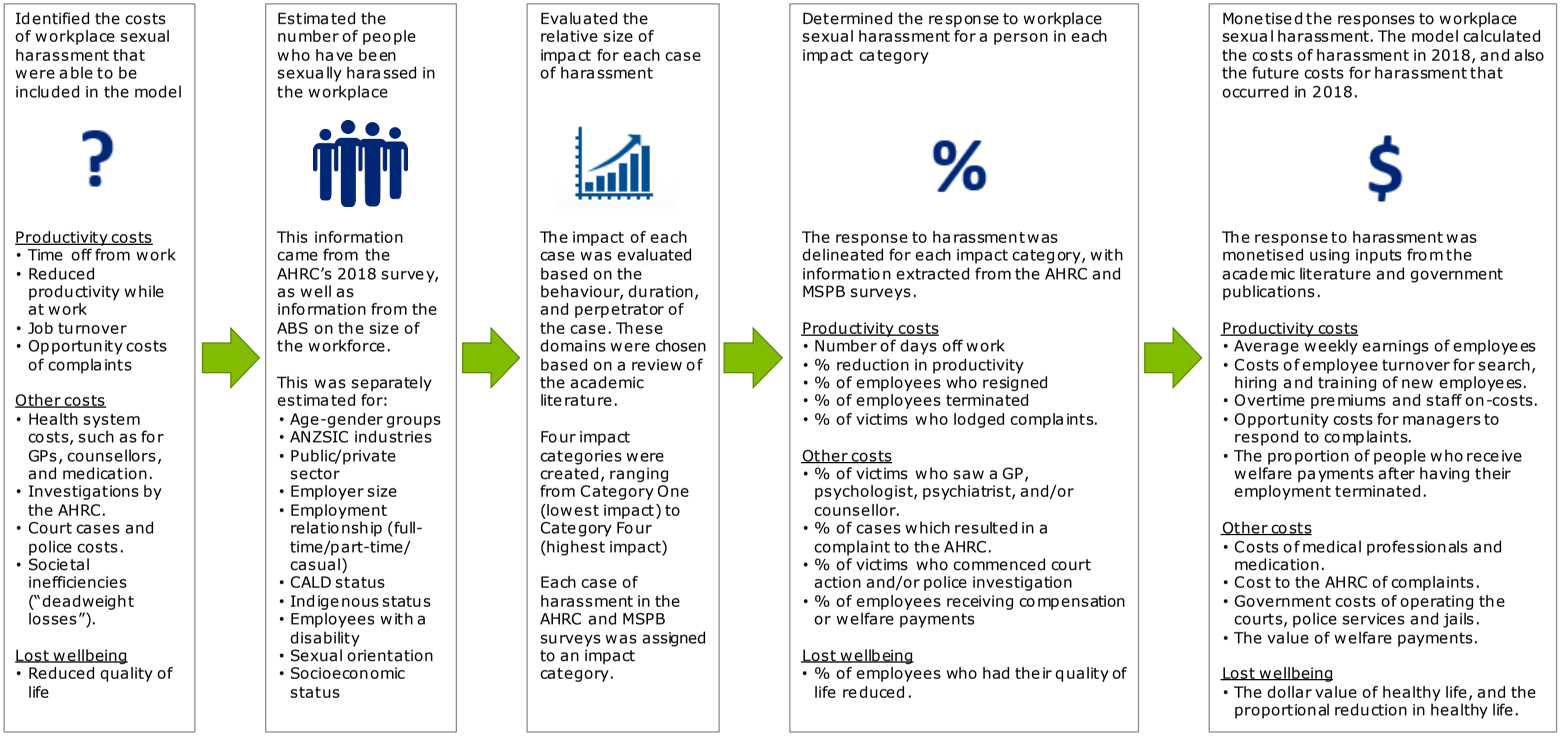
- The definition of workplace sexual harassment. This is discussed in Section 2.2.
- The number of people in the workforce who have been sexually harassed at a point in time. This is known as the *prevalence* of workplace sexual harassment. A similar concept is the *prevalence rate* of workplace sexual harassment, which is a percentage that expresses the share of the workforce who have been sexually harassed. Related to this, the costs of harassment can be measured over a specified period of time for people who have been harassed in that period, or measured as future costs for harassment that occurs for the first time in a given period. These concepts are explored in Section 2.3.
- Each case of workplace sexual harassment is different, as there are many factors that determine the size of costs to individuals, employers, the government and society. For modelling purposes, three dimensions of workplace sexual harassment were used to construct an impact framework, which assigned each case of workplace sexual harassment to an impact category. The impact framework is presented in Section 2.4.
- The nature of the costs that are imposed through workplace sexual harassment. There are many costs of workplace sexual harassment, including costs that are amenable to quantification, and costs that are difficult to quantify due to the available data and evidence. For this project, the quantified costs included productivity costs, other costs (e.g., for healthcare, and the justice system), and lost wellbeing. These are discussed in Section 3. The costs of workplace sexual harassment which cannot be quantified using

[20] An introduction to cost of illness models is provided in Segel 2006, *Cost-of-illness studies – a primer*, RTI-UNC Centre of Excellence in Health Promotion Economics. The phrase "cost of illness" is the standard terminology for a study which estimates the costs of a particular health condition or a negative social activity (for example, sexual harassment).
[21] The results extracted from the AHRC unit record files by Deloitte Access Economics are consistent with the weighted results published in the AHRC report.

existing data and information – such as disrupted career progression, long-term impacts, and impacts on the victim's family – are discussed throughout the report, with the longer-term costs of workplace sexual harassment discussed throughout the report and summarised in Table 3.1.

The overall approach that was used for the modelling is summarised in Figure 2.1, and discussed further in the remainder of Section 2.

Figure 2.1 Modelling approach



Source: Deloitte Access Economics

2.2 Defining workplace sexual harassment

As specified in the *Sex Discrimination Act 1984,* a person sexually harasses another person if: (1) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or (2) engages in other unwelcome conduct of a sexual nature in relation to the person harassed. The description applies in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. Workplace sexual harassment can occur both in the physical workplace, but also in external environments (for example, after-work drinks at a bar or on social media). It can be perpetrated by colleagues (junior, senior or peer) or clients/customers, and also by other people associated with a workplace.

Measuring sexual harassment using this approach requires people to have an understanding of what is defined as sexual harassment. As many people do not have a clear understanding of what constitutes workplace sexual harassment,[22] an alternative approach for measuring workplace sexual harassment is to define it using a list of behaviours that constitute sexual harassment.

The AHRC survey asked people to identify whether they had experienced the following behaviours:

- unwelcome touching, hugging, cornering or kissing;
- inappropriate staring or leering that made you feel intimidated;
- sexual gestures, indecent exposure or inappropriate display of the body;
- sexually explicit pictures, posters or gifts that made you feel offended;
- repeated or inappropriate invitations to go out on dates;
- intrusive questions about your private life or physical appearance that made you feel offended;
- sexually explicit comments made in emails, SMS messages or on social media;
- inappropriate physical contact;
- repeated or inappropriate advances on email, social networking websites, or Internet chat rooms;
- being followed, watched or someone loitering nearby;
- sexually suggestive comments or jokes that made you feel offended;
- sharing or threatening to share intimate images or film of you without your consent;
- indecent phone calls, including someone leaving a sexually explicit message on voicemail or an answering machine;
- requests or pressure for sex or other sexual acts;
- actual or attempted rape or sexual assault; and
- any other unwelcome conduct of a sexual nature that occurred online or via some form of technology.

The AHRC's behaviours approach to defining workplace sexual harassment was used in this study, as it provides a detailed systematic representation of the occurrence of workplace sexual harassment, and it aligns with the evidence from the AHRC survey which was captured for each behaviours-based case of sexual harassment.[23]

2.3 Time aspects

There are two broad approaches to measuring the economic costs of workplace sexual harassment: the prevalence approach and the incidence approach. The **prevalence approach** measures the number of people who have been sexually harassed in the workplace over a period of time, and estimates the costs due to the workplace sexual harassment that were incurred in that period – typically one year. For this project, the prevalence of workplace sexual harassment was measured for 2018.

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[22] In the AHRC's 2018 survey on workplace sexual harassment, close to 1 in 3 people who said they had not been harassed went on to indicate they actually had been harassed when behaviours were described to them. Hersch (2015) has noted that utilising data from a behavioural survey is a better estimate of the prevalence of workplace sexual harassment as people tend to under report sexual harassment when asked directly without contextualising behaviours. [HerscH, J. (2015). Sexual harassment in the workplace. *IZA World of Labor*.]

[23] The AHRC's 2018 survey also asked respondents "have you personally experienced sexual harassment?", which resulted in a much lower prevalence of sexual harassment. However, as no further questions were asked that related to this question, it was not possible to use the results of this question in the analysis.

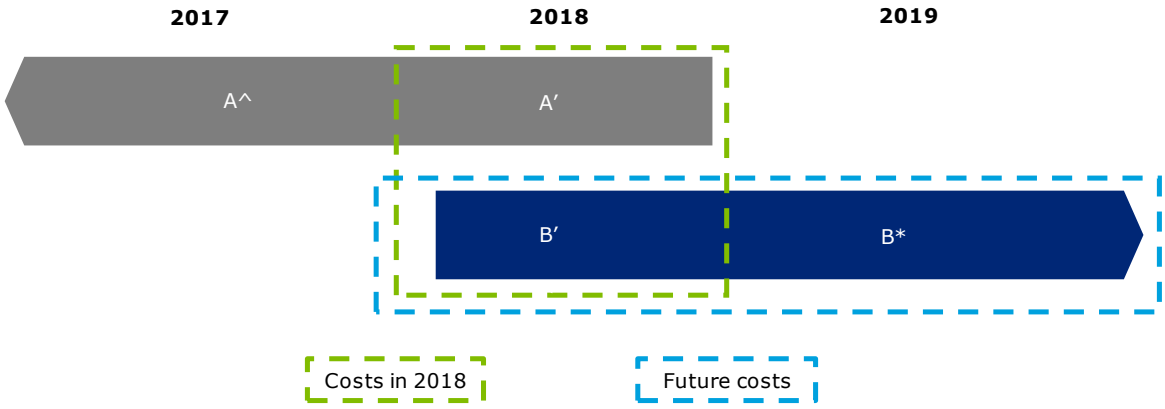
The **incidence approach** measures the number of people who have been sexually harassed in the workplace in a given year (for example, 2018), and estimates the future costs due to the harassment.[24] As outlined in Section 3, the costs of workplace sexual harassment that were included in the model did not extend beyond the following year. As longitudinal studies on the impact of sexual harassment are not available, it was not possible to estimate longer-term impacts such as disrupted career progression. Thus, for workplace sexual harassment that occurred in 2018, the estimated costs do not extend past 2019.

The approach that is used has implications for how the costs of workplace sexual harassment are calculated. Figure 2.2 demonstrates the conceptual differences between the incidence and prevalence approaches to measuring the cost of workplace sexual harassment.

- Case A represents someone who has experienced workplace sexual harassment in 2017, where the associated costs include A^ + A'.
- Case B represents someone who has experienced workplace sexual harassment in 2018, with future costs of B' + B*.

Using a **prevalence approach**, costs in the base year relating to A and B would be included, where the total cost in 2018 is equal to costs A' and B'. Using an **incidence approach**, the future costs of workplace sexual harassment that has occurred in 2018 are the sum of B' and B*.

Figure 2.2 Conceptual differences between incidence and prevalence approaches to measurement of costs



Source: Deloitte Access Economics.

As per Figure 2.2, the prevalence approach was used to estimate the costs of workplace sexual harassment incurred in 2018, for:

- the costs incurred in 2018 from cases that commenced prior to 2018; and
- the costs that were incurred in 2018 from cases that occurred in 2018.

To estimate the future costs for workplace sexual harassment that happens in 2018, the incidence approach was used to estimate costs that are incurred in 2018 and 2019.

2.4 Impacts framework

Estimating the economic cost of a case of workplace sexual harassment is a complex task, given the wide range of behaviours that constitute workplace sexual harassment (see Section 2.2). This means that some cases would be expected to impose larger costs (for example, sexual assault) and some cases impose smaller costs (for example, sexual remarks). Furthermore, there are other specific considerations for each case that

[24] Note that the incidence of workplace sexual harassment is different from the number of incidents of sexual harassment, which refers to the number of times sexual harassment occurred in a given time period (rather than the number of new people it happened to).

influence the costs imposed by a particular case. In this report, "severity" is used to refer to the nature of the behaviour experienced in the case, while "impact" is used to refer to the overall impact of the case.

Several prior studies – discussed in the remainder of this section – have used a variety of factors to classify the likely impact of costs imposed by a particular case of workplace sexual harassment. It is important to note that the categories reflect the average impact for all people in the category. As such, there will be people in each category who are more severely (or less severely) impacted than the average impact for the category.

With reference to prior studies and the nature of the data collected in the AHRC survey, Deloitte Access Economics used the following domains to classify each case of workplace sexual harassment into an overall impact classification of low, medium and high:

- the severity (nature of the behaviour that was experienced in the case);
- the perpetrator of the case; and
- the duration of the case.

In addition to the three elements noted above, the Langhout et al (2005) model of situational and personal determinants of the impacts of workplace sexual harassment also included the victim's subjective appraisal of the harassment.[25] The most direct corollary between this variable and the AHRC survey would be the questions on victim perception of intimidation and offence. However, for this study it was considered that the three domains of behaviour severity, perpetrator and duration were likely to be relatively independent of each other, while subjective appraisal of the impact of the harassment was likely to be significantly influenced by the other variables. For example, in their study of 6,304 personnel from the United States army, Settles (2014) found that the perpetrator of sexual harassment influenced the victim's subjective appraisal of the impact of the harassment.[26] Similarly, it would be expected that duration and behaviour severity would also influence the victim's appraisal of the impact of the harassment. Appendix B explores the influence of behaviour, duration and perpetrator on the victim's level of intimidation and offence. The analysis in Appendix B supports the exclusion of victim intimidation and offence from the impacts framework.

In addition to what has been identified in the data and the literature for inclusion in the framework, the AHRC has noted that there are a number other factors that could reasonably be expected to affect the relative impact to the victim of a case of sexual harassment, including but not limited to: the number of perpetrators; the response of workplace management to an incident; and the vulnerability of the victim (for example, from previous experiences of workplace sexual harassment).

2.4.1 The behaviour severity experienced in the case

As noted by Langhout et al (2005), it is widely accepted that the type of behaviour experienced influences the impact of the case on the victim. Cass et al (2010) found that the type of behaviour affected a jury opinion on compensation outcomes.[27] Jurors who read a severe harassment scenario were more likely to agree that the victim had suffered and should be compensated, compared to a mild harassment scenario.

For this study, Deloitte Access Economics adopted the severity of behaviours described in the MSPB research. The MSPB's 1981 survey, and subsequent surveys in 1988 and 1995, presented respondents with a variety of behaviours and asked them to identify the extent to which they considered each behaviour to constitute workplace sexual harassment.[28] Behaviours with a high level of agreement were considered to be more severe, while those with a mixed response were considered to be less severe. The MSPB classified behaviours into three categories: less severe, more severe, and most severe. The MSPB did not ask respondents to

[25] Langhout, R. D., Bergman, M. E., Cortina, L. M., Fitzgerald, L. F., Drasgow, F., & Williams, J. H. (2005). Sexual Harassment Severity: Assessing Situational and Personal Determinants and Outcomes 1. *Journal of Applied Social Psychology*, 35(5), 975-1007.
[26] Settles, I. H., Buchanan, N. T., Yap, S. C., & Harrell, Z. A. (2014). Sex differences in outcomes and harasser characteristics associated with frightening sexual harassment appraisals. *Journal of Occupational Health Psychology*, 19(2), 133.
[27] Cass, S. A., Levett, L. M., & Kovera, M. B. (2010). The effects of harassment severity and organizational behavior on damage awards in a hostile work environment sexual harassment case. *Behavioral sciences & the law*, 28(3), 303-321.
[28] Subsequent surveys in 1988 and 1995 asked the same questions of respondents, with similar results.

identify whether actual or attempted sexual assault constituted sexual harassment, as due to its criminal nature they assigned it to the highest severity category.

- Less severe behaviours included pressure for dates, sexually suggestive looks or gestures, and sexual teasing, jokes, remarks or questions.
- More severe behaviours included letters, phone calls or materials of a sexual nature; pressure for sexual favours; and deliberate touching, leaning over, cornering or pinching.
- The most severe behaviours were actual or attempted rape or assault.

Table 2.1 shows the proportion of men and women who considered each of the six behaviours (excluding sexual assault) to constitute sexual harassment. The questions were phrased as "if a supervisor did the behaviour" and "if another worker did this", with a higher level of agreement for the supervisor as the perpetrator.

Table 2.1 Proportion of respondents who agreed that each behaviour constituted workplace sexual harassment

Behaviour	Supervisor, males (%)	Supervisor, females (%)	Another worker, males (%)	Another worker, females (%)
Letters and calls	93	87	87	76
Pressure for sexual favours	91	84	81	65
Deliberate touching	91	83	84	69
Pressure for dates	77	76	65	59
Suggestive looks	72	59	64	47
Sexual remarks	62	53	54	42

Source: MSPB 1981.

The AHRC survey included additional behaviours as well as more granularity for each behaviour. The behaviours from the AHRC survey that were described in more granularity – for example, the MSPB described behaviour of "deliberate touching", while the AHRC included separate behaviours of "inappropriate physical contact" and "unwelcome touching, hugging, cornering or kissing" – were mapped to the severity classification based on the corresponding behaviour from the MSPB. The behaviours described in the AHRC survey that had no corresponding behaviour from the MSPB have been classified based on Deloitte Access Economics' assessment of the likely severity of the behaviour, and were discussed and agreed with Treasury. The classification of behaviours is shown in Table 2.2.

Table 2.2 Classification of behaviours

Category	MSPB (1981) behaviours	Corresponding behaviours from AHRC (2018)	Additional behaviours from AHRC (2018)
Less severe	Sexual remarks	Sexually suggestive comments or jokes that made you feel offended	
	Suggestive looks	Inappropriate staring or leering that made you feel intimidated	
	Pressure for dates	Repeated or inappropriate invitations to go out on dates	
			Intrusive questions about your private life or physical appearance that made you feel offended
More severe	Deliberate touching	Inappropriate physical contact Unwelcome touching, hugging, cornering, or kissing	
	Pressure for sexual favours	Requests or pressure for sex or other sexual acts	
	Letters and calls	Sexually explicit comments made in emails, SMS messages or on social media Indecent phone calls, including someone leaving a sexually explicit message on voicemail or an answering machine Repeated or inappropriate advances on email, social networking websites or internet chat rooms Any other unwelcome conduct of a sexual nature that occurred online or via some form of technology	
	Stalking (added in the 1995 survey)	Being followed, watched or someone loitering nearby	
			Sharing or threatening to share intimate images or film of you without your consent
			Sexual gestures, indecent exposure or inappropriate display of the body
			Sexually explicit pictures, posters or gifts that made you feel offended
Most severe	Actual or attempted rape or assault	Actual or attempted rape or assault	

2.4.2 The perpetrator of the case

Studies have identified that the perpetrator of a case of workplace sexual harassment influences the impact of the case on the victim. Mohipp & Senn (2008) noted that both men and women are more likely to consider a behaviour to be sexual harassment, and of a higher impact, if the perpetrator was a supervisor rather than a

co-worker.[29] O'Connell & Korabik (2000) identified that the more formal power that the harassers held over their targets, the more likely the targets were to report experiencing negative outcomes.[30] Langhout et al (2005) found that the relative severity of a case of sexual harassment was positively correlated with the relative power of the perpetrator to the victim.

