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National Inquiry into Sexual Harassment in Australian Workplaces

Submission to the SDC

February 2019

Australian
Chamber of Commerce
and Industry

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1 INTRODUCTION

1.1.1 This submission

1. Australian employers welcome the Sex Discrimination Commissioner's (SDC) National Inquiry into Sexual Harassment.

2. We note the Terms of Reference[1] and seek to assist the SDC in relation to a number of them.

3. The Australian Chamber has focussed on the priority matters employers tell us are the most significant and those that need to be taken up in the inquiry and recommendations if real gains are to be delivered in this area. We have endeavoured to contribute an ideas rich, relevant and engaged submission, not a commentary, nor statement of aspiration or extensive restatement of values and virtues.

4. We have focused instead on practical areas where a difference can be made and outcomes improved in workplaces, based on the practical experiences of employers and feedback from our members. We have also responded to some ideas we understand may be put to the Commission from others, although this comes with inherent limitations that lead us to strongly recommend the issuing of an exposure draft for limited further input (see Section 1.3 and Chapter 5).

1.2 Guiding principles for sexual harassment free workplaces

5. We have approached the considerations raised by this inquiry based on a series of guiding *Principles for sexual harassment free workplaces*. We have distilled these from the experiences of employers, small and large, in managing complex sexual harassment matters. They provide a framework and foundation for our input to the inquiry, and we urge the SDC to adopt and utilise this framework to shape and underpin the final recommendations arising from this inquiry.

6. The principles seek to provide a positive foundation for sound policy and initiatives in this area, which can be more effective in future in further minimising sexual harassment in Australian workplaces. They should guide recommended changes to sexual harassment law and practice, and prevention, publicity and information in Australia arising from this inquiry.

[1] National Inquiry into Sexual Harassment in Australian Workplaces – Terms of Reference.

Australian Chamber of Commerce and Industry

Principle 1: Employers oppose sexual harassment

7. Employers – like the rest of the community – see no place for sexual harassment, and are seeking to manage their workplaces to a contemporary set of positive personal and organisational values, whether these be rolled out through sophisticated dissemination and training, or simply lived every day in how smaller businesses are run. Australia's employers and managers want to deliver sexual harassment free workplaces, either as a matter of values and attitudes or at very least in recognition of the legal risks of not doing so. An intention to deliver a harassment free workplace has become one of the givens for doing business in Australia.

Principle 2: Sexual harassment is not good business

8. There is absolutely no commercial value to be extracted from sexual harassment, and virtually no contemporary business leader would make any claim the contrary. Aside from the moral and legal imperatives of providing a harassment free workplace, sexual harassment cannot stack up on any commercial grounds. It makes no business sense to (for example):

    a. Have employees intimidated, distracted, stressed or unhappy in their work, or to be absent due to the impact of sexual harassment.

    b. Have employees robbed of the chance to develop, and contribute their best performance to your business. All employees having the opportunity to be their best selves at work means they can make the best possible contributions to your business.

    c. Systematically lose talent to competitors, fail to attract the best people, or be robbed of the best contribution of a substantial proportion of your potential talent pool.

    d. Have employees focussed on protecting themselves from unwarranted behaviours, rather than focussed on their work and doing the best for your business.

    e. Have employees not be able to interact together professionally, to focus on their tasks and responsibilities. Employees who cannot speak to each other, or cannot stand to be in each other's presence is not good for any business.

    f. Gain a reputation as a poor, disreputable, negligent or damaging place to work.

    g. Have the commercial reputation and brand of your business endangered by unacceptable behaviours and attitudes. This is an intensifying concern in these times of social media, deliberate targeting of business reputation and doxing.

    h. Have your business exposed to the litigious risks, and the financial liabilities of sexual harassment. These are costly matters in which someone is almost always lost to a business, incurring at very least additional recruitment, training and induction costs.

Principle 3: More Australians need to be able to recognise sexual harassment

9. Most Australians appreciate that sexual harassment is wrong and would recognise the most egregious and obvious examples, but the wider parameters of harassment and nuances can be difficult for non-specialists to grapple with.

10. There seems significant scope for this inquiry to increase community wide familiarity and engagement with sexual harassment, what it is and how it should be approached. The challenge for the SDC and for all of us is rendering the complex into messages that are simple, explicable and able to be spread more widely. (Section 2, and various parts of this submission expand on this).

Principle 4: We need to improve the attitudes Australians bring to work

11. The 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; they are autonomous actors with all the strengths and risks this brings.

12. Governments can play an important role in changing community-wide attitudes. Important attitudinal initiatives are underway from various governments spurred originally from combatting domestic violence. It is very important we as a community continue to improve the attitudes and respect for others Australians bring into workplaces.

Principle 5: The law needs to support employers in turning values into action

13. The law needs to be an active partner in more effective action. More employers need to be able to turn their positive values and risk aversion into meaningful actions. Our laws should empower and support employers in taking action to combat sexual harassment. Employers need to be able to take decisive and effective action sooner and with more confidence that the law will back them, as expanded on in Chapter 3.

Principle 6: We need to recognise / reward learning and change

14. Some organisations can do the wrong thing, through errors of commission and omission; some fail to act or act only when problems occur. Organisations can fail those who work for them, and only awaken to sexual harassment when something goes wrong.

15. All organisations should be alive to the risks of sexual harassment and the need to protect all those who work for them.

16. However, it is also important that organisations have an opportunity to learn, respond and do better by redressing deficiencies, either following an incident, or when they otherwise move to confront risks of harassment.

