

# **Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces**

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The NSW Young Lawyers Human Rights Committee welcomes the opportunity to make a submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces ("**the National Inquiry**"). We commend the Australian Human Rights Commission ("**the Commission**") for undertaking the National Inquiry and the Australian Government for funding the work.

## Scope of Submission

This submission addresses the following Terms of Reference:

- Term of Reference 1: The prevalence, nature and reporting of sexual harassment in Australian workplaces, by sector;
- Term of Reference 4: 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;
- Term of Reference 5: The current legal framework with respect to sexual harassment; and
- Term of Reference 7: Recommendations to address sexual harassment in Australian workplaces.

## Summary of Recommendations

In summary, the HRC makes the following recommendations:

1. Employers should be required to take all reasonable steps to prevent sexual harassment in their workplace;
2. The time limit in which to make a sexual harassment complaint to the Australian Human Rights Commission should be restored to at least 12 months;
3. A complainant of sexual harassment should generally not pay the respondent's costs;
4. The Australian Human Rights Commission should be empowered to investigate sexual harassment on their own motion;
5. The definition of "adverse action" in the *Fair Work Act 2009* (Cth) ('**FWA**') should be amended to explicitly include sexual harassment;
6. The *Sex Discrimination Act 1984* (Cth) ('**SDA**') and the *Anti-Discrimination Act 1977* (NSW) ('**ADA**') should be amended to introduce a shifting onus of proof for sexual harassment matters;
7. The Commonwealth Government should restore funding to the Australian Human Rights Commission;

8. Australian governments should support access to justice for victims of sexual harassment by increasing funding to the legal assistance sector; and
9. Australian governments should foster conditions of work in which victims of sexual harassment are empowered to assert their rights by developing strategies to address insecure work.

## NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

## The Human Rights Committee

The Human Rights Committee (“**the HRC**”) comprises a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the HRC are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and its application under both domestic and international law. Members of the HRC share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The HRC takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

## Background

Recent public events provide critical context to the National Inquiry and our submission. The “Me Too” movement has drawn national and international attention to the issues of sexual harassment and sexual assault.<sup>1</sup> Both the Minister for Women Kelly O’Dwyer and the Sex Discrimination Commissioner Kate Jenkins acknowledged the impact of “Me Too” movement at the National Inquiry’s launch.<sup>2</sup>

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<sup>1</sup> See Christen Johnson and KT Hawbaker, “#MeToo: A Timeline of Events”, *Chicago Tribune* (20 August 2018) <<http://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html>>.

<sup>2</sup> Australian Human Rights Commission, “National Inquiry into Sexual Harassment in Australian Workplaces” (20 June 2018) <<https://www.humanrights.gov.au/news/media-releases/national-inquiry-sexual-harassment-australian-workplaces>>; “World-first Inquiry into Sexual Harassment in Australian Workplaces Launched”, *SBS News* (20 June 2018) <<https://www.sbs.com.au/news/world-first-inquiry-into-sexual-harassment-in-australian-workplaces-launched>>.

Tarana Burke founded the “Me Too” movement “in 2006 to help survivors of sexual violence, particularly young women of colour from low wealth communities, find pathways to healing”.<sup>3</sup> It recognises that survivors of sexual violence often experience a profound sense of isolation despite the prevalence of sexual violence. The movement aims to provide “empowerment through empathy” to survivors of sexual violence and to eradicate sexual violence from communities.<sup>4</sup>

Key developments in the “Me Too” movement occurred in October 2017. On 5 October 2017, the *New York Times* published an article detailing allegations of sexual harassment against Hollywood producer Harvey Weinstein “over nearly three decades”.<sup>5</sup> On 15 October 2017, actress Alyssa Milano tweeted, “If all the women who have been sexually harassed or assaulted wrote ‘Me too.’ as a status, we might give people a sense of the magnitude of the problem.”<sup>6</sup>

These events were followed by an uncountable number of reports by traditional and social media of sexual harassment and sexual assault, often using the hashtag #MeToo. Journalist Tracey Spicer has received almost 2000 reports of sexual harassment and sexual assault from Australians of all backgrounds and occupations since October 2017.<sup>7</sup>

In addition to the Me Too Movement, the National Inquiry follows the Commission’s landmark report titled *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (“**Change the Course**”).<sup>8</sup> Key findings of *Change the Course* included the following:

- 51% of university students were sexually harassed on at least one occasion in 2016;
- 6.9% of university students were sexually assaulted on at least one occasion in 2015 or 2016;

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<sup>3</sup> “Me Too” Movement, “me too.” (2018) <<https://metoomvmt.org/>>.

<sup>4</sup> “Me Too” Movement, “me too.” (2018) <<https://metoomvmt.org/>>.

<sup>5</sup> Jodi Kantor and Megan Twohey, “Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades”, *New York Times* (5 October 2017) <<https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news>>.

<sup>6</sup> Alyssa Milano, “If you’ve been sexually harassed or assaulted...”, *Twitter* (15 October 2017) <[https://twitter.com/Alyssa\\_Milano/status/919659438700670976/photo/1?ref\\_src=twsrc%5Etfw&ref\\_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F10%2F16%2Ftechnology%2Fmetoo-twitter-facebook.html](https://twitter.com/Alyssa_Milano/status/919659438700670976/photo/1?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F10%2F16%2Ftechnology%2Fmetoo-twitter-facebook.html)>.

<sup>7</sup> NOW Australia “#MeToo Is the Movement. NOW Is the Moment” (2018) <<https://www.now.org.au/>>; “Australian Stars Join Now Movement to Stop Workplace Sexual Harassment”, *ABC News* (26 March 2018) <<http://www.abc.net.au/news/2018-03-25/australian-stars-join-movement-to-stop-workplace-sexual-harass/9585210>>.

<sup>8</sup> Australian Human Rights Commission, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (July 2017) <[https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_2017\\_ChangeTheCourse\\_UniversityReport.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_2017_ChangeTheCourse_UniversityReport.pdf)> (“*Change the Course*”).

- Women were almost twice as likely as men to be sexually harassed and more than three times as likely to be sexually assaulted; and
- Men were overwhelmingly the perpetrators of both sexual assault and sexual harassment.<sup>9</sup>

The Commission has conducted two audits of actions taken by Australian universities in response to *Change the Course*.<sup>10</sup>

The above background illustrates that the National Inquiry takes place in the context of heightened public awareness of sexual harassment.

## **Term of Reference 1: The Prevalence, Nature and Reporting of Sexual Harassment in Australian Workplaces**

### **Sexual Harassment is Prevalent in Australian Workplaces**

While Federal, State, and Territory laws prohibit sexual harassment in areas including employment, education and accommodation, sexual harassment remains endemic in Australia. Data from the Australian Bureau of Statistics (ABS) indicates that 1 in 2 women and 1 in 4 men experience sexual harassment in their lifetime.<sup>11</sup> In the last 12 months, almost 1 in 4 (23%) women in the Australian workforce have experienced some form of workplace sexual harassment compared with 1 in 6 (16%) men in the workforce.<sup>12</sup> Barriers to reporting sexual harassment remain, with fewer than 1 in 5 people making a formal report or complaint after experiencing sexual harassment,<sup>13</sup> and many complainants are victimised upon reporting<sup>14</sup>. Sexual harassment can be a barrier to women participating fully in paid work. Diverse groups of people, including women with disability, LGBTI people and women of colour are more likely to experience sexual harassment.<sup>15</sup>

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<sup>9</sup> *Change the Course* 3-4.