A study by Till (1980) graded the impact of a case of workplace sexual behaviour based on the behaviour and whether there was an associated threat or reward as follows:[31]

1. Least severe: Generalised sexist remarks or behaviours
2. Inappropriate and offensive, but essentially sanction-free sexual advances
3. Solicitation of sexual activity or other sex-linked behaviour by promise of rewards
4. Coercion of sexual activity by threat of punishment
5. Most severe: Sexual assaults

This is in general alignment with the severity of behaviours in the MSPB's study, with the additional layer of threat/reward added for cases with a larger impact. Deloitte Access Economics considers that the additional layer of threat/reward implies that the perpetrator is in a position of power to provide the threat or reward, and, as such, the position of the perpetrator in the organisation relative to the victim influences the impact of the case.

In addition to the impact on the victim that the role of the perpetrator has, the perception that supervisors have some form of protection against accusations made against them may influence victim outcomes. This is likely to be reflected in the rate at which victims make complaints against their supervisor, and is explored in Appendix B by comparing the rate at which victims reported the behaviour when the perpetrator is their supervisor, compared to when the perpetrator is not their supervisor.

Fitzgerald et al (1995 and 1999)[32] noted that an organisation's perceived level of tolerance towards sexual harassment was correlated with fewer reports of sexual harassment. An organisation's perceived level of tolerance towards sexual harassment influenced reports of sexual harassment, and a lower tolerance for sexual harassment was correlated with fewer reports of sexual harassment. To estimate the rate of sexual harassment, the study presented respondents with a survey of behaviours; however, the authors also asked respondents whether they had been sexually harassed.

For the purposes of this project, the impact framework considered sexual harassment perpetrated by clients and customers to be analogous with harassment perpetrated by non-supervisors. Friborg et al (2017)[33] found that employees who were harassed by colleagues (including supervisors and non-supervisors) had a higher mean level of depressive symptoms compared to employees who were harassed by clients/customers.

However, harassment from customers and clients is more prevalent in some industries due to the nature of the work that is performed, and may differ in nature from harassment perpetrated by colleagues. Workers in roles where creating personal, ongoing relationships with customers is considered 'part of the job' often experience higher rates of sexual harassment.[34,35] In some person-related (caring) professions, it may be

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[29] Mohipp, C., & Senn, C. Y. (2008). Graduate students' perceptions of contrapower sexual harassment. *Journal of Interpersonal Violence*, 23(9), 1258-1276.
[30] O'Connell, C. E., & Korabik, K. (2000). Sexual harassment: The relationship of personal vulnerability, work context, perpetrator status, and type of harassment to outcomes. *Journal of Vocational Behavior*, 56(3), 299-329.
[31] Till, Frank J. 'Sexual Harassment. A Report on the Sexual Harassment of Students.' (1980).
[32] Fitzgerald, L. F., Gelfand, M. J., & Drasgow, F. (1995). Measuring sexual harassment: Theoretical and psychometric advances. *Basic and Applied Social Psychology*, 17(4), 425-445.
Fitzgerald, L. F., Magley, V. J., Drasgow, F., & Waldo, C. R. (1999). Measuring sexual harassment in the military: the sexual experiences questionnaire (SEQ—DoD). *Military Psychology*, 11(3), 243-263.
[33] Friborg, M. K., Hansen, J. V., Aldrich, P. T., Folker, A. P., Kjær, S., Nielsen, M. B. D., ... & Madsen, I. E. (2017). Workplace sexual harassment and depressive symptoms: a cross-sectional multilevel analysis comparing harassment from clients or customers to harassment from other employees amongst 7603 Danish employees from 1041 organizations. *BMC public health*, 17(1), 675.
[34] Handy, J. (2006). Sexual harassment in small-town New Zealand: a qualitative study of three contrasting organizations. *Gender, Work & Organization*, 13(1), 1-24.
[35] Hughes, K., Tadic, V. (2002) *'Something to Deal With': Customer Sexual Harassment and Women's Retail Service Work in Canada*, Gender, Work and Organisation Vol.5 Issue 4

difficult to distinguish between inappropriate sexual behaviour from clients and work-related responsibilities. For example, in eldercare, employees often work alone in clients homes and in some cases, clients may be cognitively impaired and not able to understand the consequences of their actions.[36]

People facing sexual harassment from customers have reported that it is more difficult to address sexual harassment from customers, as their position was so tightly linked to customer relationships.[37] Organisations may also refrain from explicitly taking on the responsibility for making guidelines and policies regarding sexual harassment from clients and customers. Sexual harassment is also more likely to be recurrent when conducted by clients or customers compared to sexual harassment by colleagues, supervisors or subordinates.[38]

2.4.3 Duration of the case

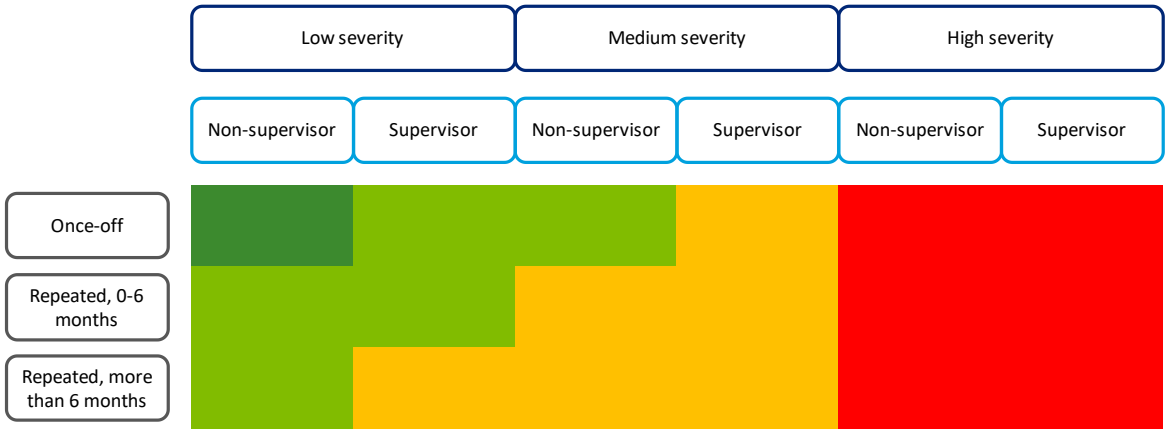
The final element in considering the impact of a case of workplace sexual harassment is the duration of the case. Langhout et al (2005), building on work from Schneider et al (1997), identified that frequent and pervasive low severity workplace sexual harassment is as offensive, disturbing, and corrosive to women's work and wellbeing as infrequent high severity workplace sexual harassment.[39] Moreover, a recent meta-analysis reported significantly stronger effects for high-frequency/low-intensity experiences (e.g. gender harassment) than for low-frequency/high-intensity experiences (e.g. unwanted sexual attention, sexual coercion); this pattern held when predicting women's job satisfaction, organisational commitment, and general health perceptions and symptoms.[40]

For this study, Deloitte Access Economics categorised duration into once-off behaviours, repeat behaviours that occurred over a period up to 6 months, and repeat behaviours that occurred for a period longer than six months. This upper bound category is consistent with the categorisations used in Langhout et al (2005).

2.4.4 Framework for estimating the impacts of workplace sexual harassment

Combining the findings from the literature concerning the three most important considerations in determining the impact of a case of workplace sexual harassment, Deloitte Access Economics in discussion with Treasury developed the framework in Figure 2.3.

Figure 2.3 Framework for estimating the impact of a case of workplace sexual harassment



[36] Hanson, G. C., Perrin, N. A., Moss H., Laharnar N., Glass, N. (2015). Workplace violence against homecare workers and its relationship with workers health outcomes: a cross-sectional study. *BMC Public Health.* 15:11.
[37] Hughes, K., Tadic, V. (2002) 'Something to Deal With': Customer Sexual Harassment and Women's Retail Service Work in Canada, *Gender, Work and Organisation* Vol.5 Issue 4
[38] Sharipova, M., Borg, V., & Hogh, A. (2008). Prevalence, seriousness and reporting of work-related violence in the Danish elderly care. *Scandinavian journal of caring sciences*, 22(4), 574-581.
[39] Schneider, K. T., Swan, S., & Fitzgerald, L. F. (1997). Job-related and psychological effects of sexual harassment in the workplace: empirical evidence from two organizations. *Journal of Applied Psychology*, 82(3), 401.
[40] Sojo, V. E., Wood, R. E., & Genat, A. E. (2016). Harmful workplace experiences and women's occupational well-being: A meta-analysis. *Psychology of Women Quarterly*, 40(1), 10-40.

The framework assesses the impact of a given case of workplace sexual harassment into four categories:

- Category 1 Minimal impact (the lowest category) – represented by dark green in the diagram – includes cases that involve once-off behaviours, of a low severity, perpetrated by a person who is not in a supervisory position to the victim, and are assigned the lowest level impacts.
- Category 2 Mild impact – represented by light green in the diagram – include a number of permutations of low-medium severity, perpetrated by either supervisors or non-supervisors, and either once-off or repeated behaviours.
- Category 3 Medium impact – represented by orange in the diagram – include permutations as per Category 2, however are at the higher impact spectrum for each determinant.
- Category 4 High impact (the highest category) is limited to high severity behaviours – actual or attempted rape or assault – regardless of the role of the perpetrator or the duration of the case.

This framework was used in the modelling to separately identify the economic impacts of workplace sexual harassment for each category of case, as well as to extract information from the MSPB survey and apply it to the Australian context. The results from the AHRC survey, including the overall prevalence of workplace sexual harassment and the distribution of cases into each impact category, are presented in Section 3.1. Following assessment of the distribution of cases into each impact category, the framework was agreed by Treasury to be appropriate for the project.

3 Methodology and data

This section outlines the methodology and data sources that were used for each of the cost elements included in the model. There are a range of costs from workplace sexual harassment that were estimated, given the available data from the AHRC survey and the findings from prior research. These include:

- **Productivity losses** due to increased absences from work ("absenteeism"), reduced productivity while at work ("presenteeism"), increased job turnover, and time out of employment while changing jobs.
- **Other costs**, such as visits to a mental health professional or a general practitioner (GP), the costs of an investigation by the AHRC or a jurisdictional anti-discrimination agency into a case of workplace sexual harassment, and costs to the justice system and police services for more serious cases. There are also associated deadweight losses from reduced tax (due to productivity losses), increased welfare payments (for unemployment while changing jobs), and government expenditure.
- **Lost wellbeing**, as measured through DALYs and monetised using the value of a statistical life year.

As discussed throughout Section 3, there are a range of costs of workplace sexual harassment that were not able to be included in the model, given the limitations in the available evidence and data. Table 3.1 summarises the costs that were included in the model, and the costs that were not able to be included in the model.

Table 3.1 Costs of workplace sexual harassment

Category	Included in model	Not included in model
Productivity losses		
Absenteeism by victims	✓	
Presenteeism by victims	✓	
Job turnover by victims, perpetrators and bystanders	✓	
Opportunity cost of manager time in handling complaints	✓	
Reduced workgroup productivity		✓
Moving to a lower paid job		✓
Moving to a less-well suited job (internally/externally)		✓
Choosing a less-well suited career		✓
Reduced collaboration and networking		✓
Physical and interpersonal withdrawal		✓
Effect of an ambient culture of harassment in the workplace		✓
Victim being demoted, labelled as a "trouble maker", denied a promotion, and other forms of retaliation		✓
Permanent reductions in number of hours worked		✓
Long-term (> 2 years) reductions in productivity		✓
Other costs		
Health system usage	✓	
AHRC/jurisdictional anti-discrimination agency investigations	✓	
Compensation for victims	✓	
Justice system costs	✓	
Newstart payments	✓	
Welfare payments other than Newstart		✓
Deadweight losses	✓	
Costs to business of engaging advisers (for example, legal counsel and human resourcing specialists) to respond to staff complaints or undertake internal investigations		✓
Reputational or brand risk to employer		✓
Lost wellbeing		
Lost wellbeing (DALYs) arising from sexual assault	✓	
Lost wellbeing (DALYs) arising from other forms of sexual harassment		✓
Loss of trust and ability to form relationships		✓

However, to ensure that a conservative, robust estimate of the costs of workplace sexual harassment is undertaken, the full range of costs in the model were not applied to each case of sexual harassment. For this project, the following costs have been mapped to each category of case. Note that the cost inputs were calculated separately for each impact category, rather than as an average across all cases.

- For **Category 1, 2 and 3,** most costs were included.

  - This included lost productivity, and other costs. As can be seen throughout this section, each cost element is higher (on a per person basis) for Category 3 compared to Category 2, and for Category 2 compared to Category 1.
  - The only cost not included was lost wellbeing, as no robust evidence exists to link Category 1, 2 or 3 cases to an increased risk of other medical conditions such as depression or anxiety. As such, while Category 2 and 3 cases are likely to reduce the wellbeing of victims, it was not possible to include these costs in the model.[41]
- **Category 4** included all costs.

The model was used to calculate how each cost was borne by individuals and/or sectors of society. For example, a victim of workplace sexual harassment may experience a decrease in income, or bear some out-of-pocket costs for healthcare. From the employer's perspective, depending on the impact of workplace sexual harassment, work loss or absenteeism will lead to costs such as higher wages (that is, accessing skilled replacement short-term labour) or alternatively lost production, idle assets and other non-wage costs. Employers might also face costs such as rehiring and retraining due to increased job turnover.

Australian governments typically bear costs associated with the health system and other services such as the AHRC and the various state-based equivalents, and the costs of operating the courts. The government will also receive less tax if productivity decreases, however as this is a transfer between individuals/companies and the government this is not a "real" cost. It does, however, impose a deadweight loss on society, as taxes need to be raised from another (less efficient) source. The analysis in this report shows the first round impacts on government and employers. No second round or longer term dynamic impacts are modelled (i.e. changes in wages or labour market outcomes).

In regard to the time aspects (see Section 2.3), most costs that were able to be included in the model did not extend beyond the year in which the harassment occurred. Analysis of the AHRC survey showed that the average duration of a case of workplace sexual harassment was:

- 22 weeks for Category 2.
- 63 weeks for Category 3.
- 38 weeks for Category 4.

A comparison of the durations from the MSPB survey is provided in Appendix A. In summary, the average length of case from the MSPB survey is lower compared to the AHRC results. The number of days off work and the length that productivity is reduced for could foreseeably be influenced by the duration of the case. However, this difference is likely due to the answer options that were provided in the survey, and is unlikely to have had a material effect on the modelling. This is discussed further in Appendix A.

The duration for Category 1 was assumed to be 0 weeks. The AHRC survey did not ask victims for the length of harassment when it was described as "once off". However, this assumption did not affect the outcome of the modelling, as the duration of the case was only necessary to identify whether costs carried over into the following year.

As such, all costs, with the exception of staff turnover costs (see Section 3.2.3), were assumed to be incurred in the same year as the harassment occurred. Further, as Category 2 and Category 4 cases lasted less than one year, all turnover costs were also assumed to occur in the same year. For Category 3 cases, turnover costs were assumed to occur in the following year, and did not extend to any more years beyond that. This

[41] It is necessary to establish a causal relationship between sexual harassment and reduced wellbeing. A correlation between these two variables is not sufficient, as correlation does not imply causation. Causal relationships are established using prospective or longitudinal studies, which track a group of people known to have been sexually harassed in the workplace to determine the odds ratio of developing a mental illness such as depression. Co-existence or cross sectional studies, while much more common, only examine the prevalence of mental illness in a population who has been sexually harassed in the workplace, after controlling for other factors such as age or gender. These types of studies do not establish that harassment caused the mental illness, since it is possible that having a mental illness may be a risk factor for reporting harassment, or there may be another factor 'x' predisposing a person to both sequelae.

It should be noted that the phrase "wellbeing" is used in many different ways in the academic literature. For this report, "wellbeing" refers to a quantifiable decrease in quality of life that is calculated using disability-adjusted life years.

assumption was made on the basis that a Category 3 case length of 63 weeks only extends a small way into the following year.

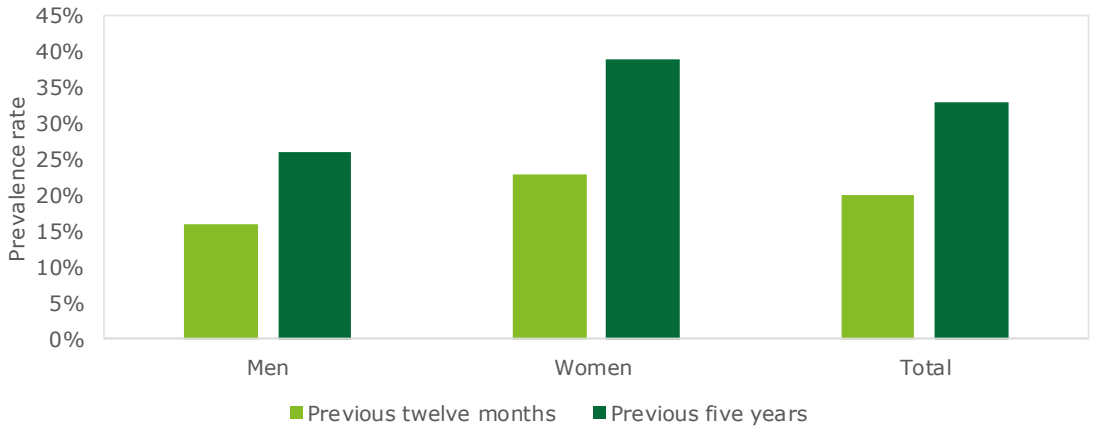
3.1 Prevalence of workplace sexual harassment

The AHRC survey recorded the five-year prevalence of workplace sexual harassment to be 33% over the period 2014-2018. Applied to the workforce in 2018, this means that approximately 4.4 million people have been sexually harassed while in the workforce in the past five years.

In total, 39% of women in the workforce, and 26% of men in the workforce have been sexually harassed in the workplace. As a victim, bystander or both, 51% of Australians (52% of women and 50% of men) in the workforce in the last five years were exposed to some form of workplace sexual harassment.

Over the past 12 months, 20% of survey respondents said that they had been sexually harassed in the workplace (23% of women, and 16% of men). In total, this means that approximately 2.6 million people have been sexually harassed in the workplace in the past 12 months. The 5-year and 12-month rates for men and women are shown in Chart 3.1.