17. Some of the strongest, most aware and active organisations in this area came to this position following problems, or at the initiative of new management. Our system needs to recognise, reward and harness the power of organisations learning from experience.

Principle 7: Individuals must be made more accountable for their own behaviour

18. Employers should be entitled to expect that all employees bring decency, empathy and consideration for others with them to work. Added to which, many employers are able to articulate their values, promote policies and provide training in order to reiterate the importance of employees respecting each other and engaging in appropriate conduct at work.

19. Where employees still fail to conduct themselves in an appropriate manner, there needs to be a clear emphasis on individual accountability. Our employment laws should apportion responsibility appropriately and empower employers to sheet home responsibility to where it should lie, including to individuals taking harassing actions. The scope of what employers can direct and control is also important. This is taken up in Chapter 3.

Principle 8: Greater effectiveness does not demand more law

20. Legislation and liability have been in place for three decades, and remain an important part of the system. However:

    a. In many areas employers have taken over from the law and driven change and innovation at the organisational policy and HR level.

    b. Changing attitudes across society seems fundamental, and critical to avoiding problems rather than remediating them legally.

21. A number of initiatives that could more effectively reduce sexual harassment in workplaces within the bounds of the current legislative framework, are addressed throughout this submission.

Principle 9: Regulation needs to be smart, simple, clear and balanced to be effective

22. Regulation will be most effective and stand the best possible chance of delivering intended outcomes where it is clear, smart and relevant. Smart regulation is:

    a. Grounded in experience, research, analysis and input from the policy community affected (in particular input from the employers that are being regulated).

    b. As simple, clear and well communicated as possible, and backed by promotion and information geared to those being regulated and regulated for.

    c. Proportionate, practical and goal directed.

    d. Sensitive to business size and capacitates; as set out in the next principle.

    e. Smart and effective regulation has an element of democratisation and openness to its evolution, formulation, articulation and enforcement. Any regulatory changes need to engage those who are subject to regulation, pertinently here, with representatives of the employer community (as well as other interests such as unions, practitioners etc).

Principle 10: Jurisdictional overlap / repetition detracts from effectiveness

23. In addition to clarity and simplicity (Principle 11) regulation is most effective when it is stand alone, and comes from a single source without competing or overlapping regulation or messaging from another quarters. Specific concerns in this area arise from:

    a. Ambiguity between the role of the Australian Government (SDC) and state and territory anti-discrimination jurisdictions (i.e the confusions of federalism).

    b. Confusion about the overlapping roles of law and regulators in the fields of sexual harassment, health and safety law, workplace relations, anti-bullying etc.

24. To the extent possible both complainants and respondents need a single source of law, guidance from a single source, and clarity on which regulator / jurisdiction they will need to deal with. Clarity of responsibility supports compliance, and in particular efforts to see more Australians able to work free from sexual harassment.

25. It is also particularly important that:

    a. There be no scope for manipulation or forum shopping.

    b. An incident or behaviour gives rise only to a single legal action in a single jurisdiction wherever possible, and not for example to a sexual harassment claim, bullying claim, discrimination claim and safety claim. There should be protections for employers and employees to avoid this.

Principle 11: Businesses have differing capacities and cultures

26. Businesses are not homogeneous, and measures to combat sexual harassment need to be sensitive to business size and capacities. Successes and failures cannot lightly be divorced from their context, and considerable attention must be paid to the differing context and capacities employers bring to tackling sexual harassment.

27. In particular, we caution against extrapolating from what Australia's largest mega enterprises can do to smaller and less resourced operations. There may be lessons, examples and innovations that can be drawn from cutting edge innovators, but these need to be by way of options that can be adapted not models to be imposed on vastly different smaller enterprises.

28. Chapter 4 emphasises the importance of addressing harassment risks in smaller businesses and the unique capacities, strengths and limitations of these smaller enterprises.

Principle 12: Sexual harassment can be challenging to manage

29. Occurrences or allegations of sexual harassment are some of the most difficult interpersonal and human resource challenges any employer will ever have to deal with.

30. Whether in Australia's largest companies or smallest employing business, sexual harassment matters are interpersonally and legally difficult, often starting with the threshold challenge of discerning what has actually occurred.

31. The primary harm is to those exposed to harassment and we are in no way suggesting that any employer ever has the worst of these situations, but the challenging and contested nature of sexual harassment matters brought to employers' attention needs to be recognised as one of the realities future policy needs to be alive to if it is to be more effective.

32. Practicality and proportionality must at the centre of what is done going forward. Unless law and practice is practical and proportionate to what employers are able to do, and to limitations upon employers, it will not be effective.

Principle 13: This is a moving target; new sexual harassment risks are emerging

33. Not only is this a difficult area to manage, but it is a moving target and new risks and dimensions are rapidly emerging through social and technological change. Employers now face challenges such as:

    a. The contemporary workplace for most Australians relies on thousands of personal, largely direct/private micro engagements between individuals that employers cannot directly supervise.

    b. It is increasingly common for Australians to for relationships at work, which can further complicate relations between co-workers, and see a level of the personal intrude into workplaces that creates new and intense risks of harassment, in particular if relationships fail.

    c. More and more of us choosing to socialise away from work, often with alcohol. Again this can spill over into work and again create new and intense risks of harassment.

    d. Employees engaging with each other on private social media. Not only does this blur and confuse the boundaries between work and non-work activities, but knowledge of co-workers out of work lives through their social media creates new harassment risks.