<sup>10</sup> Australian Human Rights Commission, *Audit of University Responses to the Change the Course Report* (December 2017) <[https://www.humanrights.gov.au/sites/default/files/AHRC\\_Audit\\_Overview\\_2017.pdf](https://www.humanrights.gov.au/sites/default/files/AHRC_Audit_Overview_2017.pdf)>; Australian Human Rights Commission, *Audit of University Responses to the Change the Course Report* (August 2018) <[https://www.humanrights.gov.au/sites/default/files/AHRC\\_Aug2018\\_Uni\\_Audit\\_snapshot.pdf](https://www.humanrights.gov.au/sites/default/files/AHRC_Aug2018_Uni_Audit_snapshot.pdf)>.

<sup>11</sup> Australian Bureau of Statistics, *Personal Safety Survey* (2016).

<sup>12</sup> Australian Human Rights Commission, 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces', 2018, <[https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_WORKPLACE\\_SH\\_2018.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_WORKPLACE_SH_2018.pdf)>, 25 ("Everyone's Business").

<sup>13</sup> Australian Human Rights Commission, 'Working Without Fear: Results of the Sexual Harassment National Telephone Survey' (Publication, 2012) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/working-without-fear-results-sexual-harassment-national>>.

<sup>14</sup> *Ibid*, 9.

<sup>15</sup> *Ibid*; and see also *Change the Course*.

In 20 July 2018, the United Nations Committee on the Elimination of all Forms of Discrimination against Women (“**the CEDAW Committee**”) expressed concern about the prevalence of sexual harassment in Australian workplaces.<sup>16</sup>

## **Sexual Harassment is Prevalent in Legal Workplaces**

*“The defence barrister made very derogatory and disparaging remarks to the prosecutor, his client and the court officer about me and my fellow female law students whilst we were all still in the Courtroom about our appearance, getting lucky that evening, my racial background and stated that he was glad he would be out of the legal profession before the likes of me were on the bench!”<sup>17</sup>*

Professional associations<sup>16</sup> have undertaken research on sexual harassment in legal workplaces. In 2013, the Law Council of Australia (“**the Law Council**”) investigated why women leave the legal profession and why they return. In 2017, the International Bar Association (“**the IBA**”) studied why women continue to experience barriers to career progression within commercial law firms.

The Law Council identified sexual harassment in legal workplaces as “a key reason why women leave the law”.<sup>18</sup> Likewise, the IBA identified sexual harassment in legal workplaces as a key factor limiting women’s career progression.<sup>19</sup>

The key findings of the Law Council’s research include the following:

- There is a very high level of discrimination and harassment in legal workplaces,<sup>20</sup> with 24% of female lawyers and 8% of male lawyers reporting that they had experienced sexual harassment at work;<sup>21</sup>

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<sup>16</sup> CEDAW Committee, *Concluding Observations on the Eighth Period Report of Australia* (20 July 2018) [48].

<sup>17</sup> NSW Young Lawyers Human Rights Committee Sexual Harassment Survey 2018.

<sup>18</sup> Law Council of Australia, “Sexual harassment in the workplace” <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/sexual-harassment-in-the-workplace>>.

<sup>19</sup> International Bar Association, *Women in Commercial Legal Practice* (December 2017) 11

<<https://www.ibanet.org/LPRU/Women-business-Lawyers-Initiative-Front-page.aspx>> (“*WCLP Report*”).

<sup>20</sup> Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2013) 76

<<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-report-on-attrition-and-re-engagement>> (“*NARS Report*”).

<sup>21</sup> *NARS Report* 32.

- Female barristers are the most likely to have experienced sexual harassment at work: 55% of female barristers report that they have experienced sexual harassment at work, compared with 22% of female lawyers in private practice and 20% of female lawyers in in-house roles;<sup>22</sup> and
- Female lawyers who work in large or medium private firms are more likely to experience sexual harassment than female lawyers who work in small firms: 24% of female lawyers in large firms, 26% of female lawyers in medium firms and 18% of female lawyers in small firms report experiencing sexual harassment at work.<sup>23</sup>

Sexual harassment is part of a range of inappropriate behaviours that occur commonly in legal workplaces. Related behaviours include:

- Bullying or intimidation;<sup>24</sup>
- Overt and subtle discrimination;<sup>25</sup> and
- Creating and maintaining male-dominated workplace cultures.<sup>26</sup>

## NSW Young Lawyers 2018 survey on sexual harassment

In October and November 2018, the NSW Young Lawyers HRC conducted a survey on the incidence of sexual harassment in the legal profession which was distributed to the NSW Young Lawyers membership by email. The survey aimed to gather data on young lawyers' experiences of sexual harassment in the workplace, as distinct from the experiences of lawyers in general. The survey questions are available at **Appendix A**. The survey received a total of 125 survey responses. The majority of survey respondents were female (73.6%), white (73.6%), heterosexual (92.86%), and did not identify as a person with a disability (94.44%).

The survey results below reinforce that sexual harassment remains endemic in the legal profession, with a particular impact upon young lawyers.

### The incidence of sexual harassment

More than half of survey respondents (50.98%) had been sexually harassed in the workplace. A further quarter of survey respondents reported having witnessed sexual harassment in the workplace.

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<sup>22</sup> NARS Report 32.

<sup>23</sup> NARS Report 34.

<sup>24</sup> NARS Report 32.

<sup>25</sup> NARS Report 36.

<sup>26</sup> NARS Report 39.

### **The forms of sexual harassment**

Respondents to the survey reported that sexual harassment took the following forms:

- An unwelcome sexual advance (63.95%);
- An unwelcome request for sexual favours (16.28%);
- Other unwelcome conduct of a sexual nature (47.67%);
- Other unwelcome conduct of a sexual nature included:
  - Unwelcome touching, including touching of hands, head and genitals; being touched, smacked or slapped on the bottom.
  - Unwelcome sexual comments, including questions about the respondent's sex life; crude jokes; talking about sexually explicit topics on a regular basis; comments on appearance and clothing.
  - Being shown explicit photographs.

One survey respondent reported the following event, which occurred while she was observing court proceedings as a law student:

*"The defence barrister made very derogatory and disparaging remarks to the prosecutor, his client and the court officer about me and my fellow female law students whilst we were all still in the Courtroom about our appearance, getting lucky that evening, my racial background and stated that he was glad he would be out of the legal profession before the likes of me were on the bench!"*

The above report illustrates both the heightened vulnerability of certain groups to sexual harassment and one of the ways in which sexual harassment can act as a barrier to the full participation of young women in the legal profession.

### **Making a complaint**

Approximately 7 in 10 of survey respondents who had been sexually harassed in the workplace or witnessed sexual harassment in the workplace never made a complaint (70.11%), with 8.05% of respondents reporting they always made a complaint and 21.84% of respondents reporting they made a complaint on some occasions.