Chart 3.1 Prevalence of workplace sexual harassment by gender



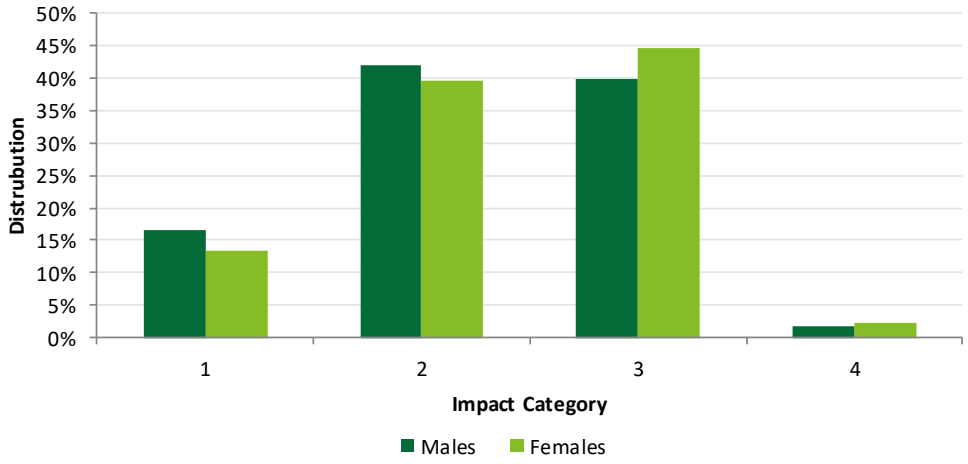
Source: Australian Human Rights Commission, 2018.

The majority of questions in the 2018 survey focused on people who had experienced workplace sexual harassment in the past 12 months. This group were used to generate most of the inputs for the model. The survey asked people in this group to identify the most recent behaviour experienced, and then answered subsequent questions based on this particular behaviour. This behaviour, along with the duration and identity of the perpetrator, were used to classify these people into the impact category. Among this group – after discarding a small proportion of incomplete responses – approximately:

- 15% of cases were in Category 1.
- 40% of cases were in Category 2.
- 43% of cases were in Category 3.
- 2% of cases were in Category 4.

The distribution in each category, by gender is provided in Chart 3.2, and shows that the distribution does not differ significantly between males and females, with the proportional representation of females in Category 3 and Category 4 being only slightly higher compared to males.

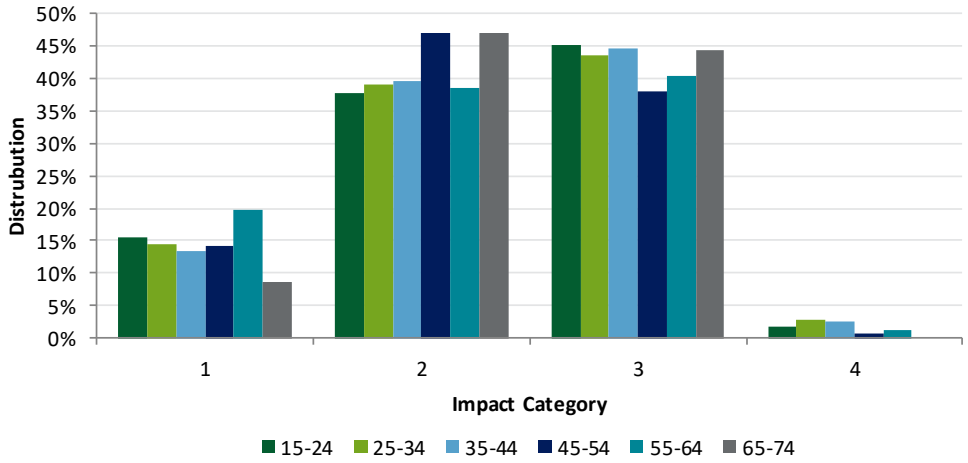
Chart 3.2 Distribution of the workforce in each impact category, by gender



Source: Deloitte Access Economics analysis of 2018 AHRC survey data.

By age, as shown in Chart 3.3, the distribution of each group in each category are similar, with the exception of the 65-74 year old group in Category 1 (less than other groups) and Category 2 (more than other groups), and the 45-54 age group in Category 2 (more than other groups) and Category 3 (less than other groups).

Chart 3.3 Distribution of the workforce in each impact category, by age



Source: Deloitte Access Economics analysis of 2018 AHRC survey data.

For perpetrators, the number of perpetrators per case that were included in the model is one.[42] However, the mean number of perpetrators is 2.1 for males experiencing workplace sexual harassment, and for females the mean number of perpetrators is 1.4. Among victims, 79% were sexually harassed by one or more male perpetrators, with this number higher for females (93%) compared to males (58%).

[42] The model conservatively assumed one perpetrator per case, as the AHRC survey did not capture outcomes for individual perpetrators, but rather captured outcomes for the "harasser/harassers". Thus, in cases with multiple perpetrators, it is not known whether the nominated outcomes applied to all, or only one of, the perpetrators.

In cases where there was a single perpetrator, the perpetrator was typically in the 41-50 years age group, with 54% aged 40 years and older. However, in cases with multiple perpetrators the typical age group was 31-40 years. Younger perpetrators (21-40 years) were more likely to have a male victim, while older perpetrators (51 years and over) were more likely to have a female victim.

3.1.1 Sub-group analysis

The model included sub-group analysis, by varying the prevalence rate for each group, the distribution of people in each impact category, and the average weekly earnings (AWE). The full list of these model inputs is provided in Appendix B.

In terms of the distribution of cases in each impact category, the greatest deviation from the population average was observed in the Administrative and Support Services industry, which had the greatest proportion of Category 2 cases. By employer size, employers of fewer than 20 employees had the greatest proportion of cases in Category 4 (7.0%), compared to the other employer sizes (between 1.7% and 1.8%). Among people with a disability, 58.4% were in Category 3 and 4, compared to 43.6% of people without a disability. In regard to sexual orientation, heterosexual males had the highest proportion of cases in Category 3 and 4 (53.3%), compared to non-heterosexual females who had the lowest proportion of cases in Category 3 and 4 (40.4%).[43]

There were no major differences by Socioeconomic Indexes for Areas (SEIFA) quintile, nor by sector (private/public), culturally and linguistically diverse (CALD) status, or employment relationship (full-time/part-time/casual).

3.1.2 Changes over time

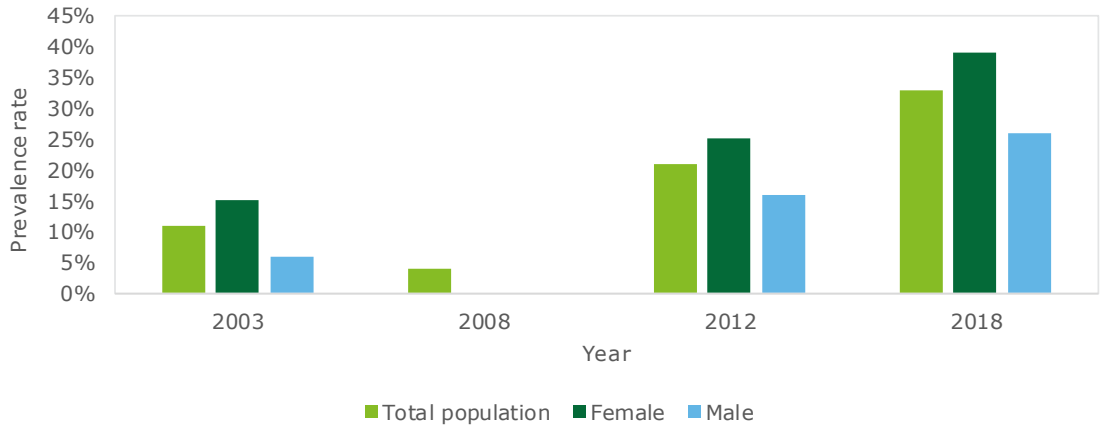
The results from the three previous AHRC survey, and the most recent survey, are shown in Chart 3.4. At face value, the prevalence rate of workplace sexual harassment dipped between 2003 and 2008, before increasing significantly in the subsequent survey (2012 and 2018). However, changes in the survey methodologies mean that these results should be interpreted with caution.

In the 2003 and 2008 surveys, respondents were asked directly whether they had experienced sexual harassment. If they answered in the affirmative, they were then provided with a list of behaviours to identify which behaviours they had experienced. In the 2018 survey, respondents were asked whether they had experienced sexual harassment in the workplace, and were also given a list of behaviours that constituted workplace sexual harassment and asked to identify whether they had been harassed using this list of behaviours. The gap between the legal and behaviour definitions is large. For example, in the 2018 survey, 43% of respondents said they had been sexually harassed when asked the question directly, but this number increased to 71% when presented with a list of behaviours that constituted sexual harassment.

In addition, the 2018 included four additional behaviours – relating to stalking, sexually explicit comments on social media, indecent phone calls, and sharing or threating to share intimate images, which may have increased the prevalence rate. As noted by the AHRC, increased awareness impacting positively on reporting rates of sexual harassment by victims could also be driving up prevalence. Between 2012 and 2018, there was a significant increase in the media coverage and online discussion of sexual harassment, and evidence from the survey indicated that awareness and understanding of sexual harassment improved between 2012 and 2018.

[43] The sexual orientations other than heterosexual in the AHRC survey included gay/lesbian, bisexual, other, and "prefer not to say". These were included in the model as "non-heterosexual".

Chart 3.4 Prevalence of workplace sexual harassment in the previous four AHRC reports



Source: Australian Human Rights Commission, 2018.

3.2 Productivity costs

For this study, the effect of workplace sexual harassment on productivity taken account of in the model included:

- Short-term absences from work, including sick leave, annual leave, and unpaid leave ("absenteeism").
- Reduced productivity while at work ("presenteeism").
- Increased staff turnover, for victims, perpetrators and bystanders. This includes individuals who resign, as well as individuals who have their employment terminated.
- Manager time when a workplace sexual harassment complaint is made.

A number of economic methodologies were used to estimate the productivity impacts. The short-term absences (absenteeism) are shared by the worker and the employer (if paid), or entirely by the worker (if unpaid), based on a friction methodology. This reflects the short-run disruption to production, until output is restored to former levels. The employer has to pay for on-costs (on the value of the remaining leave paid), and an overtime premium for a replacement worker to make up for the lost production.

The longer-term impacts – reduced productivity while at work, and increased staff turnover – are mostly borne by individuals, using a human capital approach that captures the lost employee income. Employers incur some search, hiring and training costs to replace lost staff. The model also captures the opportunity cost of manager time for responding to complaints made by victims. This cost is borne by employers.

The productivity loss is monetised with reference to the income of the employee involved in the case, noting that this could be a victim, perpetrator or bystander. As such, a key input to the productivity calculations was AWE wage data from a variety of sources. The methodology for calculating the AWE for each group in the model, and the model inputs, are presented in Section 3.5.

While employees and employers bear some of the costs of lost productivity, the government also bears some of the cost through reduced income tax (from employees), and reduced company tax (from employers). As lost productivity represents lost income (to individuals) or lost profit (to employers), this translates into less tax being paid to government.

A key input to the productivity cost calculations was the MSPB's 1995 survey on sexual harassment in the US Federal Government (see Section 1). This survey provided several inputs to the model's calculations which were not available from the AHRC's survey. These included the number of hours of leave (paid and unpaid) taken by victims of workplace sexual harassment, the reduction in productivity (presenteeism) experienced by victims, and the duration of the presenteeism.

Deloitte Access Economics obtained the raw data from this survey, and used this dataset to extract the necessary information. The MSPB survey provided sufficient information to assign each victim into an impact category (see Section 2.4). Thus, the information extracted from the dataset allowed for the productivity loss inputs to be mapped to the impact categories used in the model, and to be aligned with the outputs from the AHRC survey.

It is noted that the MSPB's survey is of Federal Government employees in the US, and thus may not reflect the experience of the Australian government workforce or the Australian private sector. For example, Federal Government employees are likely to have higher levels of education, more job security and/or more options for changing workplaces, and better internal protocols for taking action against workplace sexual harassment. These may influence individual responses to sexual harassment, such as the impact it has on productivity, or an individual's capacity to find a new job before resigning from their current one. The results of the MSPB survey are also from approximately 20 years ago, and may not reflect current attitudes or responses towards sexual harassment in the workplace. However, despite these limitations, this survey remains the only source of these inputs to the model. Future surveys from the AHRC could seek to capture these data that are specific to the Australian context.

3.2.1 Short-term absences from work

Absenteeism is measured by estimating the number of workdays that have been missed throughout the year due to workplace sexual harassment, and estimates production losses for the time required to restore production to levels before the absenteeism occurs. Employers often choose to make up lost production through overtime or employment of another employee that attracts a premium on the ordinary wage. The overtime premium represents lost employer profits, but also indicates how much an employer is willing to pay to maintain the same level of production. Thus, if overtime employment is not used, the overtime premium also represents lost employer profits due to lost production. For this study it was assumed that the overtime rate is 40%, based on data from Safe Work Australia (2015).[44]

The MSPB survey asked respondents who had been sexually harassed to nominate ranges of time for the length of absenteeism (no leave, 8 hours or less, 9 to 16 hours, 17 to 40 hours, 41 to 80 hours, or more than 80 hours) and the type of leave (sick, annual, and unpaid). A weighted average for each category and type of leave was estimated by picking the midpoint of each range, with 85 hours conservatively used for the highest range.

The results of this analysis are shown in Table 3.2. The total amount of leave taken by each impact category was higher in the high impact categories, compared to the low impact categories. Category 4, representing the most severe harassment cases, had a significantly increased average amount of leave taken, more than three times the amount taken by Category 3. Compared to Category 2, the leave taken by people in Category 3 was almost fourteen times higher. The results for Category 2 (0.78 hours) and Category 1 (0.71 hours) were similar.

Table 3.2 Hours of leave, for each impact category

	Category 1	Category 2	Category 3	Category 4
Sick	0.21	0.48	4.47	17.50
Annual	0.15	0.26	4.96	12.01
Unpaid	0.35	0.04	1.26	6.52
Total	**0.71**	**0.78**	**10.69**	**36.03**

Source: Deloitte Access Economics analysis of MSPB 1995 survey data. This includes leave for victims only.

[44] Safe Work Australia (2015) The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community 2012–13, Canberra.

Niedhammer et al (2012)[45] used results from the 4th European Working Conditions Survey to estimate the number of days of sickness absence taken by employees who were subject to a range of psychosocial work factors. After adjusting for a range of factors, an employee who had been sexually harassed was found to take an additional 0.79 days of sick leave (for men) or 0.91 days (for women). These are higher than the weighted average results from the MSPB, which show 0.33 days of sick leave (across all categories) taken by victims due to being sexually harassed.[46] The results from the two surveys are consistent, as it is likely that the European survey was limited to higher impact cases of workplace sexual harassment, and thus the days of sick leave taken by victims are also likely to be higher. The European survey used by Niedhammer reported the 12-month incidence of workplace sexual harassment to be 2%, while the 24-month incidence of workplace sexual harassment in the MSPB survey was 44% (for women) and 19% (for men).

Niedhammer et al (2012) also compared the number of days of sickness absence from workplace sexual harassment with a range of other psychosocial work factors. For men, workplace sexual harassment resulted in the fewest days of sickness absence (0.79) compared to the sickness absence from other factors which included low decision latitude, high psychological demands, low social support, physical violence, bullying, long working hours, night work, shift work, job insecurity, low job promotion prospects, and work-life imbalance. For women, the only psychosocial work factors with fewer days of sickness absence were discrimination, and long working hours.

3.2.1.1 Distributional analysis

The results in Table 3.2 show the mean hours of leave for each impact category. However, as shown in Table 3.3, the median hours of leave taken for Categories 1-3 is zero.[47] The median hours of leave for Category 4 is 8 hours. These results indicate that for most employees, they will not take any leave due to being sexually harassed in the workplace. However, a small proportion of employees will take a large number of hours of leave, which brings the mean score above the median score.

[45] Niedhammer, I., Chastang, J. F., Sultan-Taïeb, H., Vermeylen, G., & Parent-Thirion, A. (2012). Psychosocial work factors and sickness absence in 31 countries in Europe. *The European Journal of Public Health*, *23*(4), 622-629.
[46] Converted from hours of leave by dividing by 7.5 hours in a standard working day.
[47] The median score (the 50th percentile) refers to the middle score in a distribution. The 25th and 75th percentiles comprise the interquartile range, which shows lower and upper ranges for the middle 50% of scores.

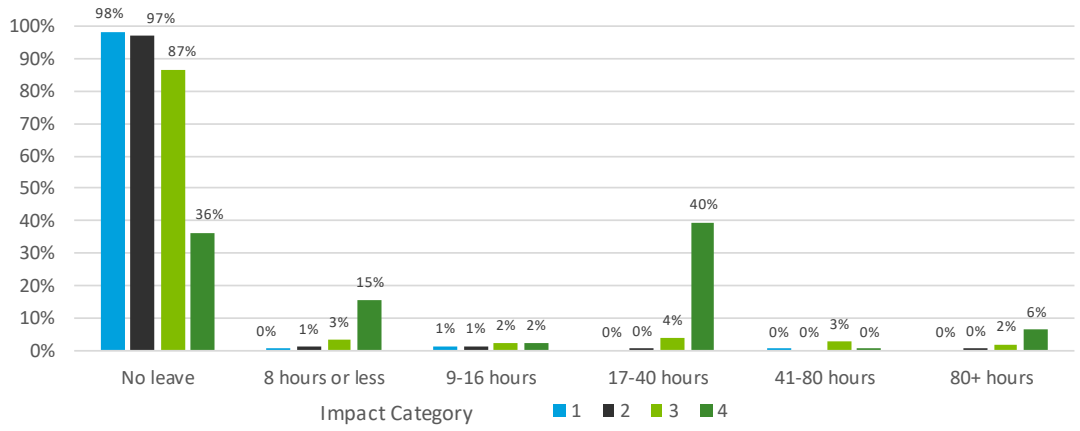
Table 3.3 Interquartile ranges for hours of leave, for each impact category

	Sick	Annual	Unpaid	Total
Category 1				
25th	0.00	0.00	0.00	0.00
50th	0.00	0.00	0.00	0.00
75th	0.00	0.00	0.00	0.00
Category 2				
25th	0.00	0.00	0.00	0.00
50th	0.00	0.00	0.00	0.00
75th	0.00	0.00	0.00	0.00
Category 3				
25th	0.00	0.00	0.00	0.00
50th	0.00	0.00	0.00	0.00
75th	0.00	0.00	0.00	0.00
Category 4				
25th	0.00	0.00	0.00	0.00
50th	4.00	4.00	0.00	8.00
75th	28.50	12.50	0.00	41.00

Source: Deloitte Access Economics analysis of MSPB 1995 survey data. This includes leave for victims only.

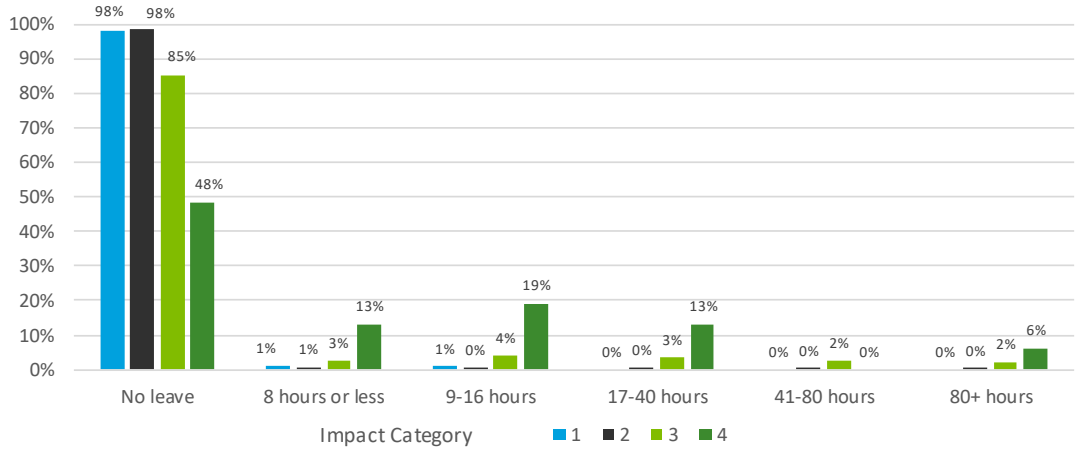
The following charts present histograms of the distribution of leave hours, for each of the impact categories. As can be seen in the charts, across all leave types, the most common response to sexual harassment was to take no leave (with the exception of Category 4 sick leave). However, while most people take no leave, the victims taking more than zero hours of leave result in the mean leave hours being greater than zero. Category 4 victims were more likely than victims in the other categories to take leave.