34. Given these moving targets, it can be very challenging for employers to know how to correctly respond, and it is important that we recognise this challenge faced by employers as workplaces change and adapt, and new risks arise.

1.3 Feedback on proposed / draft recommendations will be critical

35. It is clear in advance of submissions closing, and prior to an opportunity to review and respond to what other key interests in this inquiry recommend, that:

    a. The SDC is going to receive a range of ideas and proposals for future policy and regulation in this area, many of which would change existing duties and liabilities for employers.

b. Some of proposals would have the effect of changing, and often increasing, the obligations, liabilities and costs imposed (or potentially imposed) on businesses that employ in Australia. Put another way, the SDC is going to hear an awful lot about what those we represent should be doing and the rules they should follow.

c. Many of these proposals will, in turn, come from interests, individuals, groups etc not representative of the Australian business community. They will have been developed without reference to the perspectives and experience of those who would be subject to suggested new regulation.

36. It seems very important that key interests in this process have an opportunity to engage with each other's proposals, and that the SDC / government have an opportunity to harvest wider input and responses to these proposals. What the SDC is able to recommend to governments will, for example, clearly be strengthened by:

a. Ideas being advanced by applicant interests being able to be engaged with by those representing respondent interests.

b. Ideas being advanced by respondent interests, such as the Australian Chamber, being able to be engaged with by those representing applicant interests.

37. Where sound and impactful new proposals are brought forward, what is recommended to government will inherently benefit from being exposed to the wider policy community that is engaged with this inquiry. The wisdom of the collective set of interests in this area should be allowed to help refine or adjust what is proposed to government.

38. Interests might find common ground, or we might take forward concepts in new and even better ways, we may identify unforeseen practical considerations or conflicts of obligations that, were they able to be engaged with, could:

a. Strengthen what is ultimately recommended to government.

b. Bring proposals closer to an implementable form, potentially expediting their execution.

c. Allow parliament / government to be clearer on various perspectives.

d. Allow key interests in this area to be familiar and engage with live propositions, and properly canvass them with those they represent.

39. As a more practical and straightforward matter, there is also an element of equity and fairness in all voices being allowed an opportunity to engage with those ideas from other quarters that the Commission may be inclined towards progressing.

40. It will therefore be important that any key ideas that the SDC may wish to take forward in this inquiry be opened for feedback from other key interests:

a. If for example the employer community proposed to allocate a responsibility to trade unions in this area, or to remove a power or capacity from trade unions, this may be an entirely sound policy but it would be odd for the SDC engage with it, or recommend it without hearing from the unions potentially affected. The affected interest may pick up the concept and improve it, they may suggest parameters for how it should or should not be progressed, or they may have sound and valid reasons for not proceeding exactly as some other party has proposed.

b. An academic submitter might commend a revision to legislation with a certain goal, but other academics or interests may have a different view, or may identify unforeseen impacts or even better ways of executing the idea, as may employers. Without an opportunity for an exposure draft or to respond to proposed conclusions and recommendations, this will not be possible.

41. However, no interest can jump at shadows, and nor can any of us properly engage in advance with all the ideas the SDC is going to receive from what is likely to be hundreds or thousands of inquiry participants. No party can say anything on / contribute to proposals they are not aware of / do not foresee. We need to see the submissions and have an opportunity to assist the SDC in regard to those ideas you may be attracted to, and this needs to be incorporated into the back end of this inquiry process (see Recommendation 1).

42. We do attempt to address some foreseeable considerations in Chapter 5. However, it quickly becomes obvious that as the respondent not the proponent of such ideas we can have very little of substance to respond to at this stage. We need to see other interests' ideas to properly evaluate and engage with them.

43. There is a very practical and straightforward mechanism to address this; issuing an **initial exposure draft of recommendations and inviting submissions** on them to inform final recommendations to government.

44. This second round of tightly focussed input is generally undertaken on a considerably shorter timeframe than the initial submissions. This process is regularly used by the Productivity Commission (PC) and in our experience considerably improves:

a. The quality and relevance of final recommendations to government, which have been tested and refined with the relevant policy community to a degree not possible in a single round process.

b. The capacity for government to evaluate final recommendations handed to it, and knowledge of where competing interests are coming from.

c. The practicality of recommendations to government, which can be made in terms which can improve and expedite implementation (i.e. the additional time of the second round of consultations can be recouped in whole or part as ideas will come to government in a more evolved form, and the policy community in a particular area will be more aware and engaged with them early.

45. In support of this Recommendation, which is fundamental to the success and effectiveness of what is done going forward in this area, we note that the recent UK Inquiry and recommendations have led the UK Government to embark on further data collection and further consultation on what has been recommended to it. So by default, the comparable inquiry in the UK is being subjected to a two stage process.

46. This should occur in relation to this inquiry in Australia, and ideally should be undertaken by the SDC itself to give government the most refined and implementable recommendations possible, and to maintain and best utilise the engagement the SDC builds up during the course of this inquiry.

47. We note that not only does the Productivity Commission regularly use exposure drafts in its reviews (which are generally best practice in terms of process and how inquiries are conducted), but:

    a. They are widely used in making accounting and financial standards in order to minimize any unintended consequences before they become law.

    b. They invited discussion and democratise ideas to a greater audience than simply the originator of an idea and the review body.

    c. Reviews and recommendations are strengthened by the reviewer canvassing and taking input on their intended direction.

    d. As the Victorian Government has stressed "to enable the community to consider the detail" of proposals.[2]

Recommendation 1: Invite further input on an Exposure Draft prior to the final report

The SDC deliver recommendations to government in a two stage process:

Stage 1: Issue an initial public Exposure Draft of *proposed* conclusions and recommendations, and invite a time limited, directed further round of input on them.