The overwhelming majority of complaints were made to a supervisor or human resources (84.46%). Almost a quarter of respondents who answered this question complained to the perpetrator (23.08%), while only 11.54% made a complaint to an external body such as the Australian Human Rights Commission, Fair Work Commission or Anti-Discrimination Board of NSW. Given that the overwhelming majority of complaints were



made to a supervisor or human resources, it is critical that such personnel have adequate training, and that organisations have clear and accessible procedures for the making and resolution of complaints.

### **Reasons for not making a complaint**

The reasons for not making a complaint included:

- Almost half of respondents said they did not make a complaint of sexual harassment as they did not think the complaint would change anything (47.46%);
- Almost half of respondents said they did not make a complaint of sexual harassment for fear of retaliation (45.76%);
- Over a third of respondents reported that their workplace did not have a sexual harassment complaint process in place (33.9%); and
- The respondent did not know how to make a complaint (11.86%).

One survey respondent did not make a complaint because:

*“It was embarrassing, and I did not want the stigma of being a complainer or too sensitive. I thought that complaining would be considered a 'weak female' response”.*

Another survey respondent did not want to be identified as a victim:

*“I did not want to be a victim. I thought that if I just put my head down and worked hard then I would be known for my skill. I wanted to ignore what had happened and get on with my career. I felt a level of shame”.*

The power imbalance faced by young lawyers experiencing sexual harassment in the workplace was raised as a reason for not complaining about sexual harassment. One survey respondent stated:

*“I was worried of what people would think of me/if they would believe me. He was senior and I was junior”.*

Another survey respondent stated:

*“It is impossible to make a complaint against a partner in a law firm for whom you work. HR has no power as the partners are the owners of the company. I feared retaliation”.*

### **Outcomes of complaints**

Where a complaint of sexual harassment was made, the most common outcome was the complainant leaving the workplace (38.46%). Other outcomes of complaints included:

- The sexual harassment stopped (23.08%);

- The perpetrator was disciplined (23.08%);
- The sexual harassment continued (15.38%);
- The complainant experienced retaliation for making a complaint, such as being demoted, dismissed or bullied (15.38%);
- The perpetrator and/or the complainant's employer apologised to the complainant (15.38%);
- The sexual harassment got less frequent or less intense, but did not stop (11.54%);
- The complainant left the team, but remained in the workplace (7.69%); and
- The complainant reached a financial settlement (7.69%).

### **Eliminating or reducing sexual harassment in the workplace**

Survey respondents expressed support for both proactive measures (addressing sexual harassment before it occurs) and reactive measures (responding effectively to sexual harassment that has already occurred). Regarding proactive measures, survey respondents expressed support for education and training. Some survey respondents noted that there could be challenges in distinguishing sexual harassment from other conduct, suggesting a need for education as to what constitutes sexual harassment and what does not. Survey respondents further identified that there is a need for cultural change in legal workplaces. Regarding reactive measures, survey respondents expressed support for strong disciplinary measures against perpetrators of sexual harassment. Such measures can have a deterrent effect, reducing future incidents of sexual harassment.

## **Term of Reference 4: The Drivers of Workplace Sexual Harassment, Including Whether Some Individuals Are More Likely to Experience Sexual Harassment Due to Particular Characteristics**

### **Power imbalances are a driver of workplace sexual harassment**

A significant driver of workplace sexual harassment is the power imbalance that exists between the diverse groups of people who experience sexual harassment and the perpetrators of that harassment. People are more likely to experience workplace sexual harassment if they have characteristics associated with social vulnerability.

This is supported by the Commission's most recent survey on sexual harassment in Australian workplaces. The Commission found that people with various differentiating characteristics consistently reported experiencing sexual harassment at a rate significantly higher than individuals who did not have those same characteristics:

- 23% of women compared to 16% of men have experienced some form of sexual harassment in the workplace over the past twelve months;<sup>27</sup>
- People aged between 18–29 or 30–39 years (45% and 37% respectively) were more likely than those in other age groups to have been sexually harassed in the workplace in the past five years;<sup>28</sup>
- People who identified as lesbian, gay, bisexual, transgender, intersex and queer (“**LGBTIQ**”) were more likely to experience sexual harassment (52%) than those who identified as straight or heterosexual (31%);<sup>29</sup>
- People with disability were more likely than those without disability to have been sexual harassed in the workplace (44% and 32% respectively) in the past five years;<sup>30</sup>
- 53% of people who identified as Aboriginal or Torres Strait Islander had experienced sexual harassment in the workplace compared to 32% of those who did not identify as Aboriginal or Torres Strait Islander in the past five years;<sup>31</sup> and
- People from lower-income households were more likely than people from higher-income households to have experienced workplace sexual harassment in the past five years (39% and 30% respectively).<sup>32</sup>

The United Kingdom House of Commons Women and Equalities Committee (“**WEC**”) reports that “high levels of sexual harassment occur in low pay sectors such as retail, hospitality and services, and among workers in temporary or casual work”.<sup>33</sup> Sexual harassment appears to be particularly prevalent in the hospitality industry, with a recent Australian survey finding that 89% of hospitality workers had been sexually harassed at work.<sup>34</sup>

### **Insecure work is a driver of workplace sexual harassment**

The relationship between insecure work and workplace sexual harassment merits particular emphasis. The WEC reports that people in insecure work are more likely to experience sexual harassment.<sup>35</sup> Discrimination in the workplace was a persistent concern of committees of the Australian Senate and the Australian Capital

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<sup>27</sup> *Everyone’s Business*, 25.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, 28.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> United Kingdom House of Commons Women and Equalities Committee, *Sexual Harassment in the Workplace* (18 July 2018) [84] (“WEC Report”).

<sup>34</sup> United Voice, “Survey Exposes Sexual Harassment Crisis in Hospitality Industry” (28 April 2017) <[https://www.unitedvoicevic.org.au/hospo\\_sexual\\_harassment\\_survey](https://www.unitedvoicevic.org.au/hospo_sexual_harassment_survey)>.

<sup>35</sup> WEC Report [11].

Territory Legislative Assembly in their 2018 reports on the future of work and insecure work respectively.<sup>36</sup> Insecure work has a compounding effect on vulnerability to sexual harassment, as people in insecure work are more likely to be young and/or female<sup>37</sup> - two groups more likely than others to experience sexual harassment in the workplace.

The rise of insecure work in Australia is therefore particularly concerning. May 2018 marked the first time in recorded statistics that less than half of employed Australians were in standard employment, defined as “a permanent full-time paid job with leave entitlements”.<sup>38</sup> The Centre for Future Work notes that there has been a significant decline in overall job security since 2012, bearing most harshly upon young Australians despite high rates of tertiary education.<sup>39</sup>

In September 2018, the Senate Select Committee on the Future of Work and Workers (“**Select Committee**”) noted the rapid rise of precarious and insecure work, especially amongst younger Australians.<sup>40</sup> The Select Committee observed that “workers in non-standard jobs enjoy fewer rights and protections” than other workers.<sup>41</sup> This reduces the recourse available to people in insecure work who experience sexual harassment.

The HRC has received information from members who have provided legal assistance to people in insecure work, as well as members who have personally experienced insecure work. 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.