Chart 3.5 Histogram of hours of sick leave, for each impact category



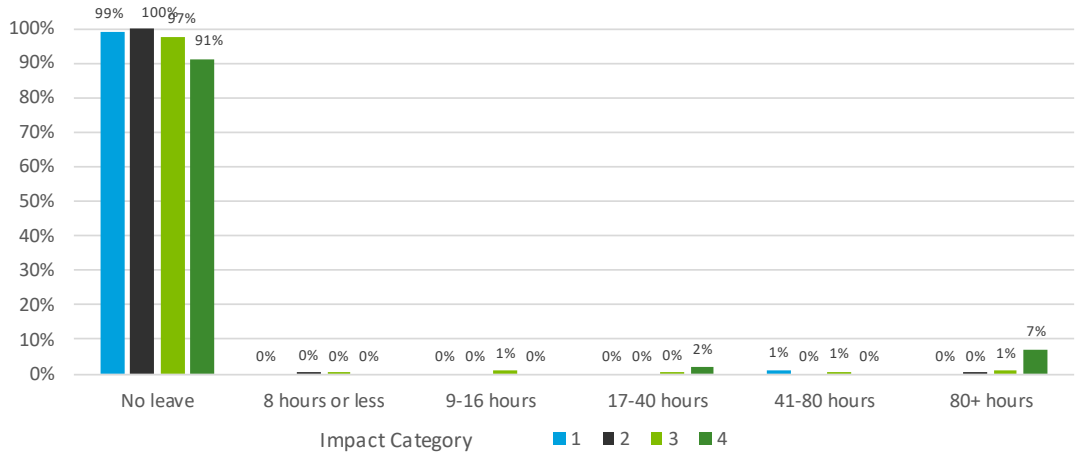
Source: Deloitte Access Economics of MSPB survey data.

Chart 3.6 Histogram of hours of annual leave, for each impact category



Source: Deloitte Access Economics of MSPB survey data.

Chart 3.7 Histogram of hours of unpaid leave, for each impact category



Source: Deloitte Access Economics of MSPB survey data.

3.2.2 Reduced productivity while at work

Presenteeism refers to the reduced productivity of an employee while at work, due to the negative effects of workplace sexual harassment on them. They may also spend time on making an official complaint about the harassment, which is time that is lost from their usual labour. As with the absenteeism costs, the presenteeism costs also used the raw survey data from the MSPB's 1995 survey, which asked respondents to indicate whether their productivity was 'not reduced', 'slightly reduced' (10% or less), 'noticeably reduced' (11-25%), 'markedly reduced' (26-50%), 'dramatically reduced' (50%), or 'don't know/can't judge'. Respondents were also asked how long this reduction persisted for – less than 1 week, 1 week to 1 month, 1 to 3 months, 4 to 6 months, and more than 6 months.

A weighted average of these results was calculated:

- For the percentage reduction, the mid-point of each range was used, with 55% used for the highest category.
- For the length of time that productivity was reduced for, months were converted to weeks. The mid-point of each range was used, with 40.5 weeks used for the highest category.

The results of this analysis are shown in Table 3.4. The reduction in productivity and the duration of the reduction followed a similar trend observed in respondents' average leave taken. Respondents from Category 4 had significantly greater impacts with a productivity reduction (12.97%) over two times that of Category 3 (5.55%) which persisted for three times the amount of time. The reduction for Category 1 and 2 were similar, and the length of reduction for Category 3 was longer than for Category 1 and 2.

Table 3.4 Productivity reduction due to workplace sexual harassment, for each impact category

	Category 1	Category 2	Category 3	Category 4
Reduction in productivity (%)	1.90	1.61	5.55	12.97
Length of reduction (weeks)	0.66	0.78	4.40	12.88

Source: Deloitte Access Economics analysis of MSPB 1995 survey data. This includes the productivity reduction for victims only.

Other than the MSPB studies, no literature was identified that has estimated the presenteeism impact of workplace sexual harassment. A 2012 study for Safe Work Australia[48] found that the annual productivity loss per worker through sickness absence and presenteeism was nearly double for the least psychologically healthy ($15,505), compared to the healthiest ($8,334). However, the report did not separately identify the components of absenteeism and presenteeism in their estimate.

A limited number of studies have explored the link between presenteeism and workplace bullying. For example, Conway et al (2016)[49] identified a positive correlation between workplace bullying and having more than eight days of reduced productivity while at work, however the study did not estimate a proportional reduction in productivity. Similarly, Janssens et al (2016)[50] calculated an increased odds ratio (1.32) of productivity loss for people experiencing high levels of workplace bullying. Hutton et al (2008)[51] reported that among nursing staff there was a 9.5% presenteeism impact for staff subject to "workplace incivility", which they defined as "low-intensity, deviant behaviour with ambiguous intent to harm the target, in violation of workplace norms for mutual respect" (p. 168). Fattori et al (2015)[52] estimated the marginal productivity loss (combined absenteeism and presenteeism) for bullied workers with a chronic medical condition, which ranged from 13.9% to 17.4%.

It is important to note the limitations of using employee-assessed estimates of presenteeism. For example, Gardner et al (2016)[53] has identified that employee estimates of presenteeism are weakly correlated with employer estimates of presenteeism, noting that this study was conducted on a relatively small sample (58 employees). However, as noted by Gardner, this comparison can only be undertaken in organisations with a

[48] Dollard, M & Bailey, T (Eds.). 2012, *The Australian Workplace Barometer: Psychosocial safety climate and working conditions in Australia*. Sydney: Australian Academic Press.
[49] Conway, P. M., Clausen, T., Hansen, Å. M., & Hogh, A. (2016). Workplace bullying and sickness presenteeism: cross-sectional and prospective associations in a 2-year follow-up study. *International archives of occupational and environmental health*, *89*(1), 103-114.
[50] Janssens, H., Clays, E., De Clercq, B., De Bacquer, D., Casini, A., Kittel, F., & Braeckman, L. (2016). Association between psychosocial characteristics of work and presenteeism: a cross-sectional study. *International journal of occupational medicine and environmental health*, *29*(2), 331-344.
[51] Hutton, S., & Gates, D. (2008). Workplace incivility and productivity losses among direct care staff. *AAOHN journal*, *56*(4), 168-175.
[52] Fattori, A., Neri, L., Aguglia, E., Bellomo, A., Bisogno, A., Camerino, D., ... & Di Sciascio, G. (2015). Estimating the impact of workplace bullying: humanistic and economic burden among workers with chronic medical conditions. *BioMed research international*, *2015*.
[53]Gardner, B. T., Dale, A. M., Buckner-Petty, S., Van Dillen, L., Amick III, B. C., & Evanoff, B. (2016). Comparison of employer productivity metrics to lost productivity estimated by commonly used questionnaires. *Journal of occupational and environmental medicine/American College of Occupational and Environmental Medicine*, 58(2), 170.

clearly defined measure of output, and so presenteeism in knowledge-based jobs needs to be estimated using employee self-assessment.

While it was not possible to include in the model given the available evidence, an ambient culture of workplace sexual harassment impacts on an organisation's overall productivity. Raver and Gelfand (2005) regressed a range of work team performance metrics against a range of ambient workplace sexual harassment behaviours such as sexual hostility and unwanted sexual attention.[54] A range of negative impacts were observed on team relationship conflict, team task conflict, team cohesion, team citizenship behaviours, and team financial performance.

Birinxhikai and Guggisberg (2017) have identified that people observing hostility towards female co-workers (both incivility and sexually harassing behaviour) were more likely to experience lower psychological wellbeing at work, possibly due to empathy and worry for the victim, concern about the lack of fairness in their workplace, or fear of becoming the next target. Lower psychological wellbeing is an established factor in reduced productivity.[55]

3.2.2.1 Distributional analysis

The results in Table 3.4 show the mean productivity reduction and length of productivity reduction for each of the impact categories. As shown in Table 3.5, the median productivity reduction for all categories are lower than the mean reduction. This indicates that the majority of victims have a reduction in productivity that is less than the mean, and a minority of victims have a relatively large reduction in productivity that is increasing the mean score. The median length of reduction for Categories 1-3 are zero weeks, which indicates that most people did not experience a reduction in productivity. For victims in Category 4, the median length of reduction was 1-3 months (9 weeks).

Table 3.5 Interquartile ranges for productivity reduction, for each impact category

	Reduction in productivity (%)	Length of reduction (weeks)
Category 1		
25th	0.00	0.00
50th	0.00	0.00
75th	0.00	0.00
Category 2		
25th	0.00	0.00
50th	0.00	0.00
75th	0.00	0.00
Category 3		
25th	0.00	0.00
50th	0.00	0.00
75th	5.00	0.50
Category 4		
25th	0.00	0.00
50th	5.00	9.00
75th	18.00	40.50

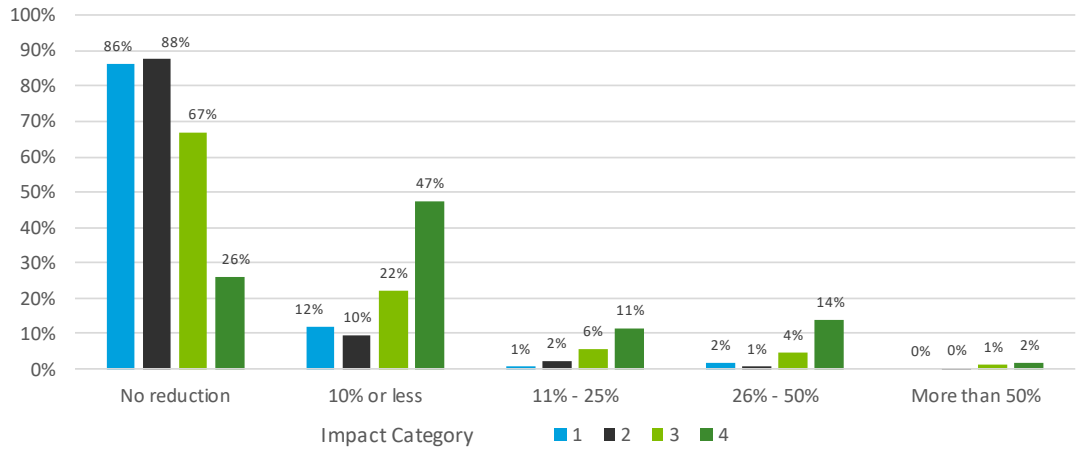
Source: Deloitte Access Economics analysis of MSPB 1995 survey data. This includes the productivity reduction for victims only.

[54] Raver, J. L., & Gelfand, M. J. (2005). Beyond the individual victim: Linking sexual harassment, team processes, and team performance. Academy of Management Journal, 48(3), 387-400.

[55] Birinxhikaj, M., Guggisberg, M. (2017). The wide ranging impact of sexual harassment in the workplace: An Australian pilot study. *International Journal of Employment Studies* Vol.25 Issue 1

The following charts present histograms of the distribution of the productivity reduction, and the distribution of the length of reduction. As can be seen, for Categories 1-3 most victims reported no reduction in productivity, with the most common response for Category 4 victims being a <10% reduction in productivity. However, there were still a significant number of respondents in Categories 1-3 that reported a <10% reduction in productivity.

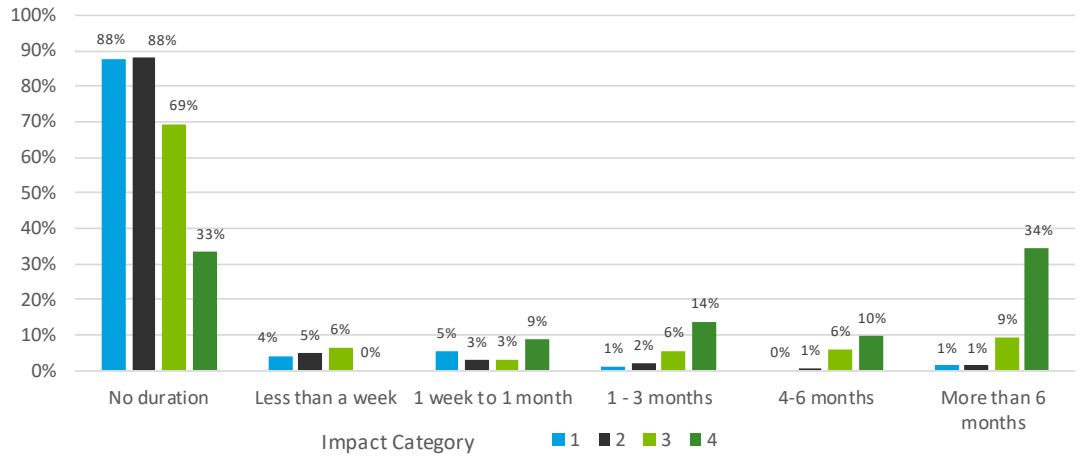
Chart 3.8 Histogram of productivity reduction, for each impact category



Source: Deloitte Access Economics of MSPB survey data.

In regard to the length of the productivity reduction, Category 4 victims were more likely to report that the reduction persisted for greater than 6 months. However, approximately the same proportion of victims reported their duration to be zero.

Chart 3.9 Histogram of length of productivity reduction, for each impact category



Source: Deloitte Access Economics of MSPB survey data.

3.2.3 Increased staff turnover

Workplace sexual harassment results in staff changing/leaving jobs more frequently than they otherwise would. For example, Terpstra (1986) surveyed female workers on their likely reaction if they were sexually

harassed in the workplace.[56] The percentage of women who would quit their job varied depending on the nature of the harassment, ranging from 14% for a sexual proposition with a job threat, through to 0% for less severe behaviours such as remarks, gestures, and sexual propositions with no threat or reward attached.

This imposes a cost on employers – who need to incur rehiring and retraining costs earlier than they otherwise would – and can also reduce income for individuals through time off between jobs. Some individuals may also leave their job before organising another job, or in some cases may have their employment terminated. In these situations, individuals may experience a period of unemployment, which reduces their income, and also requires government to pay unemployment benefits.

Results from the AHRC survey were used to identify cases which resulted in employees changing jobs due to workplace sexual harassment. This includes the victim, the perpetrator, and bystanders to the harassment.[57] Across all victims, 17% made a formal report or complaint, and the AHRC survey captured the outcomes for these employees. Of the 17%:

- 17% of victims resigned, and 8% had their employment terminated.
- 11% of perpetrators resigned, and 5% had their employment terminated.

In 38% of cases, a bystander took action to prevent or reduce the harm of the harassment that they had witnessed. Of this group, 6% resigned, and 4% had their employment terminated. The results for each impact category are shown in Table 3.6.

Table 3.6 Employee resignations and termination of employment, for each impact category

	Category 1	Category 2	Category 3	Category 4
Victim				
Resigned employment (%)	0.35	2.06	5.00	10.53
Employment was terminated (%)	0.35	0.77	1.34	2.63
Perpetrator				
Resigned employment (%)	0.35	1.93	2.32	10.53
Employment was terminated (%)	1.15	1.15	1.15	1.15
Bystander				
Resigned employment (%)	0.71	1.03	2.32	13.16
Employment was terminated (%)	0.35	1.29	1.10	10.53

Source: Deloitte Access Economics analysis of AHRC 2018 survey data.

On a weighted average basis, 3.2% of victims of workplace sexual harassment resigned their employment, and 1.0% had their employment terminated. Due to the way the AHRC survey questions were phrased, these may be conservative estimates of the rate of employee turnover. The AHRC survey only asked questions regarding resignation and termination to employees who had lodged a formal report or complaint, noting that the "formal report or complaint" could include complaining about the behaviour to a colleague. Thus, employees who had resigned or had their employment terminated without making a formal report or complaint were not captured in these questions. Anecdotally, some employees will leave an organisation after having been sexually harassed, without making a formal report or complaint.

However, compared to the results from the MSPB survey, the AHRC results appear to be similar as the comparable questions from the MSPB survey were broader in nature and so would have captured more respondents. In the MSPB survey:

[56] Terpstra, D. E., & Baker, D. D. (1986). A framework for the study of sexual harassment. *Basic and Applied Social Psychology*, 7(1), 17-34.
[57] Perpetrators and bystanders were mapped to the impact category as per the victim of the case.

- 4.5% of victims "transferred or quit", noting that this category also includes internal transfers which is broader than the AHRC category for "resigned employment". This compares to 3.2% from the AHRC survey.
- 1.6% of victims were "reassigned or fired", noting that this category also includes internal re-assignments which is broader than the AHRC category for "employment was terminated". This compares to 1.0% from the AHRC survey.

It is important to note that staff turnover approximately every 6.5 years, according to the most recent data from the Household, Income and Labour Dynamics Australia (HILDA) survey. [58] Thus, each employee who resigns or who has their employment terminated as a result of workplace sexual harassment "brings forward" the staff turnover costs that would have occurred even in the absence of the harassment. Thus, the model assumes that each employee who resigns or who has their employment terminated brings forward the turnover costs by 3.25 years. This assumes each employee is halfway along the 6.5 year period of employment at their organisation.

In addition to the data in Table 3.6, the following assumptions were used to estimate the costs from increased staff turnover:

- Costs to the organisation of hiring and training new staff were conservatively assumed to be 26 weeks of time at standard weekly wage rates, consistent with Deloitte Access Economics standard approach to conservatively estimating these costs.[59] This input represents an average cost, and would likely be shorter for less complex jobs, and higher for more complex jobs.
- For individuals who resigned their employment, the results of the MSPB's 1995 survey showed that 99% had already organised another job. This percentage was assumed to be the same for perpetrators.[60] For these individuals, they were assumed to lose income for four weeks.
- For the 1% of individuals who did not have alternative employment organised prior to their resignation, and the individuals who had their employment terminated, they were assumed to become unemployed and receive NewStart benefits[61] for the average period of unemployment (51 weeks) published in the Australian Bureau of Statistics' (ABS') *Labour Force Survey.* It was assumed that all employees who have their employment terminated had not arranged alternative employment. Results from the Labour Force survey identified that 8.5% of people who had been retrenched ended up receiving unemployment benefits, and so this proportion was used to calculate the number of employees who received unemployment benefits. Unemployment benefits are discussed further in Section 3.3.5.
- For turnover costs relating to perpetrators leaving the organisation, a weighted average of female and male perpetrator AWE was separately calculated for female victims and for male victims, based on the distribution of the gender of the perpetrators for each victim gender. This reflects, for example, that perpetrators are more likely to be male, however female victims are more likely than male victims to have a male perpetrator (see Section 3.1.1).[62]

While the model captures impacts such as employees resigning or having their employment terminated, there are many other turnover-related negative outcomes that were not able to be included in the model. For example, the AHRC survey recorded that among victims who lodged a formal report or complained:

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[58] Wilkins, R., Lass, I. (2018) *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 16*. Melbourne Institute: Applied Economic & Social Research, University of Melbourne.
[59] Further discussion is provided in Access Economics 2004, *Costs of workplace injury to the Australian economy: reviewing the estimation methodology and estimates of the level and distribution of costs*, Report for the National Occupational Health and Safety Commission. This report presented a summary of Australian evidence which provided a range of approximately 26-52 weeks of the incumbent employee's salary. The 26 weeks assumption is used in Safe Work Australia's most recent estimate of the cost of work-related injury and illness in Australia (https://www.safeworkaustralia.gov.au/system/files/documents/1702/cost-of-work-related-injury-and-disease-2012-13.docx.pdf).
[60] Information specific to perpetrators was not available. Alternative sources of information for victims, that could be used to triangulate the MSPB data, were not identified.
[61] Other impacts on welfare payments – for example, increased reliance on Family Tax Benefits, etc – cannot be estimated using the available data
[62] The model calculated turnover costs for perpetrators based on an assumption of one perpetrator per victim. In reality, there may be multiple perpetrators for a single victim, or alternatively multiple victims for a single perpetrator. It was not possible to vary this assumption in the model, given the available information.

