

Submission to the National Inquiry into Sexual Harassment in Australian Workplaces

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Thank you for the opportunity to make a submission to this Inquiry. Rather than deal in detail with each of the Terms of Reference I will address some key issues that I submit should be addressed in considering the future of regulation and practice in this area. I make this submission based on my substantial experience (over 30 years) as a union official representing workers who have experienced gendered violence at work, as a lawyer practicing in employment and discrimination law and on my current research efforts.

Within this submission I will refer to gendered violence or gender-based violence as this captures concepts such as the everyday sexism that occurs in workplaces and the fact that it is sexual harassment is a gendered phenomenon. For the purposes of this submission I will use the ILO's definition of this term which is

*violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.*¹

I argue here that the system of regulation in Australia designed to end discrimination, including sexual harassment, at work is not fit for purpose and that there is a need to recraft the starting point for how we address gender inequality and gendered violence at work.

1. The evidence demonstrates that our current laws are ineffective in preventing gendered violence at work. There are a number of reasons for this:
 - 1.1 The purpose of anti-discrimination law is to achieve gender equality through the elimination of discrimination however there is a lack of clarity around the definition of gender equality and discrimination. This leads to contestation about what is gender equality and why it is important, what is discrimination, who is responsible for eliminating discrimination and why this should be addressed within the workplace.
 - 1.2 The Sex Discrimination Act (SDA) and Fair Work Act (FWA) place the responsibility on the victims of gendered violence to raise a complaint after experiencing violence. This is when they are likely to feel most vulnerable. There is no positive duty on employers under the SDA or the FWA to prevent gendered violence in the workplace.
 - 1.3 The current complaints-based system (within organisations and to external tribunals) places unnecessary and unwarranted pressure on victims and in fact further injures those who make complaints. Many are physically or psychologically unwell as a result of going through a complaints process. Most leave employment rather than complaining or as a result of their experience in the complaints process.

¹ ILO (2019) International Labour Conference, 108th Session, 2019 Report V(1) Ending violence and harassment in the world of work Fifth item on the agenda, International Labour Office, Geneva

- 1.4 There is no enforcement, compliance or monitoring capacity under the SDA or within an under resourced Australian Human Rights Commission (AHRC).
2. Our regime of employment laws is fundamentally flawed and incapable of addressing gender inequality and gendered violence at work.
 - 2.1. There is no positive obligation under the FWA for employers to prevent gendered violence within the workplace. Unless the parties have agreed to prevention of gendered violence within registered agreements², there is also no access to the Fair Work Commission to seek resolution of disputes associated with gendered violence at work.
 - 2.2. Our system of employment laws, by reinforcing gender inequality, create the conditions within which gendered violence flourishes:
 - 2.2.1. Employment law is based on the standard employment relationship (SER) and male breadwinner model where the normative standard for a worker is male.
 - 2.2.2. This fails to recognise the experiences of women and the vulnerabilities they experience including that they are:
 - 2.2.2.1. the majority of workers employed insecurely
 - 2.2.2.2. the majority of those in low paid work
 - 2.2.2.3. responsible for most of the unpaid care giving within households and the community and therefore more likely to have interrupted patterns of engagement with the labour market
 - 2.2.2.4. less likely to be in decision making positions within organisations.
 - 2.2.3. This compounds the gender inequality that is at the heart of what drives violence against women, including that experienced in the workplace.
 - 2.3. The historical divide between employment and discrimination law has allowed workplace tribunals to push away their need to build capacity in this space and deal with issues of gendered violence at work.
3. Workplace health and safety laws provide positive obligations on employers to provide for healthy and safe workplaces however little attention has been given to sexual harassment and other forms of gendered violence as a health and safety issue.
 - 3.1. Regulators have not promoted or acted on sexual harassment and gendered violence as a health and safety issue although there are recent initiatives here including that between WorkSafe Victorian and the Victorian Trades Hall Council.

² I note that the Victorian Trades Hall Council (VTHC) has adopted a model enterprise agreement clause on this matter.

- 3.2. 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.
- 3.3. Health and safety regulators do not routinely gather data identifying complaints, queries, or injuries, coded in a manner that would allow for the identification tracking and monitoring of the incidence of gendered violence at work.
4. For the above reasons I argue that our system of regulation designed to end discrimination, including sexual harassment, is not fit for purpose and that there is a need to recraft the starting point for how we address gender inequality and gendered violence at work. This requires changes beyond amendments to the SDA, FWA or workplace health and safety laws. A complete overhaul is required.
5. A new framework for regulation would:
 - 5.1. Acknowledge and respond to the needs of women as legitimate and central actors at work
 - 5.2. Address the drivers of gender equality at work (see 6 below)
 - 5.3. Have the objectives of ending gendered violence and promoting gender equality at work.
6. Our understanding of what drives violence against women is further advanced than when anti-discrimination laws were originally drafted. Regulation needs to target what we now understand are the drivers of violence against women that are prevalent in the workplace:
 - 6.1. Men’s control of positions of power in workplace
 - 6.2. Women’s position of vulnerability in the labour market
 - 6.3. Cultures of sexism and norms that support sexism and harassment and promote violence
 - 6.4. Violence and aggressive behaviour being supported, accepted and rewarded.³
 - 6.5. Conditions of work and work arrangements that create conditions of violence.
7. The International Labour Organisation (ILO) is currently discussing a new international standard to end violence and harassment (including gender-based violence) against women and men in the world of work. ILO Conventions provide important normative standards. In this instance

³ See VTHC (2016) *Stop Gendered at Work* and Our Watch, Australia’s National Research Organisation for Women’s Safety (ANROWS) and VicHealth (2015) *Change the story: A shared framework for the primary prevention of violence against women and their children in Australia*, Our Watch, Melbourne, Australia.

the draft Convention provides guidance for a new more effective framework for addressing all forms of violence, including gendered violence, at work.

8. The ILO Convention draft text:
 - 8.1. Names gender inequality as at the heart of gender-based violence.
 - 8.2. Is prevention rather than complaints focussed.
 - 8.3. Has a scope that extends to the world of work which would ensure that those that fall outside of the traditional employment relationship, or who experience work related gendered violence in private spaces, are covered.
 - 8.4. Acknowledges that in some sectors of the economy or occupations workers are more vulnerable to violence and that work arrangements or conditions under which work is performed can promote violence.
 - 8.5. Sets out the responsibility of employers and governments for effective, resourced and gender sensitive enforcement, monitoring, compliance and victim support.
 - 8.6. Acknowledges the need to consult with workers and their representatives in the development of any regulation or initiatives.
9. There are other examples that we can also draw on when crafting a new starting point. The Victorian Government's program of work on gender equality and the prevention of violence against women arising from *the Royal Commission into Family Violence* is an example of a holistic response in this area.
10. The achievement of gender equality should be at the centre of any new framework to end gendered violence at work however when crafting a new way forward, we cannot start from the point of view that everyone accepts this need for gender equality or that this is a workplace concern:
 - 10.1. There is a powerful body of work to do with organisations, workers, unions and employer representatives about their understanding of the issue, and why systemic measures are needed.
 - 10.2. Initiatives must include education and awareness of the drivers of violence against women in society and in the workplace and measures to address these.
 - 10.3. Initiatives that move forward on the basis that they presume widespread acceptance and understanding of the drivers of gendered violence are likely to be ineffective.
 - 10.4. There is a need to argue the business and community case for why significant change is required in this space.

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