### **Non-sexual factors play a significant role in workplace sexual harassment**

Although sexual harassment is necessarily of a sexual nature, the above information illustrates that other factors play a significant role in how and why sexual harassment occurs. It involves behaviour whereby one

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<sup>36</sup> Australian Senate Select Committee on the Future of Work and Workers, *Hope Is Not a Strategy – Our Shared Responsibility for the Future of Work and Workers* (September 2018) [2.19], [2.30]–[2.32], [2.56] and [2.91] (“*Future of Work*”); Australian Capital Territory Legislative Assembly Standing Committee on Education, Employment and Youth Affairs, *Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT* (May 2018) [6.3].

<sup>37</sup> *Future of Work*, 65.

<sup>38</sup> The Australian Institute Centre for Future Work, , *The Dimensions of Insecure Work: A Factbook*(29 May 2018) 1 <[https://d3n8a8pro7vhmx.cloudfront.net/theausinstitute/pages/2807/attachments/original/1528337971/Insecure\\_Work\\_Factbook.pdf?1528337971](https://d3n8a8pro7vhmx.cloudfront.net/theausinstitute/pages/2807/attachments/original/1528337971/Insecure_Work_Factbook.pdf?1528337971)>.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Future of Work* [4.31]–[4.33].

<sup>41</sup> *Ibid* [4.36].

party fails or refuses to respect and recognise the dignity of the other, and does so through sexualised conduct. Academic commentators have noted that sexual harassment is not simply or even necessarily concerned with sexual desire, sexual harassment reflects discriminatory and often gendered attitudes towards certain individuals and groups.<sup>42</sup> By way of illustration, the policing of gender roles in certain industries is evidenced by the fact that women are more likely to experience sexual harassment in traditionally male-dominated industries and vice versa: for example, in the past five years 74% of women experienced sexual harassment in the mining industry compared to 32% of men; while 46% of men experienced sexual harassment in the education sector, compared to 35% of women.<sup>43</sup>

As the information above has demonstrated, the social and economic vulnerability of certain individuals increases the risk they will be a victim of sexual harassment. Any response to the issue and existence of sexual harassment will need to address the social disadvantage and discrimination experienced by these groups more broadly.

## **Term of Reference 5: The Current Legal Framework with Respect to Sexual Harassment**

International law and domestic Australian law both prohibit sexual harassment in the workplace.

### **The International Legal Framework**

Sexual harassment in the workplace violates internationally recognised human rights, including the right to freedom from discrimination, the right to security of person, the right to work and the right to just and favourable conditions of work. Such rights are recognised by the following treaties, to which Australia is a party and by which Australia has therefore agreed to be bound:

- *Convention on the Elimination of All Forms of Discrimination Against Women* (“**CEDAW**”);
- *International Covenant on Civil and Political Rights* (“**ICCPR**”);
- *International Covenant on Economic, Social and Cultural Rights* (“**ICESCR**”); and
- *Discrimination (Employment and Occupation) Convention* (“**DEOC**”).

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<sup>42</sup> See for e.g. Brian Soucek, ‘Queering Sexual Harassment Law’ (2018) 128 *The Yale Law Journal Forum* 67, 68 and 73-76.

<sup>43</sup> *Everyone’s Business*, 58.

### ***Convention on the Elimination of All Forms of Discrimination Against Women***

Article 11 of *CEDAW* requires states to “take all appropriate measures to eliminate discrimination against women in the field of employment”.

The *CEDAW* Committee has the power to make general recommendations under *CEDAW*.<sup>44</sup> In *General Recommendation No. 19*, the *CEDAW* Committee notes that “discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”.<sup>45</sup> It recognises that sexual harassment in the workplace is a form of gender-specific violence.<sup>46</sup>

The *Beijing Declaration and Platform for Action*, which has been adopted by 189 countries including Australia, reiterates that sexual harassment at work is a form of violence against women.<sup>47</sup> It calls upon governments, employers, trade unions, community and youth organisations and non-government organisations to “Develop programmes and procedures to eliminate sexual harassment and other forms of violence against women in all educational institutions, workplaces and elsewhere”.<sup>48</sup>

### ***International Covenant on Civil and Political Rights***

Article 9(1) of the *ICCPR* recognises that “Everyone has the right to liberty and security of person”.

The United Nations Human Rights Committee (“**the UNHRC**”) monitors the implementation of the *ICCPR*. It has the power to issue “General Comments”,<sup>49</sup> which the International Court of Justice considers to be of “great weight” as interpretive guidance.<sup>50</sup>

In *General Comment No. 35*, the UNHRC states that “The right to security of person protects individuals against intentional infliction of bodily or mental injury”. It requires States “to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors”. It also requires States to “respond appropriately to patterns of violence against categories of victims such as ... violence against women ... violence against persons on the basis of their sexual orientation or gender identity, and violence against persons with disabilities”.<sup>51</sup>

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<sup>44</sup> *CEDAW* art 21.

<sup>45</sup> *CEDAW* Committee, *General Recommendation No. 19* [6].

<sup>46</sup> *Ibid* [17].

<sup>47</sup> *Beijing Declaration and Platform for Action* [113(b)].

<sup>48</sup> *Ibid* [126].

<sup>49</sup> *ICCPR* art 40(4).

<sup>50</sup> *Diallo (Republic of Guinea v Democratic Republic of the Congo) (Judgment)* [2010] ICJ Rep 639, 664 [66].

<sup>51</sup> UNHRC, *General Comment No. 35* (16 December 2014) [9].

The Commission has previously recognised that sexual harassment violates the human right to security of person.<sup>52</sup> The *ICCPR* therefore requires government action to protect individuals from sexual harassment and to respond appropriately to the disproportionate impact of sexual harassment upon women.

### ***International Covenant on Economic, Social and Cultural Rights***

Article 6(1) of the *ICESCR* recognises the right to work, requiring governments to “take appropriate steps to safeguard this right”. Article 7 of the *ICESCR* recognises “the right of everyone to the enjoyment of just and favourable conditions of work”, including “safe and healthy working conditions”. The HRC submits that a victim of sexual harassment is denied the right to safe and healthy working conditions. This, in turn, acts as a barrier to enjoyment of the right to work.

The United Nations Committee on Economic, Social and Cultural Rights (“the CESCR”) monitors the implementation of the *ICESCR*. As with the UNHRC with respect to the *ICCPR*, the CESCR has the power to make “General Comments” regarding the *ICESCR*.<sup>53</sup>

In *General Comment No. 18*, the CESCR emphasises the equal right of men and women to enjoy the right to work. It “underlines the need for a comprehensive system of protection to combat gender discrimination and to ensure equal opportunities and treatment between men and women in relation to the right to work”.<sup>54</sup> We return to the impact of sexual harassment as a form of gender discrimination. As sexual harassment disproportionately affects women, it limits the opportunities of women in Australian workplaces. Sexual harassment therefore violates the equal right of women to enjoy the right to work.