Stage 2: Then, based on responses to the proposed recommendations, deliver a *final* report, setting out finalised / refined conclusions and recommendations to government, taking into account the input on the Exposure Draft.

[2] https://www.premier.vic.gov.au/media-centre/bills/

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2 CHANGING ATTITUDES ACROSS OUR SOCIETY

48. The results of the *Everyone's Business* survey showing that one in three (33%) Australians had experienced sexual harassment in the workplace in the last five years are of significant concern.[3]

49. That nearly three in four (72%) Australians report having experienced sexual harassment at some point in their lives[4] indicates that the problem is far from being confined to our workplaces. A substantial part of what's done in this area should be directed to changing the attitudes and behaviours individuals bring into our workplaces.

50. Combatting 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.

51. This chapter in no way seeks to downplay the legitimate responsibilities of employers in preventing and combatting sexual harassment within their sphere of knowledge, responsibility and control. Employers can and do positively direct their people and seek to manage the behaviours of persons at work, to the extent they have knowledge and are able to exercise control.

52. Rather, this chapter is about the wider context, examining how much of the responsibility for sexual harassment can / should legitimately fall with employers, some of the other key factors at play, and where potential solutions may lie to do better as a whole community on sexual harassment. The focus is also on improving the attitudes Australians bring into our workplaces, which drive what are ultimately in most cases interactions between sovereign, self-determining individuals who should control, and be personally accountable for their conduct towards others.

53. Sexual harassment is not solely a workplace or employment problem; it is a wider problem throughout our community that is brought into our workplaces. Multiple studies show a high level of prevalence of sexual harassment in public places,[5] on public transport,[6] at music festivals,[7] and at universities.[8]

54. For example, a 2018 Australian survey of females in Sydney aged 18-25 found:[9]

    a. 90% do not feel safe in the city after dark, reportedly being harassed, followed, cat-called, groped or leered at, often on a regular basis.

    b. Of those who have personally experienced 'street harassment', almost 1 in 4 experience it at least once a month.

[3] This includes sexual harassment experienced at work, at a work-related event or while looking for work. See Human Rights Commission (2018) *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, p.8.
[4] See Human Rights Commission (2018) *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, p.18.
[5] See, for example, Plan International Australia, Sexism in the City, May 2018.
[6] See, for example: See, for example, Plan International Australia, Sexism in the City, May 2018, p.7 and *The Age*, 'Hands off' campaign aims to track down pervs who molest women on trains, trams', 24 October 2017.
[7] Fileborn, Wadds and Tomsen, New research shines light on sexual violence at Australian music festivals, 24 October 2018.
[8] Australian Human Rights Commission, Change the course: National Report on Sexual Assault and Sexual Harassment at Australian Universities, 2017.
[9] Plan International Australia, Sexism in the City, May 2018.

c. 4 out of 5 say they first experienced street harassment when they were under 18.

d. More than a third were first harassed between the ages of 11 and 15.

55. The SDC's 2017 publication *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* reported that:[10]

a. Over half of Australian university students were sexually harassed on at least one occasion in 2016.

b. One in four students was sexually harassed in a 'university setting' on at least one occasion in 2016.

56. It is clear that sexual harassment is not isolated to workplaces, or to any institution or event, but afflicts society as a whole. In fact, it occurs from a young age, before Australia's young people enter the workforce. Positive steps are being taken by institutions such as universities[11] and music festival organisers,[12] in an effort to stop sexual harassment, and such steps should continue to be taken. The pervasive, community wide prevalence of harassment reinforces that a multifaceted approach to combatting sexual harassment is necessary.

57. A multifaceted approach is particularly important when considering entrenched attitudes towards sexual harassment held by some individuals. The SDC has previously noted that "violence supportive" attitudes contribute to the prevalence of sexual harassment.[13] Such attitudes can include:[14]

a. Justifying and excusing harassment as inevitable because men cannot control their sexual urges.

b. Trivialising and minimising conduct, saying it was just meant as a joke, good natured banter, "a compliment".

c. Shifting some of the blame for sexual harassment to the victim, based on what she wore; what she drank; where she was; whether she objected.

58. Similar attitudes were demonstrated in the 2017 *National Community Attitudes towards Violence against Women Survey*, which found that nearly one quarter of Australians see no harm in telling sexist jokes.[15]

59. This attitude is particularly concerning when considered in the context that the most common type of sexual harassment experienced in the workplace in the past five years was offensive, sexually suggestive comments or jokes.

[10] Australian Human Rights Commission, Change the course: National Report on Sexual Assault and Sexual Harassment at Australian Universities, 2017, p.36.
[11] SBS News, 'University statements on how they're tackling sexual violence on campus', 13 May 2018.
[12] See, for example, The Sydney Morning Herald, ''Zero-tolerance policy': Falls Festival cracks down on sexual assault', 16 August 2018.
[13] Kate Jenkins, Sex Discrimination Commissioner, 'Sexual Harassment – Safer Workplaces', 14 December 2017.
[14] Kate Jenkins, Sex Discrimination Commissioner, 'Sexual Harassment – Safer Workplaces', 14 December 2017.
[15] Australia's National Research Organisation for Women's Safety Limited (ANROWS), National Community Attitudes towards Violence against Women Survey (NCAS), 2017, p.11.