- 19% were labelled a trouble-maker;
- 18% were ostracised, victimised, and/or ignored by colleagues;
- 16% had their shifts changed;
- 11% were denied workplace opportunities, such as training or promotion;
- 11% were disciplined;
- 7% were transferred; and
- 6% were demoted.

McLaughlin et al (2017) has identified that victims of sexual harassment who resign their jobs may take up lower paying jobs or jobs to which they are less well-suited.[63] Changing jobs often has a negative impact on long-term financial outcomes, particularly when this instability occurs early in a person's career. This may be a result of a loss of firm- or industry-specific human capital, and in some cases harassment targets may have trouble obtaining references from managers and co-workers.

Even where a person does not leave their job, there may be negative consequences for their career. For example, they may reduce hours or change roles within their organisation in order to avoid the perpetrator.[64] Women who experienced sexual harassment report adjusting their work habits and withdrawing physically or interpersonally from their departments, colleagues, and fields. Some also cease contact with collaborators and mentors, avoid non-required interactions with peers, and stop attending scientific and professional gatherings, all of which have negative long-term impacts on their careers. Some victims may also face retaliation within their job.[65]

Cortina & Magley (2003) reported that victims who spoke up about mistreatment and subsequently experienced retaliation reported the highest levels of job dissatisfaction, job stress, and organisational withdrawal, which could translate to lower productivity. However, victims who spoke up and did not experience retaliation reported better job-related outcomes than victims who remained silent.[66]

Finally, workplace sexual harassment, or the prospect of harassment, may influence which jobs people take in the first place. For example, medical students who were exposed to gender discrimination and sexual harassment during their undergraduate studies have reported that this influenced their choice of residency program and speciality choice.[67]

3.2.4 Manager time

The AHRC survey identified that 10% of cases of workplace sexual harassment resulted in a formal report or complaint being made to a direct manager or supervisor. These complaints reduce the productivity of the individual[68] – see Section 3.2.2 – and also impose an opportunity cost on the manager/supervisor from handling the complaint. For each impact category, the proportion of cases in each category that resulted in a complaint being made to a manager/supervisor are shown in Table 3.7. Category 2 and Category 3 both reported approximately 10% of cases lead to a complaint being made, compared to half this rate (5.3%) in Category 1, and double this rate (21.1%) in Category 4.

Table 3.7 Proportion of cases resulting in complaints to manager/supervisor, for each impact category

	Category 1	Category 2	Category 3	Category 4
Proportion of cases (%)	5.3%	9.9%	10.4%	21.1%

[63] McLaughlin, H., Uggen, C., & Blackstone, A. (2017). The Economic and Career Effects of Sexual Harassment on Working Women. *Gender & Society*, 31(3), 333–358.
[64] Ibid.
[65] Lindquist, C., & McKay, T. (2018). *Sexual harassment experiences and consequences for women faculty in science, engineering, and medicine*. Research Triangle Park, NC: RTI Press.
[66] Lilia M. Cortina, Vicki J. Magley. Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace Journal of Occupational Health Psychology 2003, Vol. 8, No. 4, 247–265
[67] Stratton, T. D., McLaughlin, M. A., Witte, F. M., Fosson, S. E., & Nora, L. M. (2005). Does students' exposure to gender discrimination and sexual harassment in medical school affect specialty choice and residency program selection?. *Academic Medicine*, 80(4), 400-408.
[68] Opportunity costs for victims were captured in the estimated impact on presenteeism. Costs beyond this – for example, a victim spending leisure time preparing a complaint – were not able to be captured with the available data.

Source: Deloitte Access Economics analysis of AHRC 2018 survey data.

While no literature has been identified that has estimated the time taken for managers/supervisors to address complaints of workplace sexual harassment, Sheehan et al (2001) estimated the opportunity cost in Australia for a case of workplace bullying to be $1,440 in 2001 dollars.[69] This was used as a proxy for workplace sexual harassment, and updated to approximately $2,500 in 2018 using historical wage price index data. This opportunity cost of manager time is borne by the employer. Associated costs for bystanders and co-workers – for example, if a manager sought input from other team members who may have observed the harassment – was not included as no information on these time costs were identified.

There are other costs to business from responding to staff complaints, such as the costs of hiring external advisers – for example legal counsel, or human resources specialists. There may also be additional complexities for national businesses due to jurisdictional differences in legal frameworks, such as the responsibilities of state and Federal anti-discrimination agencies, and workers compensation legislation. These costs were not included in the model due to limitations in the available evidence. However, anecdotal evidence from employer groups suggests that these costs may be a significant burden on business. Note that these costs are not productivity costs, but are classified as "other costs" – see Section 3.3.

3.3 Other costs

There are a number of other costs from workplace sexual harassment that were included in the model:

- Health system usage by victims of workplace sexual harassment.
- Investigations by the AHRC and state-based commissions into workplace sexual harassment.
- Compensation for victims of workplace sexual harassment.
- Justice system costs (for example, legal representation costs, court costs, and police costs).
- The deadweight losses associated with government expenditure, lost taxation revenue, and increased welfare payments.

Many of these costs, such as spending on healthcare, or legal fees, could be considered as increasing economic activity. However, spending on these services represents a sub-optimal use of money, and in the absence of workplace sexual harassment this money would have been spent on other goods and services.

3.3.1 Health system costs

Workplace sexual harassment can be detrimental to the physical and mental health of people who have been harassed. There are a variety of health system costs that can be attributed to workplace sexual harassment. The model included:

- Costs of GPs.
- Costs of other specialists (e.g. psychologists).
- Medications prescribed to victims due to their experience of harassment.
- Costs of allied health professionals such as counsellors.

The AHRC survey asks respondents to identify where they sought help from, including a counsellor or psychologist. Additionally, some respondents identified that they sought help from a doctor, GP or nurse. These options were not presented to respondents, but some respondents included a GP in 'other'. As such, the reported proportion of people visiting a GP is likely to be underestimated.

Table 3.8 shows the proportion of cases that resulted in a visit to a GP, and to a counsellor or psychologist. Consistent with the approach used for the rate of employment termination for perpetrators, the rate of GP visits was applied equally across all categories and is likely to underestimate the rate of GP visits.

[69] Sheehan, M. et al. (2001). A model for assessing the impacts and costs of workplace bullying. Standing Conference on Organisational Symbolism, Trinity College, Dublin, vol. 30.

Table 3.8 Health system utilisation for each case of workplace sexual harassment, for each impact category

	Category 1	Category 2	Category 3	Category 4
Visit to GP (%)	0.73%	0.73%	0.73%	0.73%
Visit to counsellor or psychologist (%)	1.06%	1.42%	5.12%	21.05%

Source: Deloitte Access Economics analysis of AHRC 2018 survey data.

The results from the AHRC survey were combined with results from the Bettering the Evaluation and Care of Health (BEACH) dataset,[70] which records visits to GPs where the primary issue was related to mental health concerns. The BEACH dataset (1998-2016) was a survey of GPs in Australia that records characteristics of approximately 100,000 consultations each year.

For each mental health-related visit, the 2015-16 BEACH dataset records subsequent referrals and medications that were dispensed. The most recent data show that 9.3% of visits resulted in a referral to a psychologist, and 2.7% to psychiatrists. The model assumed that each person followed through on the referral, and had three visits to the referred practitioner.

For visits to a "counsellor/psychologist", as recorded in the AHRC survey, the number of visits to psychologists (from the BEACH data) were subtracted from this amount, which provided the number of visits to counsellors. An average cost per visit to a counsellor was estimated to be $185, based on the mid-range of average costs[71], and there were assumed to be three visits.

Healthcare costs were borne by individuals, the Commonwealth Government, and employers. Average Commonwealth Government rebates were sourced from item-specific rebates the Medicare Benefits Schedule, while patient out-of-pocket payments were estimated using Medicare Benefits Schedule Broad Type of Service data. Employer costs were limited to counsellors, as it was assumed these would be provided through an Employee Assistance Program, which are typically funded through employers.

The BEACH dataset also records the most commonly prescribed medications for mental health related visits. These were antidepressants (27.8% of visits), anxiolytics (9.8%), hypnotics and sedatives (9.1%), and anti-psychotics (6.6%). For these medications, the most common molecule (by number of scripts over 2017-18) was used as a proxy to represent the class of medication: escitalopram for anti-depressants, diazepam for anxiolytics, and mirtazapine for hypnotics and sedatives. Anti-psychotics were not included as it was considered unlikely that these would be prescribed for treating mental health conditions associated with workplace sexual harassment. Average patient out-of-pocket costs and Commonwealth Government contributions were sourced from Chemist Warehouse Online[72].

Other health system costs, such as hospitalisation costs for inpatients, were not included in the model for Categories 1, 2 and 3, as they were considered to be very small for victims in these categories. For Category 4 – sexual assault – there may be some costs arising from injuries sustained during the assault. The results of the ABS' *Personal Safety Survey* show that the most common type of injury experienced by a sexual assault victim are for scratches, bruises and cuts. However, results from the *Personal Safety Survey* for the rates of more serious types of injuries – broken bones, being stabbed/shot, and miscarriages – have relative standard errors over 50%, which means they are unreliable.

Given this, results from the Australian Institute of Criminology[73] were used to estimate health costs for Category 4 victims. The results from the AIC analysis identified that the 28% of sexual assaults resulted in

[70] Australian Institute of Health and Welfare. 2018, *Mental health services in* Australia, available from https://www.aihw.gov.au/getmedia/86df866c-05c5-4d44-92c8-d35c3a36f18f/Mental-health-related-service-provided-by-general-practitioners-2015-16.xlsx.aspx
[71] Ranging from $40-$330 per session. (http://eap.org.au/eap-costs/)
[72] www.chemistwarehouse.com.au
[73] Smith R, Jorna P, Sweeney J, Fuller G. 2017, *Counting the costs of crime in Australia: 2011 estimate*, Australian Institute of Criminology. Available at https://aic.gov.au/publications/rpp/rpp129.

injury, and that the average medical costs for an injury were $950. Inflated to 2018 dollars using historical health price data, the weighted average cost for each Category 4 case was $300.

3.3.2 Investigations costs

For some victims of workplace sexual harassment, they may lodge a complaint with the AHRC or a jurisdictional anti-discrimination commission. To calculate these costs, the AHRC and all of the jurisdictional anti-discrimination commissions provided Deloitte Access Economics with confidential administrative data which recorded:

- the number of complaints which were accepted by the commissions, and the proportion which related to workplace sexual harassment; and
- the salary expense for staff who handled complaints for the commissions.

This information was used to calculate an average cost per complaint across all types of complaints, which was then multiplied by the number of complaints which were specific to workplace sexual harassment. It is important to note that the investigation costs that are incurred are a conservative estimate, as they do not include additional overheads for staff such as IT costs and legal counsel, and anecdotal evidence suggests that a workplace sexual harassment case is more resource intensive than the average complaint that is handled by the commissions.

For modelling purposes, the cost of addressing a complaint was borne by the Commonwealth Government (for the AHRC) or state governments (for the state-based commissions). In 2018, this was estimated to be approximately $800,000.

The costs of investigations to other organisation such as the Fair Work Commission, or a union, were not included due to limitations in the available data.

3.3.3 Compensation for victims of workplace sexual harassment

For some cases of workplace sexual harassment, compensation may be awarded to the victim. Compensation may be paid for a variety of reasons, including for damages, pain and suffering, legal costs, to compensate for lost earnings, employment termination/redundancy, or to pay out leave entitlements. These are typically paid by the employer, however in some cases the perpetrator may be liable.

The AHRC survey identified that 17% of victims made a formal report or complaint of their experience. This could be internally (e.g. to a manager/supervisor, or to Human Resources), or externally (e.g. to the police, a union, or the AHRC). Of these victims who lodged a complaint, 5% were paid compensation by either their employer or the perpetrator. However, the survey did not record the amount of this compensation.

Charlesworth et al (2012) [74] published information on the amount of compensation[75] paid to victims of workplace sexual harassment, based on an analysis of AHRC records lodged over July-December 2009. This study identified that 35% of all complaints lodged with the AHRC resulted in compensation being paid to the victim. Per case, this was estimated to be $14,610 in 2009 figures, which was updated to be approximately $18,000 in 2018 using historical consumer price index data. While it is likely that the compensation paid for a Category 4 case would be larger than compensation paid for a Category 2 case, the information that was available meant that it was not possible to separately identify compensation per case for each category.

While compensation was included in the model to identify which parties bear the costs (employers and individuals), the compensation itself is a transfer between two different economic agents, and therefore not a net cost. There are also costs to businesses of holding insurance to cover the costs of discrimination claims (including workplace sexual harassment cases). The premium amount is affected by the number of claims, so these costs will be higher for employers who are required to make a claim.

3.3.4 Justice system costs

There are many ways by which a victim may progress a workplace sexual harassment complaint. Some cases of workplace sexual harassment will proceed into the justice system, with associated costs for legal

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

[75] This includes compensation paid as part of a workers compensation claim.

representation and court costs, police costs, and incarceration costs for higher impact offences such as sexual assault.

The various legal bodies, such as tribunals and different types of courts, differ in each jurisdiction. In some jurisdictions, a workplace sexual harassment case must first proceed through a tribunal before a court will hear the case. The AHRC's survey provides information on the proportion of complaints that were finalised through the courts, and/or with police involvement. As the proportion of cases which include a case that is heard by other legal bodies (such as tribunals) was not known, these costs were not included in the model.

The AHRC survey results for the proportion of cases which proceed to court are shown in Table 3.9. The survey provided unexpected results, with no Category 2 cases proceeding to court, and a greater proportion of Category 1 cases (0.35%) proceeding to court than Category 3 cases (0.24%). However, as expected the proportion of Category 4 cases proceeding to court (5.26%) was much higher than for the other categories.

Table 3.9 Justice system utilisation, for each impact category

	Category 1	Category 2	Category 3	Category 4
% of cases which proceed to court	0.35%	0.00%	0.24%	5.26%

Source: Deloitte Access Economics analysis of AHRC 2018 survey data.

The Productivity Commission's *Report on Government Services* (ROGS) was the primary source for estimating justice system costs associated with workplace sexual harassment. The average costs to government of a court case were estimated to be $6,620 in 2017[76], based on total spending on court cases from ROGS, and data from the ABS *Recorded Crime* series which provides information on the number of cases which proceed to court.

The costs to victims of legal representation were delineated for courts which handle civil and criminal cases:

- The Productivity Commission's *Inquiry into Access to Justice Arrangements*[77] identified the average legal fees for a plaintiff in the Supreme Court to be $59,340, in 2012-13 dollars (approximately $65,000 in 2018). These were assumed to apply for cases in Categories 1-3, as these are civil cases and thus heard in the Supreme Court.
- The Law Institute of Victoria[78] estimated plaintiff legal fees in the County Court to be $11,290 in 2009 (approximately $14,000 in 2018), based on the cost of a 5-day trial. These fees were applied to Category 4 cases, as these are criminal cases and thus heard in the Country Court.[79]

In each case, there would also be legal representation costs for defendants, although neither of the aforementioned studies reported on legal representation costs for defendants, and no other robust estimates of these costs were identified. Consequently, legal costs for defendants were not included in the model.

Police costs for investigations were calculated using the total expenditure on policing, with the amount of police resourcing spent on investigations (19.4%) applied to the total spending.[80] Information on the proportion of sexual assault cases and the total number of sexual assault cases (from the ABS' *Recorded Crime* series) were used to estimate the average cost of a police investigation, which was $2,203. The average cost of a police investigation into sexual assault was applied to Category 4 only, reflective of the severity of the category.

Incarceration costs were limited to Category 4 cases, as it was considered unlikely that any cases in Category 2 and Category 3 would result in incarceration of the perpetrator. For sexual assault cases, the

[76] This was updated to 2018 using historical consumer price index data. These include all costs to government of operating the courts, including judges, facilities, other staff, etc.
[77] Productivity Commission. (2014). *Access to Justice Arrangements Vol. 1*, p.119, Australian Government, Canberra.
[78] Community Law Australia. (2012). *Unaffordable and out of reach: the problem of access to the Australian legal system*. http://www.communitylawaustralia.org.au/wp-content/uploads/2012/07/CLA_Report_Final.pdf
[79] The County Court in Victoria is similar to district courts in other jurisdictions.
[80] NSW Police Force. (2012). *Annual report 2011-12*. NSW Government, Sydney.

Australian Institute of Criminology[81] has estimated that 38% of cases which proceed to court result in a guilty verdict against the perpetrator.[82] The average incarceration costs for a sexual assault perpetrator were estimated to be $103,295 per year, based on information from the Productivity Commission's *Report on Government Services*, which is assumed to be borne by state governments. Costs to the perpetrator – for example, forgone income while incarcerated – were not included in the model.

3.3.5 Deadweight losses

Societal inefficiencies, known as **deadweight losses**, increase when taxes are raised above the level that they would otherwise have been in the absence of workplace sexual harassment. Thus, the inclusion of deadweight losses in this analysis implicitly assumes that governments maintain a budget neutral position despite the decreased tax revenue and increased government spending due to workplace sexual harassment, for example to pay for additional health services resulting from workplace sexual harassment. This requires that governments increase taxes above what they would have been in the absence of workplace sexual harassment to:

- maintain the same amount of tax revenue despite a smaller pool of taxable income from individuals and taxable profits from businesses (see Section 3.2); and
- pay for additional government spending in areas such as health care, AHRC investigations, and the justice system as a result of workplace sexual harassment (see Sections 3.3.1, 3.3.2 and 3.3.4).

Increasing taxes above what they would otherwise have been reduces the efficiency of resource allocation within that market because it changes the relative price of those goods or services being taxed. For example, an increase in income tax rates will increase the relative price of work compared to leisure and therefore create a disincentive to work at the margin. Similarly, businesses may be discouraged from operating in Australia if company tax rates were too high.