In *General Comment No. 23*, the CESCR notes that the right to just and favourable conditions of work includes “freedom from violence and harassment, including sexual harassment”. It recommends the application of a national policy to both public and private sector workplaces, providing significant detail as to the minimum that such a national policy should include (see **Appendix B**). In light of NSW Young Lawyers’ firm commitment to the principle of access to justice,<sup>55</sup> we emphasise CESCR’s recommendation that a national policy include “access to justice for victims, including through free legal aid”.<sup>56</sup>

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<sup>52</sup> *Change the Course 27*.

<sup>53</sup> *ICESCR* art 21; Economic and Social Council Resolution 1985/1 (28 May 1985).

<sup>54</sup> CESCR, *General Comment No. 18* (24 November 2005) [13].

<sup>55</sup> NSW Young Lawyers, “Access to Justice” (November 2016) <<https://www.lawsociety.com.au/sites/default/files/2018-04/YL%20Access%20to%20Justice.pdf>>.

<sup>56</sup> CESCR, *General Comment No. 23* (27 April 2016) [48].

### ***Discrimination (Employment and Occupation) Convention***

The *DEOC* has been recognised by the United Nations International Labour Organization (“ILO”) as one of eight conventions “fundamental to the rights of human beings at work”.<sup>57</sup>

Article 2 of the *DEOC* requires governments “to declare and pursue a national policy designed to promote [...] equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”. It is therefore closely linked to equal right of women to enjoy the right to work under article 6 of the *ICESCR* and to the need for a national policy under article 7 of the *ICESCR*.

## **The Domestic Australian Legal Framework**

Within a domestic Australian context, anti-discrimination law and workplace law both prohibit sexual harassment in the workplace.

### **Anti-discrimination law**

At the Commonwealth level, s 28B of the *SDA* prohibits sexual harassment in the workplace.<sup>58</sup> All Australian States and Territories have similar provisions, although the precise terms vary.<sup>59</sup> In NSW, the relevant provision is s 22B of the *ADA*.

Section 28A(1) of the *SDA* defines sexual harassment as “an unwelcome sexual advance”, “an unwelcome request for sexual favours” or “other unwelcome conduct of a sexual nature”. The advance, request or conduct must take place “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”.<sup>60</sup> Sexual harassment may include making sexually suggestive comments or sending sexually suggestive images.

The Commission oversees the implementation of the *SDA* and the *CEDAW*.<sup>61</sup> It has the power to receive complaints of “unlawful discrimination”,<sup>62</sup> which includes sexual harassment.<sup>63</sup> In certain circumstances, the

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<sup>57</sup> International Labour Office, *The International Labour Organisation’s Fundamental Conventions* (2003) 7 <[https://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_095895.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_095895.pdf)>.

<sup>58</sup> *Sex Discrimination Act 1984* (Cth) s 28B.

<sup>59</sup> *Anti-Discrimination Act 1977* (NSW) s 22B; *Equal Opportunity Act 2010* (Vic) s 93; *Anti-Discrimination Act 1991* (Qld) s 118; *Equal Opportunity Act 1984* (SA) s 87; *Equal Opportunity Act 1984* (WA) s 24; *Anti-Discrimination Act 1998* (Tas) s 17; *Discrimination Act 1991* (ACT) s 59; *Anti-Discrimination Act 1996* (NT) s 22.

<sup>60</sup> *Sex Discrimination Act 1984* (Cth) s 28A(1).

<sup>61</sup> *Sex Discrimination Act 1984* (Cth) s 48(1).



President of the Commission must inquire into and attempt to conciliate such complaints.<sup>64</sup> The Commission also has the power to intervene in “proceedings that involve [...] discrimination involving sexual harassment” if the Commission considers it appropriate to do so and has leave of the court.<sup>65</sup>

## Workplace law

The *FWA* creates a national workplace relations system covering most Australian workplaces.<sup>66</sup> Although the *FWA* does not use the words “sexual harassment”, it provides some protection against sexual harassment in the workplace via its “general protections” regime.<sup>67</sup>

The concept of “adverse action” is at the heart of the general protections regime, which prohibits certain persons from taking adverse action against certain persons in certain circumstances. For example, s 340(1) of the *FWA* provides, amongst other things, that a “person must not take adverse action against another person because the other person [...] has or has not exercised a workplace right”.

A detailed definition of “adverse action” is provided in a table at s 342(1) of the *FWA* (see **Appendix C**). According to the table, it is adverse action if certain persons discriminate against certain persons – for example, if an employer “discriminates between [an] employee and other employees of the employer”. The *FWA* does not define “discrimination” for the purposes of the general protections regime, although it does provide a list of statutes that it deems to be “anti-discrimination law”.<sup>68</sup> This list includes the *SDA* and its State and Territory equivalents. Given that the *SDA* recognises and prohibits “discrimination involving sexual harassment”,<sup>69</sup> the definition of “adverse action” would include sexual harassment by certain persons against certain persons in certain circumstances.

Section 351 of the *FWA* specifically prohibits an employer from taking certain discriminatory forms of adverse action for certain discriminatory reasons. It applies only to action that is “unlawful under any anti-discrimination law”.<sup>70</sup>

As demonstrated above, the *FWA*'s protection against sexual harassment depends on a highly complex scheme. It involves the interaction of multiple statutes, each of which are complex themselves. This

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<sup>62</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46P.

<sup>63</sup> *Australian Human Rights Commission Act 1986* (Cth) s 1.

<sup>64</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46PF(1).

<sup>65</sup> *Sex Discrimination Act 1984* (Cth) s 48(1)(gb).

<sup>66</sup> Fair Work Ombudsman, “The Fair Work System” <<https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system>>.

<sup>67</sup> *Fair Work Act 2009* (Cth) ch 3 pt 3-1.

<sup>68</sup> *Fair Work Act 2009* (Cth) s 351(3).

<sup>69</sup> *Sex Discrimination Act 1984* (Cth) ss 3(c), 28B.

<sup>70</sup> *Fair Work Act 2009* (Cth) ss 351(1)–(2).

contributes the *FWA* 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. For example, it is not clear on the face of the *FWA* whether it would protect an employee against an employer who sexually harasses employees of all genders in an indiscriminate manner. We provide recommendations for improvement below.

## **Term of Reference 7: Recommendations to Address Sexual Harassment in Australian Workplaces**

### **Recommendation 1: Employers should be required to take all reasonable steps to prevent sexual harassment in their workplace**

The framing of sexual harassment as an individual issue that requires an individual complaint to prompt employer action means that employers have traditionally not been held to account for failing to introduce transparent complaint policies and procedures, sexual harassment training and cultural change to prevent sexual harassment from occurring in their workplaces.

Currently, employers can only be held accountable for failing to take all reasonable steps to prevent sexual harassment through the vicarious liability provisions of the *SDA* which require an individual complaint of sexual harassment to be made – this means the test only becomes relevant where an employer is defending a claim of sexual harassment. Under the *ADA* the vicarious liability provisions are even narrower, with employers only vicariously liable if they expressly or impliedly authorise the act of sexual harassment. If no complaint of sexual harassment is made, employers who fail to take steps such as implementing workplace policies and conducting training cannot be held accountable for failure to take all reasonable steps to prevent sexual harassment in their workplace. There is currently no statutory positive duty in discrimination law on employers to take all reasonable steps to prevent sexual harassment of or by their employees.