60. Australians bring these predetermined, ingrained attitudes into workplaces large and small, just as they do onto our streets, our campuses, sporting fields and events and our social gatherings.

61. While employers play a key role in promoting appropriate workplace cultures and enforcing appropriate behaviours, there are multiple cases in which the inappropriate behaviour and attitudes of an individual has persisted even where their employer has policies on appropriate workplace behaviour, including sexual harassment, has delivered training to the employee, and has specifically warned the employee about their behaviour.

62. For example, in a 2018 unfair dismissal matter[16], an employee bombarded younger female subordinates with inappropriate text messages, many with sexual overtones, including an unsolicited photo of his penis.

63. Despite his employer delivering sexual harassment training and warning the employee about his conduct, he continued to act inappropriately. In fact, he said to one of his colleagues: [17]

    a. "Your arse looks good, but I can't say that as I have done my sexual harassment course, so I can't."

    b. "Aaaahhh… can't let you in all my secrets. Might need them to go up against you one day… when you have me on sexual harassment."

64. While the unfair dismissal application of this particular employee was ultimately dismissed by the Fair Work Commission, it highlights an all too common scenario whereby no amount of training, counselling or warnings will change the behaviour of some people.

65. It is just one example of an employee in the workplace not, and continuing to not, recognise the inappropriate nature of their behaviour and failing to take responsibility for their actions. Unfortunately, there are many more cases of a similar nature.[18]

66. While some may say the system 'works' as the particular employee in this case was successfully expelled from the workplace, with attitudes such as the one demonstrated, there is nothing to say the employee (and other employees holding similar views) will not again engage in sexual harassment in their next workplace. In this regard, the Commission noted:

> ***[189]*** *To this day Mr Reguero-Puente continues to assert that his conduct ought to be excused because it was consensual. Despite the opportunity to review his text message exchanges in preparation for the hearing, he still appears to fail to recognise the inappropriateness of the frequency, timing and content of his messages to multiple, less senior, female colleagues. His position appears to be that he is entitled to say and do what he pleases unless his female colleagues tell him emphatically in writing to stop.*

[16] *Reguero-Puente v City of Rockingham* [2018] FWC 3148.
[17] *Reguero-Puente v City of Rockingham* [2018] FWC 3148.
[18] See, for example *Sapienza v Cash in Transit Pty Ltd T/A Secure Cash* [2018] FWC 607. In this case, the employee did not accept responsibility for his conduct (sexual harassment of multiple young females), instead saying it was "due to his Italian heritage and being of an affectionate nature".

> ***[190]*** *There is nothing to suggest that Mr Reguero-Puente would not continue the same pattern of behaviour leading to further young women being subjected to his inappropriate overtures if he were to return to the workplace…*

67. This case underscores the extent to which sexual harassment, if not sexual assault, arises from a sense of sexual entitlement, combined with a lack of empathy and due consideration for the person being harassed. Unfortunately, these attitudes and the behaviours they generate are ingrained across our society and neither start nor stop at the door of any workplace.

68. One of the fiendish difficulties for law and practice in this area is determining what can legitimately be required of employers in relation to personal conduct, personal control and the (sometimes deficient) sense of common decency and reasonable action individuals bring into our workplaces as community members first and employees second.

69. At the time of writing we are in the midst of a national (and in fact global) conversation on appropriate messages to men on their conduct, and the role of men in challenging the behaviour of other men. Clearly the factors leading to sexual harassment extend far beyond any workplace, any employment relationship and what any employer can realistically control.

70. Employers are being asked to prevent behaviour by employees that has been entrenched from a young age, outside of the workforce. This of course does not mean that businesses should not play a key role preventing and combatting sexual harassment, or not be responsible to the extent they can or should reasonably be able to control employee behaviour. However, the core problem that needs to be addressed is the unacceptable behaviour itself and the values and attitudes that lie behind it.

71. Sexual harassment policies for the community generally, not restricted to workplaces, must aim to stop harassment at its source.

72. Significant work needs to be done to change societal views, and the views of young people before they enter the workforce. The recommendations of this inquiry need to emphasise continuing and adding to education and awareness across the community generally in relation to appropriate behaviour.

73. Laws and regulations are very important, but they can only take us so far. Wider cultural change is very powerful, and of ever increasing relevance in assisting employers to implement, maintain and enforce safe cultures in workplace.

74. An analogy to road safety may be relevant. Road safety authorities continue to publicise and improve the direct policing of speed, drink driving etc. and the serious sanctions that apply if one is caught. However, increasingly they also target changing driver attitudes, and the culture of all road users. We recognise in road safety that spending on advertisements, awareness and prevention is every bit as important if not more so than policing, litigation and penalties after the fact. We recognise as a community that personal awareness and accountability (and a mix of empathy and threats of accountability) are critical to reducing road accidents.

75. So too with sexual harassment. Sanctions and compliance remain important in contemporary Australian workplaces, as do greater personal liabilities and accountability for individuals, but further

significant gains in reducing sexual harassment behaviours are going to come in substantial part from positive changes in wider societal attitudes and behaviours. It's an old saying, but this seems to be a genuine instance of an ounce of prevention being better than a pound of cure.

76. As was found in Victoria's Royal Commission into Family Violence, if we are to prevent unacceptable behaviour we must change the attitudes that give rise to it.[19] There is a need to implement primary prevention strategies to dismantle harmful attitudes and encourage respectful relationships. Educating society about respectful interactions must be a core part of a long-term prevention strategy for sexual harassment.