To estimate the deadweight loss due to lost taxation revenue, taxes were assumed to be maintained by taxing individuals and companies more as necessary (to replace the lost tax, and to raise funds to cover the additional spending). Each tax in the economy imposes various burdens on the efficiency of society. Analysis by Cao et al (2015) reports the marginal burden of various Commonwealth Government taxes. These are:

- income tax: $0.26 for every $1 raised;
- company tax: $0.51 for every $1 raised;
- goods and services tax: $0.19 for every $1 raised; and
- state taxes impose a range of marginal burdens from taxes on gambling, insurance, motor vehicles, and payroll, and stamp duties (KPMG, 2010).

The analysis assumes that additional tax revenue to maintain a budget neutral position is raised in the same proportions from the sources of tax from which it is currently being raised. Thus, weighted by the source of tax revenue:

- Reduced income for individuals results in a 24% efficiency loss.
- Reduced income for employers results in a 51% efficiency loss.
- Welfare payments, health and other Commonwealth Government expenditure results in a 30% efficiency loss.
- State government expenditure results in a 60% efficiency loss.

The methods for calculating lost tax revenue, and the costs of most of the areas of government expenditure, have been discussed previously in Section 3. The final component that was necessary to calculate deadweight losses was the value of welfare payments paid due to unemployment from workplace sexual harassment.

For calculating the welfare benefits paid due to unemployment, results from the MSPB and the AHRC surveys were used. For victims who resigned, the MSPB survey identified that 1% of people did not have alternative employment organised prior to resigning, while the remaining 99% who resigned had arranged alternative

[81] Lievore, D. (2005). *Prosecutorial decisions in adult sexual assault cases*. Canberra, Australia: Australian Institute of Criminology.
[82] While there are many sentencing options for sexual assault offenders, incarceration is overwhelmingly the most common sentence. Costing of every sentencing option was beyond the scope of analysis for this report.

employment. The same proportion was assumed to apply for perpetrators and bystanders. Using the AHRC survey results (see Section 3.2.3), people whose employment was terminated, and the 1% of people who resigned and did not have alternative employment arranged were assumed to undergo a period of unemployment that was consistent with the national average of 51 weeks, as recorded in the ABS' *Labour Force Survey*. For modelling purposes, these people were assumed to receive Newstart payments of $550.20 per fortnight.[83]

3.4 Lost wellbeing

For victims of workplace sexual harassment in Category 4, the impact of sexual assault on the lost wellbeing of victims can be captured using DALYs. These are an approach developed by the World Health Organization (WHO), World Bank and Harvard University. DALYs are comprised of two components – the years of life lost due to premature death and the years of healthy life lost due to morbidity. Disability weights are assigned to various health states, where zero represents a year of perfect health and one represents death. Other health states are given a weight between zero and one to reflect the quality of life that is lost due to a particular condition. For example, a disability weight of 0.2 is interpreted as a 20% loss in the quality of life relative to perfect health for the duration of the condition.

The DALY approach has been adopted globally and in Australia by the Australian Institute of Health and Welfare. The approach is used to overcome some of the issues in relation to comparability between individuals and nations. DALYs represent a non-financial approach to valuing human life, and DALYs are enumerated in years of life.

The dollar value of DALYs can be estimated by multiplying DALYs attributable to workplace sexual harassment by the value of a statistical life year, using official inputs recommended by the Department of the Prime Minister and Cabinet.[84] The value of statistical life year is an estimate of the value society places on an anonymous year of life. Estimates of the value of a statistical life can be derived from observing the choices people make in situations where they rank or trade off various states of wellbeing (loss or gain) either against each other, or for dollar amounts. An example of this is an individual's willingness to pay for an intervention that enhances health. Another example could be an individual's willingness to accept worse health outcomes or the risk of such states. The value provided by the Department of the Prime Minister and Cabinet is an estimate of the net value of a statistical life year, which subtracts financial costs borne by individuals.

The dollar value of DALYs does not represent an economic cost *per se*, since wellbeing is not included in gross domestic product, but rather it represents a monetised estimate of the wellbeing impact experienced by victims of workplace sexual harassment.

The estimate of lost wellbeing from workplace sexual harassment was limited to high impact cases of sexual harassment – actual or attempted rape or assault – regardless of the role of the perpetrator or the duration of the harassment. Consistent with the approach Deloitte Access Economics used for estimating the value of services provided for the Gippsland Centre Against Sexual Assault (GCASA)[85], proxy inputs for anxiety were used to represent the disability weight for sexual assault. This approach has been confirmed with clinicians to broadly capture the experience of people following a sexual assault. Anxiety is widely referenced in the literature as a common response to a traumatic experience such as sexual assault. The disability weights for anxiety are specified by the WHO's Global Burden of Disease publications (Salomon et al, 2012):

- Mild anxiety disorder: 0.030
- Moderate anxiety disorder: 0.149
- Severe anxiety disorder:0.523

Using the distribution of severity from the GCASA analysis, across all victims of sexual assault the weighted average disability weight was calculated to be 0.102. This was assumed to apply for a period of three months.

[83] This rate applies to singles with no children. No further details were available in the AHRC survey on whether victims had children or had a partner, which are other factors in calculating their NewStart payment.
[84] Available at https://www.pmc.gov.au/sites/default/files/publications/Value_of_Statistical_Life_guidance_note.pdf.
[85] Available at https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-gippsland-centre-against-sexual-assault-services-analysis-211116.pdf.

Consistent with the approach used in the GCASA analysis, mortality from suicide linked to sexual assault has been conservatively excluded from the calculations.[86]

While workplace sexual harassment increases the risk of related conditions for less severe cases of harassment, the links are less strong - with paucity of robust data. For example, several studies[87] have identified an increased risk of depression for victims of workplace sexual harassment. However, these studies have not been conducted longitudinally, and as such it is difficult to robustly estimate the increased risk of depression or anxiety for lower impact categories of workplace sexual harassment.[88] To ensure a defensible and conservative estimate, the estimate of lost wellbeing was limited to actual or attempted sexual assault cases.

3.5 Sub-group analysis

The model calculated the cost of workplace sexual harassment for different sub-groups. These included:

- Gender (male/female) and age (10-year age groups from 15 to 74 years old).
- Industry classified to the Australian and New Zealand Standard Industrial Classification divisions.
- Sector: public/private
- Employer size:1-4 employees, 5-19 employees, 19-200 employees, and 200+ employees
- Employment relationship: full-time, part-time, and casual
- CALD employees: yes and no
- Aboriginal and Torres Strait Islander employees: yes and no.
- Disability status: has a disability, does not have a disability.
- Sexual orientation: orientation other than straight/heterosexual (male and female), straight/heterosexual (male and female).
- Socioeconomic Index for Areas: quintiles 1 (most socioeconomically disadvantaged) through to 5 (most socioeconomically advantaged).

The model inputs that were varied for each sub-group were the prevalence, distribution in each impact category, and AWE. The methods for calculating each of these for each sub-group, and the model inputs, are specified in Appendix B.

3.5.1 Prevalence by group

For all groups with the exception of sector (public/private), the prevalence and severity of sexual harassment within each sub group was estimated using the AHRC survey data and the impacts framework developed in Section 2.4. For example, women experience both higher rates and slightly greater impact categories of harassment than men. As the AHRC survey does not report results by public/private sector, the population has been apportioned using ABS Labour Force data, with the same impact classifications applied to both sectors.

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[86] There may be a small number of deaths where the perpetrator of sexual assault kills the victim. These were not included on the basis that no victims of sexual assault in the AHRC survey had died.

[87] For example:
Friborg, M. K., Hansen, J. V., Aldrich, P. T., Folker, A. P., Kjær, S., Nielsen, M. B. D., ... & Madsen, I. E. (2017). Workplace sexual harassment and depressive symptoms: a cross-sectional multilevel analysis comparing harassment from clients or customers to harassment from other employees amongst 7603 Danish employees from 1041 organizations. *BMC public health*, 17(1), 675.
Langhout, R. D., Bergman, M. E., Cortina, L. M., Fitzgerald, L. F., Drasgow, F., & Williams, J. H. (2005). Sexual Harassment Severity: Assessing Situational and Personal Determinants and Outcomes 1. *Journal of Applied Social Psychology*, 35(5), 975-1007.
Willness, C. R., Steel, P., & Lee, K. (2007). A meta-analysis of the antecedents and consequences of workplace sexual harassment. *Personnel psychology*, 60(1), 127-162.

[88] Cross-sectional studies (while more common) do not actually establish a cause and effect relationship between workplace sexual harassment and mental health conditions. Longitudinal studies track a group of people know to have been harassed, to determine the odds ratio (i.e. change in risk) of developing a mental health condition. These types of studies are preferred to establish causal pathways.

3.5.2 Costs by group

In the model, only productivity costs are able to be varied by group. While in reality, there may be differences in other costs (for example, if different groups report harassment at different rates or use the health system at different rates), the number of respondents in the survey were too low to vary these other costs by group.

AWE estimates were based on ABS data (6302.0 – Average Weekly Earnings, Australia) for May 2018, providing a mid-year estimate for 2018. Where the required data were not available from this series, data from 6306.0 Employee Earnings and Hours, Australia (May 2016), the 2016 Census, and 6310.0 Employee Earnings, Benefits and Trade Union Membership, Australia (June 2013), and estimates from academic literature, have been used. A description of each of these sources and the methodology used to estimate AWE for each group is at Appendix B, which also contains detailed AWE estimates used for each group.

3.5.3 Impacts on vulnerable workers

The prevalence, nature and impact of workplace sexual harassment is generally more severe for vulnerable workers. While the model included prevalence rates for casual workers and workers from a CALD background, this group may be harder to survey and thus may be underrepresented in the AHRC survey results. The experience of vulnerable workers is discussed below, and it is expected that capturing these effects would increase the costs of sexual harassment.

A study of working Australians by Lamontagne (2009) found that workers who had precarious work[89] or were self-employed were between three and five times more likely to be the victim of unwanted sexual advances at work. The study also found that workers on a limited tenure were more at risk, no matter their position within the organisation. People in this group are much less likely to report workplace sexual harassment for fear of losing their jobs.[90]

Foreign or migrant workers, and workers in private households or other unregulated environments, are more vulnerable to sexual harassment. Welsh et al. (2006) discuss this phenomenon in a Canadian context, finding that migrant domestic workers in Canada have limited escape or recourse when facing sexual harassment as they are live-in workers and rely on the sponsorship of their employer to remain in the country. This also demonstrates the difficulty of dealing with sexual harassment for domestic workers, where there is no formal mechanism for their complaints.[91]

[89] Precarious work is defined in the Lamontagne study as "work arrangements characterised by instability, lack of protections, insecurity and social and economic vulnerability."
[90] LaMontagne, A. D., Smith, P. M., Louie, A. M., Quinlan, M., Shoveller, J., & Ostry, A. S. (2009). Unwanted sexual advances at work: Variations by employment arrangement in a sample of working Australians. *Australian and New Zealand journal of public health*, 33(2), 173-179.
[91] Welsh, S., Carr, J., MacQuarrie, B., & Huntley, A. (2006). "I'm Not Thinking of It as Sexual Harassment" Understanding Harassment across Race and Citizenship. *Gender & Society*, 20(1), 87-107.

4 Results

This section presents the results from the modelling, which includes:

- The cost of workplace sexual harassment in 2018
- The future cost of workplace sexual harassment that occurs in 2018
- The cost of workplace sexual harassment for each of the sub-groups.

The section also discusses the limitations in the data and evidence that were used, and how this impacts on the results.

4.1 The economic costs of workplace sexual harassment

Table 4.1 shows the costs of workplace sexual harassment in 2018, and also the future costs of workplace sexual harassment that occur in 2018 which were able to be captured in the model. As noted in Section 3, most costs from workplace sexual harassment that were included in the model do not extend beyond the year in which they occur. As such, the majority of costs in 2018 relate to workplace sexual harassment that has occurred in 2018. Similarly, most of the future cost of workplace sexual harassment that occurs in 2018 does not extend to 2019.

The headline results from the model, shown in Table 4.1 and Table 4.2, are calculated as the aggregate cost of each age and gender group that were calculated in the model. Costs for each sub-group are presented in Section 4.2.

Table 4.1 Costs of workplace sexual harassment

Component	Cost in 2018 ($m)	Cost per person in 2018 ($)	Future cost ($m)	Future cost per person ($)
Productivity	**2,622.2**	**1,053**	**2,630.6**	**1,053**
Absenteeism	741.8	297	741.8	297
Presenteeism	426.4	171	426.4	171
Staff turnover	830.6	336	838.9	336
Manager time	623.4	250	623.4	250
Other costs	**936.5**	**375**	**936.7**	**375**
GPs, psychologists, psychiatrists, counsellors	48.0	19	48.0	19
Injuries	15.4	6	15.4	6
Medication	0.0	0	0.0	0
AHRC/jurisdictional investigations	0.8	0	0.8	0
Individual legal fees	290.4	116	290.4	116
Government justice system costs	158.4	63	158.4	63
Deadweight losses	423.5	170	423.7	170

Source: Deloitte Access Economics analysis. Totals may not add due to rounding.

Table 4.2 Costs of workplace sexual harassment in 2018, by impact category

Category	Productivity costs ($m)	Other costs ($m)	Productivity costs per person ($)	Other costs per person ($)
Category 1	144.8	120.0	393	325
Category 2	690.0	99.7	683	99
Category 3	1,520.0	411.1	1,422	384
Category 4	267.4	305.7	5,345	6,110
Total	**2,622.2**	**936.5**	**1,053**	**375**

Source: Deloitte Access Economics analysis. Lost wellbeing is reported separately as the costs could only be attributed to Category 4 victims.

In 2018, workplace sexual harassment is estimated to impose $2.62 billion in lost productivity, which represents the loss of gross domestic product imposed by workplace sexual harassment. This figure increases slightly ($2.63 billion) on a future costs basis, reflecting natural increases in the workforce between 2017 and 2018 due to factors such as population growth. However, the per person costs remain constant.

Category 3 represented the largest share of total productivity costs ($1.52 billion). On a per person basis, each case of workplace sexual harassment reduces the size of the economy by $1,053, ranging from $393 in Category 1 through to $5,345 in Category 4.

The largest component of lost productivity are the costs of staff turnover – victims, perpetrators and bystanders who have their employment terminated or resign – which represent $830.6 million in lost productivity, or $336 per victim. On average, in almost 50% of Category 4 cases somebody associated with the case will leave the organisation, which reduces individual income and imposes costs on the organisation to find, hire and train a replacement worker.

The next largest costs are from short-term absences from work ("absenteeism", $741.8 million), which range from less than one hour for a Category 1 case, through to 36 hours for a Category 4 case. The opportunity cost of manager time to respond to complaints is $623.4 million. While few employees lodge a complaint (5% for Category 1, through to over 20% for Category 4), the estimated opportunity cost of each complaint is over $2,000. Reduced productivity while at work ("presenteeism") imposes costs of $426.4 million, due to reductions in productivity which range from 2% for 3 days for Category 1, through to almost 13% for 13 weeks in Category 4.

The other costs ($936.5 million, or $375 per victim) were primarily driven by the deadweight losses, which represent the lost societal inefficiencies that arise from increased government spending on welfare payments, reduced tax revenue from individuals and companies, spending on the justice system, and healthcare expenditure. The largest DWL arises through government replacing the lost company taxes.

The health costs due to workplace sexual harassment were relatively small compared to the productivity losses, at only $25 per person. This is likely due to the phrasing of questions in the AHRC survey, which did not directly ask victims whether they had visited a GP, with respondents having to proactively identify whether they had visited the GP. There was also a low rate of victims seeking help from a counsellor/psychologist, with only 1% of Category 1 and Category 2 victims seeking assistance from this source, which rose to 5% for Category 3 and 21% for Category 4. On a per person basis, costs were highest in Category 4 due to the increased use of counsellor/psychologist services, and the costs of injuries from sexual assault.

The final cost component – lost wellbeing – was limited to Category 4 cases only. In total, this imposed costs of $249.6 million, or $4,989 per victim in this category.

Table 4.3 shows how the economic cost of workplace sexual harassment is shared by different groups. The largest productivity-related costs were imposed on employers ($1,840.1 million), which is driven by turnover costs, as well as friction costs associated with short-term absences from work, and manager time spent responding to complaints. Government loses $611.6 million in taxes through reduced individual and company taxes.

The largest sources of other costs are the deadweight losses ($423.5 million), which are incurred by society. The other major source of costs in this category are costs to government for courts, jails and police; and legal fees for individuals.

Table 4.3 Economic costs of workplace sexual harassment in 2018, by payer

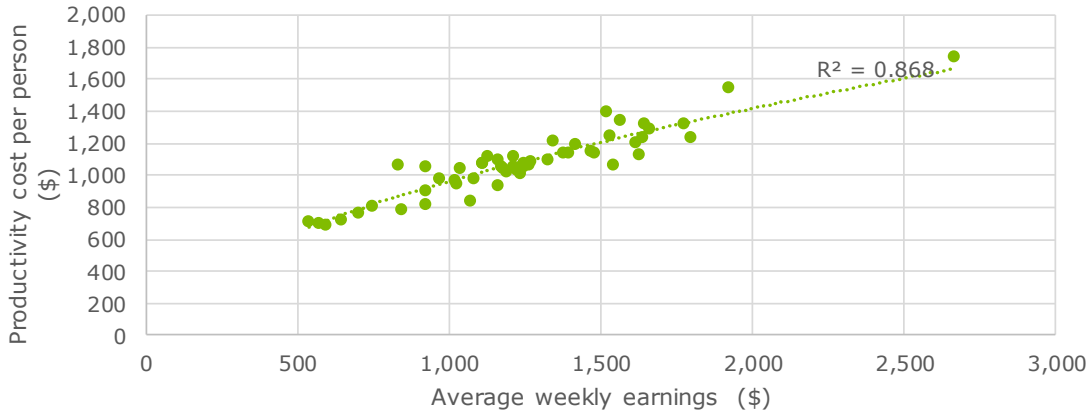
	Individuals ($m)	Employers ($m)	Government ($m)	Society ($m)	Total ($m)
Productivity	170.5	1,840.1	611.6	-	**2,622.2**
Other costs	103.5	134.3	275.3	423.5	**936.5**
Lost wellbeing*	249.6	-	-	-	**249.6**

Source: Deloitte Access Economics analysis. Note: * lost wellbeing was limited to Category 4 cases only as outlined in Chapter 3.

4.2 Sub-group analysis

The following tables present the costs of workplace sexual harassment in 2018, for each of the groups identified in Section 3.5. As discussed in Section 3, a primary driver of the productivity losses is the AWE of each sub-group. As most of the sub-groups are similar in their distribution of victims in each impact category (see Section 3.1.1), differences in AWE between the groups explain most of the differences in the per person productivity losses. This is shown in Chart 4.1, which maps the productivity losses per person and AWE for each of the sub-groups. As shown, there is a very strong positive correlation between these two variables (R^2 = 87%)[92].

Chart 4.1 Productivity losses per person compared to average weekly earnings per person



Source: Deloitte Access Economics analysis.

As shown in Table 4.4, in the age-gender sub-group the highest per person productivity losses are in the males aged 35-44 years category, however this is predominantly driven by the high AWE in this group, as the prevalence of workplace sexual harassment in this group is lower than the population average. In total terms, the highest loss of productivity is in the females aged 25-34 years age group, driven by the high rates of workplace sexual harassment in this group. This group represents the highest productivity loss despite the AWE in this group being lower than the national average.