The *SDA* and *ADA* should be amended to impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment in their workplace.

### **Recommendation 2: The time limit in which to make a sexual harassment complaint to the Australian Human Rights Commission should be restored to at least 12 months**

Section 46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth) ("**AHRC Act**") enables the President of the Commission to terminate a complaint on the ground that "the complaint was lodged more than 6 months after the alleged acts, omissions or practices took place". This effectively acts as a 6-month

time limit, as it means that a complaint must be made within 6 months of the alleged sexual harassment for the complainant to have confidence that the complaint will not be terminated.

The 6-month time limit represents a recent tightening of the time limit in which to make a sexual harassment complaint. Before 13 April 2017, the time limit was 12 months.<sup>71</sup> A 12-month time limit recognises that there are legitimate reasons that a person may not make a sexual harassment complaint immediately, including that the person does not know how to make a complaint or fears retaliation. It is a modest time limit, being significantly shorter than the 6-year time limit in which to initiate legal action based on contract or tort.<sup>72</sup>

It is worth noting that, even with a 12-month time limit, the President of the Commission would retain a broad discretion to terminate complaints.<sup>73</sup> The President must terminate a complaint in certain circumstances, including “if the President is satisfied that the complaint is trivial, vexatious, misconceived or lacking in substance”.<sup>74</sup>

The HRC submits that the President’s other powers to terminate a complaint provide sufficient protection against inappropriate complaints. The HRC recommends that s 46PH(1)(b) of the *AHRC Act* be amended to restore the time limit in which to make a sexual harassment complaint to the Commission to at least 12 months.

### **Recommendation 3: A complainant of sexual harassment should generally not pay the respondent’s costs**

Currently, the Federal Circuit Court and Federal Court are costs jurisdictions for complaints of sexual harassment made under the *SDA*. The risk that a victim of sexual harassment will be ordered to pay the respondent’s legal costs is a significant disincentive to bringing a sexual harassment claim to court. As the Women and Equalities Committee summarised, “It is expensive to secure legal representation, but it is very difficult to win a [sexual harassment] claim without it.”<sup>75</sup> In other words, the cost barriers to bringing a sexual harassment claim are often significant for a victim, even without an unfavourable costs order. The cost barriers are exacerbated if a victim must be prepared to pay not only their own legal costs, but also the respondent’s legal costs if they do not succeed.

Although there are exceptions, the Women and Equalities Committee identifies that there is typically an “inequality of arms”, whereby an employer is able to spend more on defending a claim than an employee is

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<sup>71</sup> *Human Rights Legislation Amendment Act 2017* (Cth) ss 2, 39.

<sup>72</sup> *Limitation of Actions Act 2008* (Cth).

<sup>73</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1).

<sup>74</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B)(a).

<sup>75</sup> WEC Report, 29 [82].

able to spend on bringing one.<sup>76</sup> This produces a situation in which employers are both more likely to succeed than if legal representation were equal and also likely to face a smaller costs order than employees if they are unsuccessful. The threat of a costs order is sometimes used to discourage sexual harassment claims or to pressure claimants to settle.<sup>77</sup>

It would enhance access to justice for victims of sexual harassment if complainants were generally not required to pay the respondent's costs. It is worth noting, in relation to court proceedings arising under the *FWA* for workplace law, that a party can only be ordered to pay costs if an exception applies.<sup>78</sup> These exceptions are, in general terms, that:

- The party instituted the proceedings vexatiously or without reasonable cause;
- The party caused the other party to incur costs by an unreasonable act or omission; or
- The party they unreasonably refused to participate in a matter arising from the same facts before the Fair Work Commission.<sup>79</sup>

The HRC recommends that Part IIB Division 2 of the *AHRC Act* be amended to provide that applicants and respondents in sexual harassment matters must bear their own costs unless an exception applies. The exceptions under Part IIB Division 2 of the *AHRC Act* should be modelled on the above exceptions under s 570(2) of the *FWA*. Such exceptions strike a reasonable balance between the need to reduce cost barriers to bringing sexual harassment claims and the need to protect against costs incurred by unreasonable conduct.

#### **Recommendation 4: The Australian Human Rights Commission should be empowered to investigate sexual harassment on their own motion**

The current anti-discrimination law system relies on individuals to bring complaints. Many of these complaints are resolved through confidential conciliation or mediation conferences, which limits the ability of the system to address systemic sexual harassment or repeat offenders.

To address systemic discrimination, the Commission and the Sex Discrimination Commissioner should be given the power to conduct own-motion investigations of conduct that appears to be unlawful sexual harassment under the *SDA*. The Commission should also be given the power to commence court proceedings without receiving an individual complaint. The Commission should be sufficiently resourced to perform this role.

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<sup>76</sup> *Ibid* [80].

<sup>77</sup> *Ibid* 29 [81].

<sup>78</sup> *Fair Work Act 2009* (Cth) s 570(1).

<sup>79</sup> *Fair Work Act 2009* (Cth) s 570(2).

This would assist in addressing systemic sexual harassment experienced by workers who may not be in a position to bring a complaint due to their personal circumstances, including fear of victimisation such as dismissal and further harassment. Such action could also act as an incentive for employers to engage in a higher level of action to address sexual harassment in workplaces where it is endemic.

### **Recommendation 5: The definition of “adverse action” in the Fair Work Act 2009 (Cth) should be amended to explicitly include sexual harassment**

The HRC refers to the definition of “adverse action” in s 342(1) of the *FWA* (see **Appendix C**) and recommends that items 1–4 be amended to explicitly include sexual harassment.

This amendment would broaden, strengthen and clarify the *FWA*'s protection against sexual harassment in the workplace. It would broaden the protection by bringing sexual harassment within the definition of “adverse action”. It would strengthen the protection by providing employees, prospective employees and independent contractors with a clear path to challenge sexual harassment via the *FWA*'s general protections regime. It would clarify the protection by stating that sexual harassment is a form of adverse action in the *FWA*, rather than requiring a complex interpretive exercise involving other statutes as is currently the case. This would further send a clear message that sexual harassment in the workplace is unacceptable.

### **Recommendation 6: The *Sex Discrimination Act* and the *Anti-Discrimination Act* should be amended to introduce a shifting onus of proof**

The balance of power in the employee-employer relationship is typically unequal. This inequality should be addressed by introducing a shifting onus of proof to ensure a more equitable resolution of workplace disputes.

Under the *SDA* and the *ADA*, the onus of proof in sexual harassment matters rests with the complainant. This places a significant evidentiary burden on an individual complainant, who typically has access to fewer resources than their employer with which to conduct a claim. It can be impossible for complainants to satisfy this burden, even in clear cases of sexual harassment and subsequent victimisation, as the evidence is often held by or accessible only to the employer respondent. A shifting onus of proof, similar to that of s361 of the *FWA* would assist in addressing this power imbalance. For example, this would involve the complainant establishing a prima facie case of the primary elements of sexual harassment and victimisation. The onus would then shift to the respondent to show that the conduct complained of did not occur or was not within the definition of sexual harassment or victimisation. If the respondent was unable to discharge this onus, the case would be made out.