77. The Federal Government's 'Stop it at the Start' campaign aimed at breaking the cycle of violence by encouraging adults to reflect on their attitudes, and have conversations about respect with young people is a good example of a positive initiative to help shape attitudes and behaviours. Advertisements in the first phase of the campaign were reportedly viewed over 43 million times online, with hundreds of thousands of shares on social media.[20] Of the campaign's effect, the Federal Government said after the first phase of the campaign in 2016, its research had found that more than two thirds of adults who saw the ads took some form of action.[21] The Australian Chamber submits a similar type of ongoing campaign commitment in relation to sexual harassment would be of great benefit.

78. The focus should not solely be on creating a culture that does not tolerate sexual harassment, the focus should also be on creating a culture in which there are fewer perpetrators of sexual harassment, and victims and bystanders are empowered and motivated to speak out.

79. In relation to the reporting of sexual harassment, the *Everyone's Business* survey found:

    a. Just 17% of those who experienced sexual harassment in the workplace in the last five years made a formal report or complaint.[22]

    b. Almost one half (49%) of people who did not report or make a complaint about workplace sexual harassment did not report because they thought people would think they were overreacting.

80. For people to change attitudes and behaviours, and for that to have a lasting impact, we need to tackle those attitudes at their core. Fostering a society-wide culture in which sexual harassment is not tolerated, those who experience sexual harassment, and the bystanders that witness it, feel comfortable raising concerns, and where complaints of sexual harassment are handled with respect, will likely go a long way in reducing sexual harassment.

81. In relation to witnessing sexual harassment, *Everyone's Business* survey found that more than one third (38%) of people had observed or heard about sexual harassment of another person at their

[19] Royal Commission into Family Violence (Victoria), Final report: summary and recommendations, March 2016.
[20] ABC News, 'New domestic violence campaign to focus on 'boys being boys' attitude in society', 3 October 2018.
[21] ABC News, 'New domestic violence campaign to focus on 'boys being boys' attitude in society', 3 October 2018.
[22] Human Rights Commission (2018) *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, p.67.

workplace over the past five years.[23] Of these, only one in three (35%) of bystanders took any action to prevent or reduce the harm of the sexual harassment they witnessed.[24]

82. A 'campaign' to encourage bystanders to call out harassment could be very positive. An example of a positive initiative concerning bystander action is the Victorian Government's bystander campaign to call out the attitudes and behaviours that lead to family violence. The Respect Women: Call It Out campaign provides the tools necessary to call out disrespectful and sexist behaviour, a known driver of violence against women. It has been reported that as a result of the 'behavioural change campaigns', more than 4 out of 5 Victorians can identify what family violence is and its causes, and that Victorians who have seen the campaign are more likely to endorse the importance of respect.[25]

83. The Australian Chamber submits a similar campaign in relation to bystander action concerning sexual harassment, including but perhaps not restricted to workplace sexual harassment, would have a positive impact on changing attitudes and encouraging bystander intervention.

Recommendation 2: Continue to actively encourage changes in wider societal attitudes

The SDC's recommendations to government(s) should include building on already successful campaigns and providing additional and ongoing funding for initiatives to change societal attitudes and behaviours.

Government(s) should deliver an advertising campaign (or other comparable initiative) to prevent sexual harassment across the community / change attitudes and behaviours as a key predicate to reducing its incidence in workplaces. Such programs should seek to:

- Educate Australians about what constitutes sexual harassment.
- Educate Australians about what types of behaviour are and are not appropriate in any context.
- Promote respectful relationships and appropriate behaviours.
- Promote a culture in which victims of sexual harassment are treated with respect.
- Promote bystanders and peers calling out sexual harassment.

[23] Human Rights Commission (2018) *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, p.94.
[24] Human Rights Commission (2018) *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, p.94.
[25] The Hon Natalie Hutchins MP, Media Release, Respect Women: Call it out campaign returns, 23 August 2018.

Australian Chamber of Commerce and Industry

3 SUPPORT EMPLOYERS IN TAKING ACTION

3.1 Businesses are already taking leadership and implementing positive initiatives

84. Industry groups and businesses are already implementing a range of positive initiatives and showing leadership to drive the right behaviours and address issues of sexual harassment in workplaces.

85. This builds on often decades of human resource training and of setting and enforcing standards of conduct, often informally but nonetheless effectively. Allied with this are the positive normative or values / organisational cultural commitments of many contemporary organisations in support of greater diversity, generally backed by values and attitudes inimical to sexual harassment.

86. Employers see some mix of (a) training, policies and procedures (where appropriate to the size and capacities of the workplace), along with (b) normative values and positive cultures as critical to further improvements in this area, and to changing behaviours and improving individuals' experiences of work.

87. One recent positive example comes from the Australian entertainment industry. Live Performance Australia (LPA) and Screen Producers Australia (SPA) last year released mirror industry codes aimed at preventing workplace discrimination, harassment, sexual harassment and bullying.[26]

88. The codes aim to harmonise industry efforts in understanding and complying with various federal, state and territory laws relating to prohibited conduct in the workplace, including sexual harassment.

89. 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.

90. The codes are organised into two parts, encompassing:

    a. A guide for employers, an overview of the relevant legislative framework and obligations, and best practice guidance on steps employers can take to effectively prevent and respond to workplace discrimination, harassment, sexual harassment and bullying.

    b. Templates and resources to assist employers to develop and/or review policies and procedures.

91. 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 difference sizes, the codes and accompanying resources also includes a checklist to assess current policies and procedures, for those with policies already in place.

[26] Live Performance Australia Code; Screen Producers Australia Code.