[92] R^2 denotes the proportion of variation in the dependent variable (in this case, productivity cost per person) that can be predicted by the independent variable (in this case, AWE). An R^2 of 1 denotes perfect correlation, while an R^2 of 0 denotes no correlation.

Comparing males and females, females accounted for $1,468.4 million in lost productivity (56% of the total), despite the female share of prevalence being 60% of the prevalent population, due to the lower earnings in the female population.

In comparing results for other subgroups, it is important to note that variations in AWE are calculated on a population basis as reported by the ABS (not the survey population).[93] For this reason, to the extent that the survey population differs from the total population there may be discrepancies in total numbers when comparing different groups. To ensure consistency between estimates, the share of costs borne by each group is applied to the results in Table 4.1.

Table 4.4 Cost of workplace sexual harassment in 2018, by age and gender

	Productivity cost ($m)	Productivity cost per person ($)	Other costs ($m)	Other costs per person($)
Male				
15-24 years	110.9	768	49.6	344
25-34 years	377.6	1,194	131.7	416
35-44 years	262.2	1,321	79.3	399
45-54 years	193.8	1,241	50.1	321
55-64 years	165.7	1,128	48.7	332
65-74 years	43.7	1,031	10.6	249
Male total	**1,153.8**	**1,148**	**370.0**	**368**
Female				
15-24 years	171.1	703	78.1	321
25-34 years	547.2	1,074	224.2	440
35-44 years	337.1	1,122	133.6	444
45-54 years	222.3	943	64.2	273
55-64 years	150.8	982	55.0	359
65-74 years	39.9	794	11.3	225
Female total	**1,468.4**	**983**	**566.5**	**379**
Overall total	**2,622.2**	**1,053**	**936.5**	**375**

Source: Deloitte Access Economics analysis. Totals may not add due to rounding.

The costs in each industry are compared in Table 4.5. The largest contributor to lost productivity is the Health Care and Social Assistance industry, which is driven by the high prevalence in this sector, as the cost per person in this sector is slightly below the population average. This may be due to wages in the sector which are also slightly below average. On a per person basis, the highest productivity loss is in the Mining industry ($1,749 per person), driven by the high wages in this sector.

[93] Consistent with standard surveying methodologies, the AHRC survey results were weighted to be consistent with the age, gender and geographical distribution of the Australia population. However, the survey results were not weighted to be consistent with other sub-group variables, for example industry or SEIFA group. The implication of this is that calculating a weighted average AWE using the SEIFA-specific AWE from the ABS and the proportions of people in each SEIFA group from the AHRC survey, would give a different result to the population level AWE that is published by the ABS. This means that summing the productivity losses for each SEIFA quintile would give a different result to the headline results in Table 4.1. Thus, the share of costs borne by each group were applied to the headline results, to ensure that the components added up to the total.

Table 4.5 Cost of workplace sexual harassment in 2018, by industry

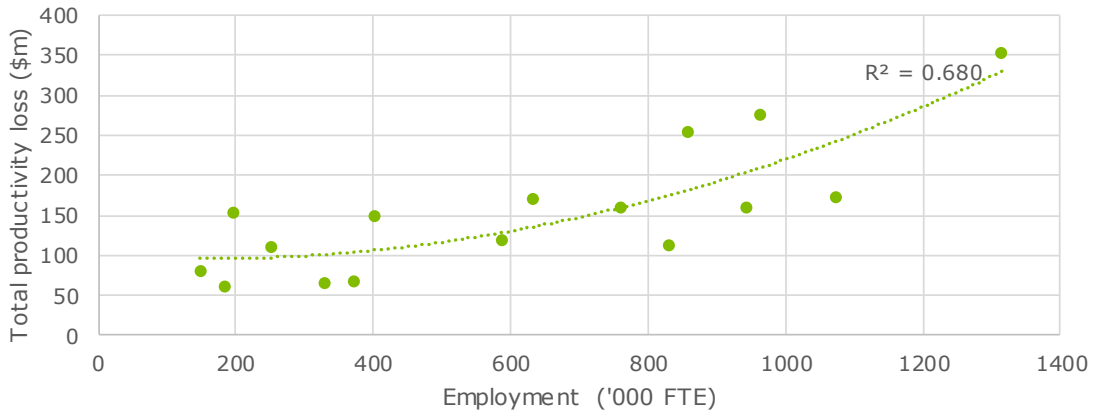
	Productivity cost ($m)	Productivity cost per person ($)	Other costs ($m)	Other costs per person ($)
Mining	110.5	1,749	20.7	327
Manufacturing	112.4	1,095	35.3	343
Electricity, Gas, Water and Waste Services	79.7	1,551	17.2	335
Construction	171.8	1,403	74.2	606
Wholesale Trade	67.5	1,140	22.7	383
Retail Trade	275.7	808	119.8	351
Accommodation and Food Services	171.6	712	91.9	381
Transport, Postal and Warehousing	118.5	1,343	41.0	465
Information Media & Telecommunications	154.3	1,288	48.4	404
Financial and Insurance Services	148.4	1,239	40.1	335
Professional, Scientific and Technical Services	159.0	1,207	46.9	356
Administrative and Support Services	66.2	838	18.2	231
Public Administration and Safety	160.4	1,069	39.0	260
Education and Training	253.6	1,019	92.5	372
Health Care and Social Assistance	353.3	1,052	117.8	351
Arts and Recreation Services	60.9	826	17.3	235
Other Services	68.4	980	32.3	462

Source: Deloitte Access Economics analysis. Note that three industries – Agriculture, Forestry and Fishing; Personal Services; and the Australian Defence Force – were excluded from the modelling as AWE data for these industries were not available. A fourth industry – Rental, Hiring and Real Estate Services – was also excluded due to the low number of survey respondents (18) in this industry. As such, the total costs across each industry will not sum to the overall total.

For each industry, Chart 4.2 and Chart 4.3 graph the total productivity losses against industry employment and industry gross value added[94], respectively. As shown in Chart 4.2, employment and total productivity loss are positively correlated (R^2 = 67%). This is to be expected, as the level of employment in each industry will drive a large component of total productivity losses, in addition to AWE.

[94] Gross value added is a measure of each industry's contribution to gross domestic product.

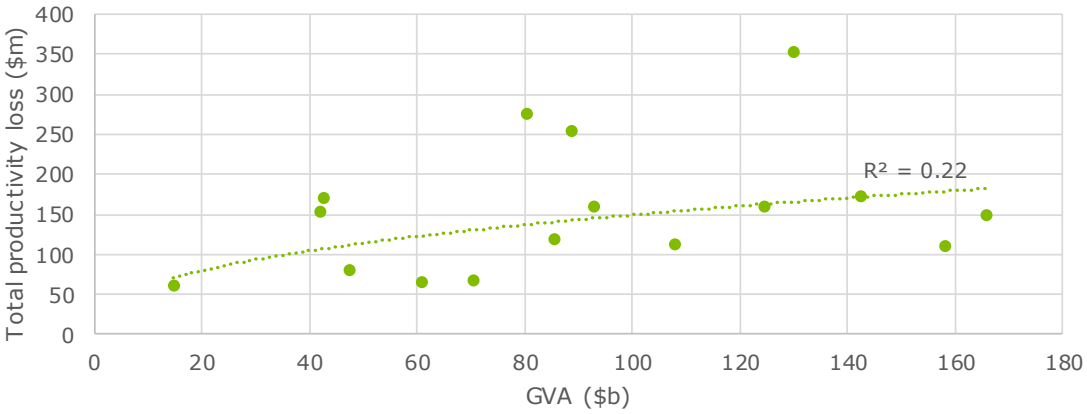
Chart 4.2 Total productivity losses compared to employment, by industry



Source: Deloitte Access Economics. Employment data were sourced from the ABS *Labour Force Survey*.

As shown in Chart 4.3, while industry value added is positively correlated with total productivity losses, the strength of the relationship is much less (R^2 = 22%). The industry which was furthest from the trend line is the Healthcare and Social Assistance industry, with a relatively high productivity loss relative to its gross value added contribution.

Chart 4.3 Total productivity losses compared to gross value added, by industry



Source: Deloitte Access Economics. Data on gross value added were sourced from ABS *National Accounts* data.

Table 4.6 compares sector, employer size, and employment relationship. The private sector has larger overall productivity losses reflecting the larger share of the labour force in the private sector, however on a per person basis the productivity losses in the public sector are larger due to higher average wages. Large employers (200+ employees) had the highest per person productivity loss, and also the highest total productivity loss. However, micro employers (1-4 employees) had the highest per person "other costs". By employment type, the highest per person productivity losses were experienced by full-time employees, which was mostly driven by higher wages in this group. This group also had the largest total productivity losses, due to its share of the labour force.

Table 4.6 Cost of workplace sexual harassment in 2018, by type of employment

	Productivity cost ($m)	Productivity cost per person ($)	Other costs in 2018 ($m)	Other costs per person ($)
Sector				
Private sector	2,228.5	1,024	809.7	372
Public sector	393.7	1,225	126.7	394
Total	*2,622.2*	*1,053*	*936.5*	*375*
Employer size				
1-4 employees	118.9	1,050	72.3	639
5-19 employees	467.1	910	177.2	345
20-199 employees	865.7	1,021	300.6	355
200+ employees	1,170.6	1,144	386.3	378
Total	*2,622.2*	*1,053*	*936.5*	*375*
Employment relationship				
Full-time employees	2,018.0	1,259	668.7	417
Part-time employees	279.6	689	129.6	320
Casual employees	324.6	663	138.2	282
Total	*2,622.2*	*1,053*	*936.5*	*375*

Source: Deloitte Access Economics analysis. Totals may not add due to rounding.

Table 4.7 compares results for CALD status, Aboriginal and Torres Strait Islander status, disability, and sexual orientation. None of these groups had significant differences in per person productivity losses, with the exception of straight/heterosexual females who had the lowest per person productivity losses due to the relatively lower incomes in this group. However, people with a disability had higher per person "other costs" compared to people with no disability.

Table 4.7 Cost of workplace sexual harassment in 2018, by employee characteristics

	Productivity cost ($m)	Productivity cost per person ($)	Other costs ($m)	Other costs per person ($)
CALD status				
CALD	102.7	1,054	40.2	413
Non-CALD	2,519.5	1,050	896.2	373
Total	*2,622.2*	*1,053*	*936.5*	*375*
Aboriginal and Torres Strait Islander status				
Yes	94.8	1,014	37.3	399
No	2,527.4	1,051	899.1	374
Total	*2,622.2*	*1,053*	*936.5*	*375*
Disability status				
Disability	215.1	1,061	134.8	665
No disability	2,407.1	1,049	801.6	349
Total	*2,622.2*	*1,053*	*936.5*	*375*
Sexual orientation				
Identifies as not straight/ heterosexual, male	168.2	1,210	61.0	439
Identifies as not straight/ heterosexual, female	180.5	1,118	60.1	372
Identifies as straight/heterosexual, male	987.1	1,140	309.1	357
Identifies as straight/heterosexual, female	1,286.5	966	506.3	380
Total	*2,622.2*	*1,053*	*936.5*	*375*

Source: Deloitte Access Economics analysis. Totals may not add due to rounding.

By SEIFA group (Table 4.8), the differences in per person productivity were driven by differences in AWE, with Quintile 1 having the lowest per person cost, and Quintile 5 having the highest per person cost. There were no major differences for other costs.

Table 4.8 Cost of workplace sexual harassment in 2018, by SEIFA quintile

	Productivity cost ($m)	Productivity cost per person ($)	Other costs ($m)	Other costs per person ($)
1st quintile (lowest SEIFA group)	278.2	923	95.8	318
2nd quintile	437.1	1,051	182.7	439
3rd quintile	520.8	1,033	182.4	362
4th quintile	604.5	1,041	219.0	377
5th quintile (highest SEIFA group)	781.5	1,124	256.5	369
Total	**2,622.2**	**1,053**	**936.5**	**375**

Source: Deloitte Access Economics analysis. Totals may not add due to rounding

The estimates of lost wellbeing for age and gender groups, and industry are shown in Table 4.9. As previously mentioned, it was only possible to estimate lost wellbeing for Category 4 cases. Consequently, the average cost per person harassed has not been provided in these tables. Of the total ($249.6 million), females accounted for $164.2 million (66% of the total). Females account for a higher proportion of total lost wellbeing than they do productivity or other costs as the DALY is independent of earnings. Similarly, females account for

a higher share of lost wellbeing than their share of prevalence, reflecting that they are more likely to be in Category 4.

Table 4.9 Lost wellbeing due to workplace sexual harassment in 2018, by age and gender

	Lost wellbeing ($m)	Proportion (%)
Male		
15-24 years	13.1	5.2
25-34 years	39.4	15.8
35-44 years	19.7	7.9
45-54 years	6.6	2.6
55-64 years	6.6	2.6
65-74 years	-	-
Male total	*85.4*	*34.2*
Female		
15-24 years	19.7	7.9
25-34 years	78.8	31.6
35-44 years	46.0	18.4
45-54 years	6.6	2.6
55-64 years	13.1	5.2
65-74 years	-	-
Female total	*164.2*	*65.8*
Overall total	**249.6**	**100.0**

Source: Deloitte Access Economics analysis. Totals may not add due to rounding.

When comparing industries (Table 4.10), the construction, retail trade, and accommodation and food services industries contribute the most to lost wellbeing. While the costs by industry for productivity and other costs tend to be driven by the overall prevalence, the reduction in wellbeing is also strongly affected by the proportion of Category 4 cases.

Table 4.10 Lost wellbeing due to workplace sexual harassment in 2018, by industry

Industry	Lost wellbeing ($m)	Proportion (%)
Mining	-	-
Manufacturing	6.5	2.6
Electricity, Gas, Water and Waste Services	-	-
Construction	32.7	13.1
Wholesale Trade	6.5	2.6
Retail Trade	32.7	13.1
Accommodation and Food Services	32.7	13.1
Transport, Postal and Warehousing	13.1	5.2
Information Media & Telecommunications	13.1	5.2
Financial and Insurance Services	6.5	2.6
Professional, Scientific and Technical Services	6.5	2.6
Administrative and Support Services	-	-
Public Administration and Safety	-	-
Education and Training	26.1	10.5
Health Care and Social Assistance	26.1	10.5
Arts and Recreation Services	-	-
Other Services	13.1	5.2

Source: Deloitte Access Economics analysis. Note that three industries – Agriculture, Forestry and Fishing; Personal Services; and the Australian Defence Force – were excluded from the modelling as AWE data for these industries were not available. A fourth industry – Rental, Hiring and Real Estate Services – was also excluded due to the low number of survey respondents (18) in this industry. As such, the total costs across each industry will not sum to the overall total.

Table 4.11 compares lost wellbeing across sector, employer size, and employment relationship. As with productivity and other costs, the private sector has larger overall lost wellbeing reflecting the larger share of the labour force in the private sector. Similarly, the results for employer size and employment type are also intuitive: the overall lost wellbeing increases with employer size and the costs are largely borne by full-time employees, also reflecting the share of the labour force for each group.

Table 4.11 Lost wellbeing due to workplace sexual harassment in 2018, by type of employment

	Lost wellbeing ($m)	Proportion (%)
Sector		
Private sector	217.5	87.1
Public sector	32.1	12.9
Total	*249.6*	*100.0*
Employer size		
1-4 employees	39.4	15.8
5-19 employees	46.0	18.4
20-199 employees	72.2	28.9
200+ employees	92.0	36.9
Total	*249.6*	*100.0*
Employment relationship		
Full-time employees	190.5	76.3
Part-time employees	32.8	13.1
Casual employees	26.3	10.5
Total	*249.6*	*100.0*

Source: Deloitte Access Economics analysis. Totals may not add due to rounding.

Table 4.12 compares results for CALD status, Aboriginal and Torres Strait Islander status, disability, and sexual orientation. None of these groups had significant differences from the underlying prevalence, with the exception of people with a disability. Of total lost wellbeing, people with a disability accounted for $72.3 million, or 29%.

Table 4.12 Lost wellbeing due to workplace sexual harassment in 2018, by employee characteristics

	Lost wellbeing ($m)	Proportion (%)
CALD status		
CALD	13.1	5.2
Non-CALD	236.5	94.8
Total	*249.6*	*100.0*
Aboriginal and Torres Strait Islander status		
Yes	13.1	5.2
No	236.5	94.8
Total	*249.6*	*100.0*
Disability status		
Disability	72.3	29.0
No disability	177.4	71.1
Total	*249.6*	*100.0*
Sexual orientation		
Identifies as not straight/ heterosexual, male	19.7	7.9
Identifies as not straight/ heterosexual, female	13.1	5.2
Identifies as straight/heterosexual, male	65.7	26.3
Identifies as straight/heterosexual, female	151.1	60.5
Total	*249.6*	*100.0*

Source: Deloitte Access Economics analysis. Totals may not add due to rounding.

Quintile 1 accounted for the smallest proportion of total lost wellbeing as it has comparatively fewer Category 4 cases and a lower share of overall prevalence compared to the other quintiles (Table 4.13). Conversely, the lost wellbeing across the other quintiles was reasonably comparable, albeit slightly higher for Quintile 2, reflecting a slight skew towards more Category 4 cases in their distributions.

Table 4.13 Lost wellbeing due to workplace sexual harassment in 2018, by SEIFA quintile

	Lost wellbeing ($m)	Proportion (%)
1st quintile (lowest SEIFA group)	19.7	7.9
2nd quintile	65.7	26.3
3rd quintile	46.0	18.4
4th quintile	59.1	23.7
5th quintile (highest SEIFA group)	59.1	23.7
Total	**249.6**	**100.0**

Source: Deloitte Access Economics analysis. Totals may not add due to rounding.

5 Limitations of the analysis

As noted in Section 2, the two main sources of data for this model were the AHRC's 2018 survey, and the MSPB's 1995 survey. Every survey has limitations in regard to the size of the sample it is fielded to, the representativeness of the sample, the scope of the questions, and the way that the questions are asked. However, on balance for both of these surveys the usefulness of the survey data for this project outweighed the limitations of the data.

There were two key limitations of the ARHC survey. The first limitation related to the sub-set of respondents which some of the questions were restricted to. While the survey sample included approximately 2,500 people who had been sexually harassed in the workplace in the past five years, some of the questions were only presented to a smaller sub-sample of people who had made a formal report or complaint (n=435). This sample were asked questions relating to:

- whether the victim or their perpetrator had resigned or had their employment terminated – this question was used in calculating costs of staff turnover;
- whether the victim involved their manager/supervisor in lodging their complaint – this question was used in calculating opportunity costs of manager time; and
- whether the victim involved the AHRC, the courts, or police – this question was used in calculating other costs for the justice system.[95]

There are likely to be victims who did not make a formal report or complaint, but still resigned their employment, particularly in jobs with a higher rate of casual staff. Thus, the model may underestimate some of the productivity costs, as the survey may not have fully captured all of the lost productivity results. However, it is important to note that the proportions from the AHRC survey regarding victim turnover were similar to the proportions from the MSPB survey, which captured victim turnover rates from all victims. This is discussed further in Section 3.2.3.