## **Recommendation 7: The Commonwealth Government should restore funding to the Australian Human Rights Commission**

The Commonwealth Government has cut \$5 million from the Commission since 2014,<sup>80</sup> with further cuts of \$400,000 to take place over the next four years.<sup>81</sup> The United Nations Special Rapporteur on the Situation of Human Rights Defenders (“**the Special Rapporteur**”) noted such cuts in criticising “attacks” on the Commission and other attempts “to intimidate and undermine the Australian Human Rights Commission.”<sup>82</sup>

The HRC shares the Special Rapporteur’s concerns. Adequate and secure funding is vital to the Commission’s independence, which is in turn vital to its role in protecting human rights within Australia. This role may require the Commission to criticise policies of the government-of-the-day. The Commission should not be made to fear funding cuts for performing its duties.

Inadequate funding impacts upon the Commission’s functions in investigating and conciliating sexual harassment complaints. The HRC has received reports of sexual harassment complaints up to 6 months to reach a conciliation at the Commission due to the impact of resource constraints at the Commission. Such significant delays are stressful and time-consuming for both complainants and respondents, and are particularly distressing for complainants who may fear and/or experience victimisation in the workplace after lodging a complaint with the Commission. Moreover, the difficulty of making a sexual harassment complaint can act as a disincentive against doing so.

The HRC recommends that the Commonwealth government reverse the planned funding cuts of \$400,000 to the Commission and restore the \$5 million that has been cut from the Commission since 2014.

## **Recommendation 8: Australian governments should support access to justice for victims of sexual harassment by increasing funding to the legal assistance sector**

As noted above, a national policy on sexual harassment should include “access to justice for victims, including through free legal aid”. The government-funded legal assistance sector in Australia consists of legal aid commissions (“**LACs**”), community legal centres (“**CLCs**”), Aboriginal and Torres Strait Islander legal services (“**ATSILS**”) and family violence prevention legal services (“**FVPLS**”).<sup>83</sup>

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<sup>80</sup> Commonwealth Government, *Mid-Year Economic and Fiscal Outlook: Appendix A – Policy Decisions Taken since the 2014-2015 Budget: Expense Measures* (December 2014) 120.

<sup>81</sup> Commonwealth Government, *Budget 2018-19 - Budget Paper No. 2* (8 May 2018) 48, 75.

<sup>82</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Australia* (28 February 2018) [93]-[95], [107].

<sup>83</sup> Productivity Commission, *Access to Justice Arrangements*, vol 2 (5 September 2014) 665.

We commend the NSW Government for supporting access to justice by implementing key recommendations of the *Review of Community Legal Centre Services* (“**Cameron Review**”).<sup>84</sup> On 1 August 2018, the NSW Government committed to providing:

- An additional \$2.2 million each year from 2019-20 to expand the reach of CLCs and address critical service gaps; and
- An additional \$12.6 million over four years to implement recommendations of the Cameron Review.

The NSW Government also committed an additional \$10 million to Legal Aid NSW.<sup>85</sup>

We further commend the NSW Government for supporting the Cameron Review’s recommendation that the NSW Government should “continue to provide funding to CLCs that engage in strategic advocacy that seek to identify and remedy systemic issues”.<sup>86</sup> This echoes the Productivity Commission’s view that funding legal aid commissions and CLCs to engage in strategic advocacy enhances access to justice. The Productivity Commission considered that such activities are economically efficient, as they can free up the resources of all parties involved by addressing underlying problems.<sup>87</sup>

As sexual harassment is a systemic issue that disproportionately affects disadvantaged people, it is an area in which the expertise of LACs and CLCs is of particularly great value.

It is also worth noting the vital work performed by CLCs in regional, rural and remote (“**RRR**”) Australia. The limited availability of specialist services in RRR Australia requires great versatility of local CLCs. Specialist and RRR services are strong contenders for increased funding to provide access to justice for victims of sexual harassment.

Unfortunately, the NSW Government’s commitment to improving access to justice has not been matched at the Commonwealth level. The Commonwealth Government is yet to implement the Productivity Commission’s recommendation that it provide an additional \$120 million each year to the legal assistance sector.<sup>88</sup> Moreover, the Commonwealth Government prohibits LACs and CLCs from using Commonwealth funding “to lobby governments or to engage in public campaigns”.<sup>89</sup> The Special Rapporteur has

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<sup>84</sup> Alan Cameron, *Review of Community Legal Centre Services* (December 2017)

<<https://www.justice.nsw.gov.au/Documents/publications-research/Final-Report-CLC-Services.pdf>>.

<sup>85</sup> NSW Government, “NSW Budget 2018: Funding Support for Courts and Legal Centres” (19 June 2018)

<<https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/funding-support-for-courts-and-legal-centres.aspx>>

<sup>86</sup> NSW Government, *Cameron Review of Community Legal Services: NSW Government Response* (2018)

<<https://www.justice.nsw.gov.au/Documents/publications-research/govt-response-cameron-review-clc-services.pdf>>

<sup>87</sup> Productivity Commission, *Access to Justice Arrangements*, vol 2 (5 September 2014) 708-9.

<sup>88</sup> *Ibid* 738-739.

<sup>89</sup> *National Partnership Agreement on Legal Assistance Services 2015-20* cl B7.

recommended that Australian governments end such prohibitions,<sup>90</sup> noting that “advocacy” is inseparable from the “frontline services” that non-government organisations provide.<sup>91</sup>

The HRC recommends that Australian governments support access to justice to victims of sexual harassment by increasing funding to the legal assistance sector. In particular, we recommend that the Commonwealth Government:

- Implement the Productivity Commission’s recommendation to provide an additional \$120 million each year to the legal assistance sector; and
- Implement the Special Rapporteur’s recommendation to end the prohibition on LACs and CLCs using Commonwealth funding to lobby governments or engage in public campaigns.

### **Recommendation 9: Australian governments should foster conditions of work in which victims of sexual harassment are empowered to assert their rights by developing strategies to address insecure work**

Given that people in insecure work are more likely to experience workplace sexual harassment, strategies to address insecure work have significant potential to reduce the prevalence of sexual harassment in the workplace. The HRC submits that, as part of a holistic strategy to combat sexual harassment in the workplace, Australian governments should develop strategies to increase the availability of secure work and to ensure that people employed in insecure work enjoy equal protection to those employed in secure work. Consistent with the principle that the government should be the model employer,<sup>92</sup> governments should address the prevalence of insecure work within government agencies, government-funded organisations and businesses with which the government contracts. In this way, Australian governments can use their unique position in the Australian labour market to foster conditions of work in which sexual harassment is less likely to occur and more likely to be addressed.

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<sup>90</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Australia* (28 February 2018) [107].

<sup>91</sup> *Ibid* [53]-[54].

<sup>92</sup> See Australian Government Solicitor, “Implied Terms of Mutual Trust and Confidence and Good Faith in Employment Contracts: What do They Mean for Commonwealth Agencies?”, *Express Law* (11 September 2014) <<https://www.ag.gov.au/publications/express-law/el223.html>>; Keith Ewing, “The Privatisation of the Civil Service” in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty-First Century* (2007, ANU E Press) 281, 290.