92. LPA and SPA are also both providing training to their respective memberships and the broader entertainment industry. The online component of this training will aim to provide certification that both employers and employees can use before working on entertainment projects.

93. The approach of these organisations represents a positive initiative which the Australian Chamber commends and submits represents a positive way of dealing with the important issue of sexual harassment in the workplace which could usefully be adapted for other industries, as a voluntary, industry driven initiative

94. Another initiative comes from the hotel and accommodation industries. Anti-Discrimination Guidelines for the Hotel and Accommodation Industry were produced by the Anti-Discrimination Board of NSW, the Australian Hotels Association (NSW) (AHA (NSW)) and Tourism Accommodation Australia (NSW) in consultation with the Office of Liquor, Gaming and Racing.[27]

95. The guidelines explain the rights and responsibilities of hoteliers and their employees under anti-discrimination law, including in relation to sexual harassment. The guidelines are updated periodically to ensure they are current and reflect best practice. The latest version, which was distributed in USB form to hotels in New South Wales, includes a presentation which can be used as a tool to train staff.

Recommendation 3: Encourage further industry driven initiatives

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 SMEs lacking capacity to do so on a stand-alone basis.

3.2 Employers need more support to deliver harassment free workplaces

96. Business recognises and supports the need for Australia's workplaces to be free of sexual harassment, and for as many Australians as possible to work free from sexual harassment and the negative consequences of being exposed to sexual harassment. Recent high profile cases, and community recognition and engagement such as through the #MeToo movement, have made more Australian businesses attuned to responsibilities, risks and expectations in this area, and are leading others to examine their efforts for opportunities to be more effective.

97. 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. This includes setting and enforcing standards of acceptable conduct, including through counselling, discipline and where necessary terminating employment.

[27] Guidelines for the hotel and accommodation industry.

98. One of the key precepts of this submission is that Australian employers oppose sexual harassment, and are increasingly alive to risks of unacceptable and damaging conduct. However, changes are needed to better empower more businesses to turn commitment and sensitivity into action. Employers need the tools to be able to take action to meet their responsibilities, and to deliver the harassment free workplaces the Australian community increasingly demands.

99. Where employers have policies and procedures in place, or become aware of unacceptable conduct, it is imperative that they have the genuine support of 'the system' in enforcing such standards. Employers need to be able to deliver workplace cultures where it is clear sexual harassment will not be not tolerated, and in which employers can meet their statutory obligations to provide workplaces free of sexual harassment. Where attempts to prevent sexual harassment have not been successful, businesses must be able to enforce workplace cultures where unacceptable and damaging behaviours such as sexual harassment are not tolerated and will be acted against – and they need to be better supported by the system in taking action and enforcing standards.

100. If employers are to be responsible for minimising risks of sexual harassment in their workplaces, they have to be able to take effective action to address these risks. Employers need to be able to back up organisational policies and commitments with appropriate and effective actions. This means being able to reliably and defensibly counsel, discipline or terminate the employment of those doing the wrong thing.

101. However, under Australia's current unfair dismissal regime (under the *Fair Work Act 2009*), employers are having in an unacceptable proportion of circumstances to compensate or reinstate employees who have bullied, threatened, assaulted, or sexually harassed their colleagues. In other cases, consideration of precedent and practice unnecessarily and inappropriately delays employers in taking action, perpetrating risks and exposures. This is unacceptable and it needs to change.

102. The status quo on dismissal is placing the safety of others in the workplace at serious risk, and sends a message to the workforce that while the employer expects its policies will be adhered to, troglodyte employees will be given second, third or more chances if they intentionally breach them. Some harassers will then of course view employers' incapacities to act on their conduct as a free license to harass.

103. The system does not presently provide employers with any level of certainty about how they should go about dealing with such issues in the workplace without either the risk of a costly claim, or real and unacceptable risks to others in the workplace or to patients or clients through an unacceptable perpetuation of harassing conduct.

104. The status quo under the existing Fair Work Act does not provide sufficient certainty about how employers should navigate concurrent obligations under work health and safety laws, anti-discrimination laws and the FW Act.

105. Employers are expected to maintain and enforce acceptable standards of workplace conduct, however the wider body of laws, and the Fair Work Act in particular, are tying employer's hands and making it difficult for them to do so. Our members report that they feel **'damned if they do, damned if they don't'** in acting on instances of sexual harassing conduct.

106. This is unacceptable and this inquiry is an opportunity to take action and deliver the level of balance and certainty in employer actions that the community expects. This inquiry is an opportunity to turn the 'damned if you do, damned if you don't' paralysis of the status quo, into better empowering employers to deliver what the community expects of us, and frankly what we owe our people.

107. The following examples / parameters of this challenge demonstrate some of the difficulties faced by employers in enforcing positive workplace cultures and values in the wake of an employee engaging in conduct constituting sexual harassment. They highlight the need to provide employers with more support in setting and enforcing appropriate standards and acceptable workplace conduct, the point of which is ultimately to reduce instances of sexual harassment in Australian workplaces.

108. In each case, we provide specific recommendations that we call on the HRC/SDC to take up in its recommendations to government.

The following examples are drawn from published decisions of the Fair Work Commission and other industrial tribunals, being cases that have proceeded to hearing and determination. They are the tip of the iceberg of the multiple more instances where employers settle claims regarding dismissal for sexually harassing conduct without 'going to court' on a commercial basis, or to avoid reputational risk.