The AHRC survey may have also underestimated the rate of health system utilisation. In the survey, victims who had sought support or advice (n=476) were asked to nominate which parties they sought advice from. From a health system utilisation perspective, the only option presented to victims was "counsellor/psychologist". However, a small number of victims identified a GP/doctor/nurse in the "other" category. The rate at which victims reported seeking advice from a GP/doctor/nurse – 0.6% of all victims of workplace sexual harassment – seems to be low, particularly given that approximately 2% of victims were subject to actual or attempted sexual assault. It is likely that if "GP/doctor/nurse" was presented as a separate option, and if the question specifically asked victims about their interaction with the health system following the harassment, then the rate of people reporting that they had visited a GP/doctor/nurse would be higher.

In regard to the MSPB survey, the key limitations of applying the survey results to the Australian population were that the survey was fielded to US Federal Government employees, and that the data were collected approximately 20 years ago. The response to workplace sexual harassment by government employees may be different to the response to workplace sexual harassment for non-government employees.[96] The three sources of information extracted from the MSPB survey – days off from work (paid and unpaid), reduced productivity while at work, and the proportion of employees who were able to arrange alternative employment before leaving their current employment – may differ between the two sectors. For example, the lower rate of casualisation in the government sector would increase the rate of paid leave that government employees are able to take.

[95] The survey results for the question regarding complaints lodged with the AHRC did not align with the real world data supplied by the AHRC and the jurisdictional commissions. As such, the survey results for this question were not used in the model (see Section 3.3.2).
[96] The AHRC survey did not identify whether victims worked in the public or private sector. While it did identify whether victims worked in the "Public Administration and Safety" ANZSIC industry, many government employees – for example, teachers and healthcare professionals – may not identify as working in this industry.

Increased job security, coupled with the higher levels of education among government employees, would also impact on the proportion of people who were able to arrange alternative employment prior to resigning from their current employment. Similarly, the government sector is likely to have better internal protocols for handling sexual harassment complaints, which would decrease the rate at which people leave their organisation.

The second limitation of the MSPB data – that they were collected over 20 years ago – limits the applicability of the results to 2018 due to the significant changes in societal perceptions of sexual harassment, and the actions taken by victims in response to being harassed. For example, employees in 1995 may have been less likely to take leave in response to being sexually harassed, which would understate the productivity loss when applied to 2018.

In summary, the limitations of both the AHRC and the MSPB surveys likely result in the modelling presenting a conservative estimate of the cost of workplace sexual harassment. The results should be interpreted within this context, noting that both of these surveys are the first of their kind to be undertaken around the world, and that the AHRC survey was not designed for the purposes of estimating the economic costs from workplace sexual harassment.

To address some of the limitations of the analysis, Deloitte Access Economics recommends that consideration be given to capturing the following data in future surveys on workplace sexual harassment. This list includes data that would address the limitations of the surveys, as well as additional data items that were not captured in either of the surveys.

- Data from the MSPB survey in regard to days off from work, reduced productivity while at work, and arranging alternative employment before leaving their current employment, that is specific to the Australian context and not limited to US Federal Government employees.
- The costs to business of responding to employee complaints, such as the costs of hiring legal counsel and human resources advisers. Anecdotal evidence suggests that the costs for each case are a material cost to businesses.
- Broadening the sub-sample of victims who are asked questions regarding whether they left their organisation, and their use of the health system.
- Information on victim income – the survey captured information on household income, rather than individual income which is necessary for estimating productivity losses. To address this limitation, the modelling used AWE data from the ABS. It is not known whether the AHRC survey was representative in regard to the AWE of survey respondents.
- The AHRC survey captured information from victims on whether they experienced negative productivity-related outcomes such as being demoted, transferred, or having shifts changed. However, it would be useful for victims to identify the impact that these negative outcomes had on their income. Similarly, future surveys could capture information from victims on the amount by which their income level changed when changing jobs due to workplace sexual harassment.
- The costs to individuals of legal representation, the amount of compensation they received, and who paid the compensation (i.e. what share was paid by employers and by perpetrators).

The final recommendation for future data collection efforts relates to the lack of longitudinal data on the long-term effects of workplace sexual harassment. Deloitte Access Economics did not identify any longitudinal studies of workplace sexual harassment that could be included in the model.[97] This placed a significant limitation on the ability to calculate "lifetime" impacts, with the model restricted to capturing costs in the year immediately following the harassment, and no ability to estimate longer-term impacts on career progression, workforce participation, and income. It was also not possible to include lost wellbeing for categories other than Category 4, as the lack of longitudinal data have meant that it is not possible to reliably estimate the attributable fraction of conditions such as anxiety and depression that are due to workplace sexual harassment. To address these limitations, consideration could be given to including a question on workplace sexual harassment in future waves of the HILDA survey, to capture longitudinal data.

[97] The work by McLaughlin (2017) regarding future rates of financial distress was not sufficiently detailed to be included in the modelling. [McLaughlin, H., Uggen, C., & Blackstone, A. (2017). The Economic and Career Effects of Sexual Harassment on Working Women. *Gender & Society*, 31(3), 333–358]

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Appendix A Additional survey analysis

This appendix contains additional survey analysis, that is referred to in the body of the report.

A.1 Intimidation and offence

As discussed in Section 2.4, a fourth domain of victim intimidation/offence was not included in the impacts framework, as it was considered likely that the three domains – behaviour, duration and perpetrator – would influence the level of intimidation and offence that was experienced by victims. The AHRC survey collected data from respondents regarding the level of intimidation they experienced (ranked from 1-5, with 1 representing "no intimidation" and 5 representing "extreme intimidation"). Data on the level of offence experienced by victims were also collected, using the same scale from "no offence" through to "extreme offence".

As shown in Table A.1, the intimidation and offence score increases for each impact category. These results support the exclusion of victim intimidation and offence from the impacts framework.

Table A.1 Intimidation and offence scores for each impact category

	Category 1	Category 2	Category 3	Category 4
Mean intimidation score	2.5	2.8	3.1	4.1
Mean offence score	3.0	3.3	3.6	4.0

Source: Deloitte Access Economics analysis of the AHRC survey.

The AHRC survey report also explored how the level of intimidation and offence experienced by victims influenced whether they make a formal report or complaint regarding the case. As shown in Table A.2, victims who made formal reports or complaints were more likely to report a higher level of intimidation and offence.

Table A.2 Level of intimidation and offence for respondents who made a formal report or complaint

Intimidation/ offence level	Intimidation (%)	Offence (%)
1	7	3
2	11	6
3	20	20
4	29	28
5	33	43

Source: AHRC survey.

A.2 Influence of perpetrator on reports and complaints

As discussed in Section 3.2.3, approximately 17% of victims made a formal report or complaint following the workplace sexual harassment. As shown in Table A.3, this proportion differs depending on the role of the perpetrator. Victims harassed by a non-supervisor were 24% more likely to make a formal report or complaint (21.1% of all victims), whereas victims harassed by a supervisor were 24% less likely to make a formal report or complaint (13.7% of all victims).

Table A.3 Influence of perpetrator on reports and complaints

	Perpetrator is supervisor	Perpetrator is not supervisor
Proportion of victims making formal report or complaint	13.7%	21.1%

Source: Deloitte Access Economics analysis of the AHRC survey.

A.3 Duration of case

As discussed in Section 3, the average duration of cases in the MSPB survey is shorter than for cases in the AHRC survey. The results from the two surveys are shown in Table A.4.

Table A.4 Duration of cases in AHRC and MSPB surveys

	Category 2	Category 3	Category 4
AHRC (# weeks)	22	63	38
MSPB (# weeks)	10	26	30

Source: Deloitte Access Economics analysis of the AHRC and MSBP surveys.

There are two potential reasons for the differences in these results:

- underlying differences in the nature of harassment experienced, and victim's reaction to each case (for example, capacity to leave the organisation thus ending the harassment), in the two surveys; and
- differences in the way the questions were phrased in the two surveys.

For the second reason, the phrasing of the questions in the two surveys may have influenced the duration that was reported for each case. In the MSPB survey, respondents were provided with the following ranges:

- Less than a week
- 1-4 weeks
- 1-3 months
- 4-6 months
- More than 6 months.

In the AHRC survey, respondents were provided with the following ranges:

- Less than 1 month
- 1-3 months
- 4-6 months
- 7-12 months
- 1-2 years.
- More than 2 years.

For modelling purposes, the midpoint of each range was used, with 50% added to the open ended ranges. For example, in the MSPB survey "less than 1 week" was coded as 0.5 weeks, "1-4" weeks was coded as 2.5 weeks, and so on. At the other end of the scale, "more than 6 months" was coded as 9 months for the MSPB survey results, and "more than 2 years" was coded as 3 years for the AHRC survey results.

The MSPB survey provided respondents with greater granularity for shorter duration cases, while the AHRC survey provided respondents with greater granularity for longer duration cases. The combined effect of this is that the MSPB durations will be shorter compared to the AHRC durations, even if the true durations in each survey were the same.

To remove the effect of the answer options on the duration, the answer options from each survey were collapsed to the following common categories: less than 1 month; 1-3 months; 4-6 months; and more than 6 months. Using these common categories, the weighted average duration from each survey were similar:

17.9 weeks for the MSPB cases, and 18.4 weeks for the AHRC cases. Thus, there were no material differences in duration of cases between the two surveys once the effect of the different answer options was removed.

Appendix B Detailed methodology and model inputs

This appendix contains detailed notes on the methods for calculating the prevalence and AWE inputs for each of the sub-groups (Table B.1), and the inputs for each sub-group that were used in the model (Table B.2). Note that due to the variety of sources that were used for calculating the AWE inputs, there were some minor discrepancies (<2%) in the weighted average AWE for each sub-group. To account for this, all AWE inputs were rebased to a consistent weighted average ($1,244/week in 2018).

Note that the AHRC did not provide information on whether the victim was in the public or private sector. To account for this:

- The distribution of workplace sexual harassment into each sector was aligned with ABS *Labour Force* data.
- The prevalence rate for each sector was the same as for the population average.
- The impact category distribution within each sector was the same as for the population average.

Table B.1 Methodological notes for calculating of AWE inputs

Characteristic	Detailed source	Methodology	Limitations
Industry, Sector (public/private)	ABS (2018). 6302.0 Average Weekly Earnings, Australia, May 2018 – Average weekly cash earnings.	Employer survey of average weekly cash (AWCE) earnings. Cash earnings are gross (pre-tax) current and regular payments in cash to employees for work done, inclusive of salary sacrifice amounts. AWCE has been used rather than AWE to capture the complete definition of income and improve comparability ABS 6306.0 data. Total cash earnings (rather than ordinary time cash earnings) includes superannuation. This is considered appropriate for the human capital approach taken in this modelling.	Using aggregate numbers may lead to discrepancies in totals to the extent that the AHRC survey is not representative of the employment mix of the general population.
Gender, Employment relationship (full time/part time/casual), Employer size	ABS (2017). 6306.0 Employee Earnings and Hours, Australia, May 2016 - Average weekly total cash earnings.	Employer survey of AWCE. Rebased to May 2018 prices using 6302.0 AWE.	Using aggregate numbers may lead to discrepancies in totals to the extent that the AHRC survey is not representative of the employment mix of the general population. These data are now two years old.
Age by gender	ABS (2017). ABS 6310.0 Employee Earnings, Benefits and Trade Union Membership, June 2013	Employer survey of mean weekly earnings in main job, by 5 year age groups. Converted from 5 years age groups to AHRC categories by taking the midpoint of 5 year categories. Rebased to May 2018 prices using 6302.0 AWE.	These data are from 2013 and is now five years out of date. However, it is the most recent data that includes five-year age groups.
Disability status, Aboriginal and Torres Strait Islander status, CALD status, SEIFA	ABS (2017). 2016 Census - Employment, Income and Education - INCP Total Personal Income (weekly).	Household survey of total income from all sources (in ranges) a person usually receives each week. Relative income of each group is calculated relative to the total population, and rebased to May 2018 prices using 6302.0 AWE. Only the population working at least 1 hour per week is included, and non-responses are excluded from analysis. As income ranges are provided, the midpoint of each range is used, with the top income range assumed to be the lower bound of $3000/week. Negative and nil incomes are excluded. 'Not stated' responses have been excluded.	Income and earnings are not directly comparable, as income includes non-wage and salary income. However, as detailed data are not available on earnings for these groups this provides the best proxy measure for distributional analysis. Household surveys tend to be less reliable, as people may not have accurate recall of their income. Data are reported in ranges, and a midpoint value is assumed. This may introduce inaccuracies, particularly for negative income and income over the upper bound of $3000/week.
Sexual orientation	La Nauze (2015) – Percentage change relative to earnings of same gender.	Analysis of HILDA data measuring the variation in income relative to same gender. The baseline model has been used (does not control for factors including industry and personality factors).	Percentage reduction is applied to total population, rather than only the straight/heterosexual population.

Table B.2 Prevalence and AWE for each sub-group

	Prevalence, 2018 ('000)	AWE ($)	Number of survey respondents
Age and gender group			
15-24 years, male	144	699	136
25-34 years, male	316	1,415	295
35-44 years, male	199	1,773	184
45-54 years, male	156	1,796	147
55-64 years, male	147	1,622	124
65-74 years, male	42	1,223	37
15-24 years, female	244	570	224
25-34 years, female	510	1,107	464
35-44 years, female	300	1,128	262
45-54 years, female	236	1,157	200
55-64 years, female	154	1,077	137
65-74 years, female	50	840	51
Industry			
Mining	63	2,664	57
Manufacturing	103	1,322	104
Electricity, Gas, Water and Waste Services	51	1,921	45
Construction	122	1,515	121
Wholesale Trade	59	1,393	56
Retail Trade	341	745	339
Accommodation and Food Services	241	535	225
Transport, Postal and Warehousing	88	1,560	91
Information Media and Telecommunications	120	1,661	120
Financial and Insurance Services	120	1,636	108
Professional, Scientific and Technical Services	132	1,611	119
Administrative and Support Services	79	1,071	73
Public Administration and Safety	150	1,539	143
Education and Training	249	1,235	246
Health Care and Social Assistance	336	1,208	345
Arts and Recreation Services	74	919	77
Other Services	70	965	69
Sector			
Private sector	2176	1,176	N/A
Public sector	321	1,530	N/A
Employer size			
Under 20 employees	113	922	122
5-19 employees	514	922	498
20-199 employees	848	1,189	848

	Prevalence, 2018 ('000)	AWE ($)	Number of survey respondents
200+ employees	1,023	1,372	1,000
Employment relationship			
Full-time employees	1,602	1,640	1,587
Part-time employees	406	641	411
Casual employees	490	591	485
CALD status			
CALD	97	1,160	240
Non-CALD	2,400	1,266	7,350
Aboriginal and Torres Strait Islander status			
Aboriginal and Torres Strait Islander	93	827	240
Non-Aboriginal and Torres Strait Islander	2,404	1,247	7,493
Disability status			
Has a disability	203	827	7,262
Does not have a disability	2,295	1,247	483
Sexual orientation			
Identifies as not straight/ heterosexual, male	139	1,341	129
Identifies as not straight/ heterosexual, female	866	1,208	148
Identifies as straight/heterosexual, male	161	1,478	778
Identifies as straight/heterosexual, female	1,332	1,015	1,175
SEIFA quintile			
1st	302	1,020	919
2nd	416	1,111	1,236
3rd	504	1,171	1,580
4th	581	1,263	1,778
5th	695	1,464	2,223

Table B.3 Impact category distribution for each sub-group

	Category 1 (%)	Category 2 (%)	Category 3 (%)	Category 4 (%)
Age and gender group				
15-24 years, male	17.4%	36.7%	44.0%	1.8%
25-34 years, male	15.1%	41.0%	41.4%	2.5%
35-44 years, male	16.7%	43.3%	38.0%	2.0%
45-54 years, male	15.3%	47.5%	36.4%	0.8%
55-64 years, male	23.4%	39.6%	36.0%	0.9%
65-74 years, male	6.3%	46.9%	46.9%	0.0%
15-24 years, female	14.7%	38.6%	45.1%	1.6%
25-34 years, female	13.8%	38.2%	44.9%	3.1%
35-44 years, female	11.0%	37.0%	48.9%	3.1%
45-54 years, female	13.5%	47.2%	38.8%	0.6%

	Category 1 (%)	Category 2 (%)	Category 3 (%)	Category 4 (%)
55-64 years, female	16.4%	37.9%	44.0%	1.7%
65-74 years, female	10.5%	47.4%	42.1%	0.0%
Industry				
Mining	8.3%	47.9%	43.8%	0.0%
Manufacturing	15.4%	39.7%	43.6%	1.3%
Electricity, Gas, Water and Waste Services	7.7%	33.3%	59.0%	0.0%
Construction	19.4%	34.4%	40.9%	5.4%
Wholesale Trade	13.3%	46.7%	37.8%	2.2%
Retail Trade	14.7%	37.1%	46.3%	1.9%
Accommodation and Food Services	12.0%	37.2%	48.1%	2.7%
Transport, Postal and Warehousing	14.9%	37.3%	44.8%	3.0%
Information Media and Telecommunications	15.4%	44.0%	38.5%	2.2%
Financial and Insurance Services	12.1%	46.2%	40.7%	1.1%
Professional, Scientific and Technical Services	22.0%	34.0%	43.0%	1.0%
Administrative and Support Services	16.7%	48.3%	35.0%	0.0%
Public Administration and Safety	16.7%	46.5%	36.8%	0.0%
Education and Training	18.0%	43.9%	36.0%	2.1%
Health Care and Social Assistance	13.7%	40.8%	43.9%	1.6%
Arts and Recreation Services	12.5%	44.6%	42.9%	0.0%
Other Services	15.1%	39.6%	41.5%	3.8%
Sector				
Private sector	14.8%	40.4%	42.8%	2.0%
Public sector	14.8%	40.4%	42.8%	2.0%
Employer size				
Under 20 employees	15.1%	39.5%	38.4%	7.0%
5-19 employees	11.5%	41.3%	45.4%	1.8%
20-199 employees	15.5%	41.5%	41.3%	1.7%
200+ employees	15.7%	39.3%	43.2%	1.8%
Employment relationship				
Full-time employees	15.0%	41.0%	41.7%	2.4%
Part-time employees	16.2%	38.3%	43.8%	1.6%
Casual employees	12.9%	40.3%	45.7%	1.1%
CALD status				
CALD	12.2%	39.2%	45.9%	2.7%
Non-CALD	14.9%	40.5%	42.7%	2.0%
Aboriginal and Torres Strait Islander status				
Aboriginal and Torres Strait Islander	5.6%	45.1%	46.5%	2.8%
Non-Aboriginal and Torres Strait Islander	15.1%	40.3%	42.7%	2.0%
Disability status				

	Category 1 (%)	Category 2 (%)	Category 3 (%)	Category 4 (%)
Has a disability	11.0%	30.5%	51.3%	7.1%
Does not have a disability	15.1%	41.3%	42.1%	1.5%
Sexual orientation				
Identifies as not straight/ heterosexual, male	12.4%	39.0%	45.7%	2.9%
Identifies as not straight/ heterosexual, female	11.5%	35.2%	51.6%	1.6%
Identifies as straight/heterosexual, male	17.3%	42.4%	38.8%	1.5%
Identifies as straight/heterosexual, female	13.7%	40.3%	43.7%	2.3%
SEIFA quintile				
1st	10.9%	42.8%	45.0%	1.3%
2nd	13.0%	38.3%	45.6%	3.2%
3rd	11.7%	40.7%	45.7%	1.8%
4th	17.0%	40.4%	40.6%	2.0%
5th	17.8%	40.5%	40.0%	1.7%

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