## Concluding Comments

NSW Young Lawyers and the Human Rights Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

### Contact:



**Jennifer Windsor**  
President  
NSW Young Lawyers



### Alternate Contact:



**Maria Nawaz**  
Chair  
NSW Young Lawyers Human Rights Committee



## Appendix A- NSW Young Lawyers Survey on Sexual Harassment in the Legal Profession

### Question 1

This survey will be used for the purpose of preparing a NSW Young Lawyers submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces. This survey takes an estimated 6 minutes to complete. This survey deals with a sensitive topic and may cause distress to some participants. Your participation in this survey is voluntary. You may choose not to participate in this survey or to withdraw from participating at any time. If you decide not to participate or if you withdraw from participating at any time, you will not suffer any adverse consequence. We will do our best to keep all survey responses confidential, but aggregated data and anonymised responses may be included in the final submission. Please do not include information that may identify you or any other individual. If you have experienced sexual assault or sexual harassment and you would like to speak to someone for support or information, 1800RESPECT (phone: 1800 737 732) can provide counselling 24 hours a day, 7 days a week. The Australian Human Rights Commission's National Information Service can assist individuals seeking information on discrimination, human rights and sexual harassment. The Commission's National Information Service can be contacted at [infoservice@humanrights.gov.au](mailto:infoservice@humanrights.gov.au) or 1300 656 419. If you have any questions or concerns about this survey, you can contact Maria Nawaz, Chair of the NSW Young Lawyers Human Rights Committee (email: [maria.nawaz@younglawyers.org.au](mailto:maria.nawaz@younglawyers.org.au)) or Sean Bowes, Submissions Coordinator of the NSW Young Lawyers Human Rights Committee (email: [sean.bowes@younglawyers.org.au](mailto:sean.bowes@younglawyers.org.au)).

#### Answer choices

- I have read the above information, I understand it, and I consent to participating in this survey
- I do not consent to participating in this survey

### Question 2

Sexual harassment refers to: An unwelcome sexual advance; An unwelcome request for sexual favours; or Other unwelcome conduct of a sexual nature; that is offensive, humiliating or intimidating. For example, sexual harassment may include making sexually suggestive comments or sending sexually explicit images. Have you ever been sexually harassed in the workplace?

#### Answer choices

- Yes
- No
- Don't know

### Question 3

Have you ever witnessed sexual harassment in the workplace?

#### Answer choices

- Yes
- No
- Don't know

### Question 4

What form did the sexual harassment take? Please tick all that apply.

#### Answer choices

- An unwelcome sexual advance
- An unwelcome request for sexual favours

- Other unwelcome conduct of a sexual nature (please specify)

#### **Question 5**

Did you make a complaint?

Answer choices

- Always
- On some occasions
- Never

#### **Question 6**

Who did you make the complaint to? Please tick all that apply.

Answer choices

- The perpetrator
- A supervisor or human resources
- An external body, such as the Australian Human Rights Commission, the Fair Work Commission or the Anti-Discrimination Board NSW
- Other (please specify)

#### **Question 7**

What was the outcome of your complaint? Please tick all that apply.

Answer choices

- The sexual harassment stopped
- The sexual harassment got less frequent or less intense, but did not stop
- The sexual harassment continued
- The sexual harassment got worse
- I experienced retaliation for making a complaint (for example, I was demoted, dismissed from my job or bullied)
- I left the team, but remained in the workplace
- I left the workplace
- The perpetrator was disciplined
- The perpetrator and/or my employer apologised to me
- I reached a financial settlement
- Other (please specify)

#### **Question 8**

Why did you not make a complaint? Please tick all that apply.

Answer choices

- I feared retaliation (for example, I feared I would be demoted, dismissed from my job or bullied)
- I did not think it would change anything
- I did not know how to make a complaint
- My workplace did not have a complaint process
- The complaints process was too difficult or confusing
- Other (please specify)

#### **Question 9**

How do you think sexual harassment in the workplace can be eliminated or reduced?

Answer choices

Text box.

**Question 10**

Which of the following best describes your gender?

Answer choices:

- Female
- Male
- Prefer not to say
- Other (please specify)

**Question 11**

Which of the following best describes your ethnicity?

Answer choices:

- Asian
- Black or African
- Indigenous Australian
- Latino
- Middle Eastern
- White
- Prefer not to say
- Other (please specify)

**Question 12**

Which of the following best describes your sexuality?

Answer choices:

- Straight
- Bisexual or pansexual
- Gay or lesbian
- Queer
- Prefer not to say
- Other (please specify)

**Question 13**

Do you identify as a person with a disability?

Answer choices

- Yes
- No
- Prefer not to say
- Other (please specify)

**Question 14**

Thank you for completing this survey. If you have experienced sexual assault or sexual harassment and you would like to speak to someone for support or information, 1800RESPECT (phone: 1800 737 732) can provide counselling 24 hours a day, 7 days a week. The Australian Human Rights Commission's National Information Service can assist individuals seeking information on discrimination, human rights and sexual harassment. The Commission's National Information Service can be contacted at

infoservice@humanrights.gov.au or 1300 656 419. If you have any questions or concerns about this survey, you can contact Maria Nawaz, Chair of the NSW Young Lawyers Human Rights Committee (email: maria.nawaz@younglawyers.org.au) or Sean Bowes, Submissions Coordinator of the NSW Young Lawyers Human Rights Committee (email: sean.bowes@younglawyers.org.au). Please share any other comments below.

Answer choices  
Text box

## **Appendix B – United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 23 on the Right to Just and Favourable Conditions of Work* (27 April 2016) [48]**

“A national policy to be applied in the workplace, in both the public and private sectors, should include at least the following elements:

- (a) explicit coverage of harassment by and against any worker;
- (b) prohibition of certain acts that constitute harassment, including sexual harassment;
- (c) identification of specific duties of employers, managers, supervisors and workers to prevent and, where relevant, resolve and remedy harassment cases;
- (d) access to justice for victims, including through free legal aid;
- (e) compulsory training for all staff, including for managers and supervisors;
- (f) protection of victims, including the provision of focal points to assist them, as well as avenues of complaint and redress;
- (g) explicit prohibition of reprisals;
- (h) procedures for notification and reporting to a central public authority of claims of sexual harassment and their resolution;
- (i) provision of a clearly visible workplace-specific policy, developed in consultation with workers, employers and their representative organizations, and other relevant stakeholders such as civil society organizations.”<sup>93</sup>

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<sup>93</sup> The above quote has been re-formatted for ease of reading.

## Appendix C – *Fair Work Act 2009 (Cth) s 342(1)*

### 342 Meaning of *adverse action*

(1) The following table sets out circumstances in which a person takes ***adverse action*** against another person.

<b>Meaning of <i>adverse action</i></b>		
<b>Item</b>	<b>Column 1 <i>Adverse action</i> is taken by ...</b>	<b>Column 2 if ...</b>
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the <b><i>principal</i></b> ) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
4	a person (the <b><i>principal</i></b> ) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.

<b>Meaning of <i>adverse action</i></b>		
<b>Item</b>	<b>Column 1 <i>Adverse action</i> is taken by ...</b>	<b>Column 2 if ...</b>
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).