3.3 Procedural defects should not render dismissal for sexual harassment unfair

109. The first key difficultly with the current unfair dismissal regime when it comes to enforcing appropriate workplace behaviour (in regard to sexual harassment) was neatly captured by the Productivity Commission (PC) in its review of our workplace relations framework.

110. It found "the most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer."[28]

111. The Productivity Commission referred to an example where an employer dismissed two employees after they assaulted their supervisor.[29] The Fair Work Commission concluded that the physical assault constituted a valid reason for dismissal, but the employer's failure to follow its expected administrative procedures meant the dismissal was unfair. It ordered the employer pay compensation to both the former employees.

112. In that case someone was assaulted, fundamentally at odds with the obligations and legal basis for employment (and with safety at work), but procedural niceties saw the dismissal rendered unfair. We invite the SDC to consider the implications for how an employer can manage their workplace free from violence and harassment in such circumstances, and to extrapolate this example to someone

[28] Productivity Commission 2015, Workplace Relations Framework, Final Report, Canberra, p. 30.
[29] Productivity Commission 2015, Workplace Relations Framework, Final Report, Canberra, p. 30.

indulging in sexually harassing conduct (examples below). Such cases and the existing law that gives rise to them:

a. Perpetuate risks of sexual harassment, and delay or preclude employers from taking effective action to address known risks.

b. Leave employers in an unacceptable 'damned if you do, damned if you don't' position in relation to sexual harassment.

113. There are multiple examples of outcomes similar to that described above involving an employee dismissed for engaging in sexual harassment. While there are also sensible Fair Work Commission decisions in this area that do accord with community expectations[30], there is unfortunately insufficient consistency in the application of the Commission's discretion. The Commission's decision making, based on the current Fair Work Act, fails to provide employers with the certainty they need to be confident in taking decisive action to address sexual harassment, and to provide the necessary deterrent to those in the workplace who may engage in such conduct.

114. For example, the Commission recently found that the dismissal of a business manager was unfair, despite finding he had engaged in sexual harassment.[31] A young, female sales trainee had told the business manager that clients were making her feel uncomfortable, to which the business manager replied "Just show them your tits and you'll be fine."

115. The Commission found the incident constituted "serious, hostile, derogatory" sexual harassment and constituted a valid reason for dismissal, being "sufficiently serious that it required the Respondent to end the employment relationship". However, the Commission awarded the business manager almost $7,500 compensation because of minor procedural defects in relation to the dismissal. Once again, damned if we don't act as employers by one area of the law, and damned if we do by another.

116. The business manager appealed the decision. Permission to appeal was refused,[32] but not without written submissions and a hearing. This created delays and costs, and negative impacts for both the employee subject to sexual harassment and the business.

117. Despite the Commission finding there was a valid reason for the dismissal, the employer was ultimately forced to defend its decision to dismiss an employee for sexual harassment on two occasions, and to provide that employee with monetary compensation. Such decisions:

a. Send a message to employees (and the public given the Commission's decisions are published) that sexual harassment is condoned, that employers are powerless unless they strictly follow a particular process and procedure, and that you will not only get away with sexual harassment, you will get a nice little financial bonus on the way out the door if you contest your dismissal. You might even get your job back (see below).

[30] See, for example, *Sapienza v Cash in Transit Pty Ltd T/A Secure Cash* [2018] FWC 607.
[31] *Parker v Garry Crick's (Nambour) Pty Ltd as The Trustee for CRICK UNIT TRUST T/A Cricks Volkswagen* [2017] FWC 4120.
[32] *Parker v Garry Crick's (Nambour) Pty Ltd as The Trustee for Crick Unit trust T/A Cricks Volkswagen* [2018] FWCFB 279.

b. Send a message to employers that form will be elevated over substance, and that it is going to be difficult, time consuming and protracted to try to translate your values and culture into action by enforcing standards of accepted conduct.

c. Impose significant costs on employers, and cause the employer to incur the significant burden of legal costs, resources and time, in addition to being ordered to pay compensation.

118. In another example, an employee, with a history of looking at explicit pornographic material on his computer at work, including a live webcam, was dismissed for looking at women in bikinis online.[33] His computer was in the line of sight of a female employee under his supervision, who witnessed, among other things, a "very explicit image" of a "naked woman sitting on a bed, apparently on a webcam" on her manager's screen.

119. The female employee was "disturbed" by the incidents and "felt vulnerable and uncomfortable" around her manager. She was reportedly seeing a psychologist and a doctor and was feeling sick at work because of her manager's conduct.

120. A report on the manager's internet usage revealed 33 instances of accessing pornographic material at work in one month alone. After a final warning, including a direction that he cease misuse of the Internet and blocking him from accessing porn on his computer, a further report showed the manager had "…gone from looking at pornography to looking at lifestyle type stuff with women with little clothing on because he could no longer access pornography."

121. Again, despite the Fair Work Commission finding there was a valid reason for dismissal, it ordered the employer to pay over $25,000 in compensation, due to a procedural defect.

122. Again, 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.

123. This example demonstrates that even where an employer has set clear standards on employee conduct and expressly set out what is and is not acceptable, and then reinforces this in a specific instance in response to specific conduct, this can carry little weight with the Commission. While there may have been some breaches of procedural fairness leading up to this dismissal, the dismissal itself was for the clearly valid reason relating to protecting co-workers (in this case a subordinate) from sexual harassment. The man was watching porn at work, a female colleague was sexually harassed by it, the employer took action, but the employee was awarded over $25,000 in compensation; something is clearly wrong.

124. The above cases demonstrate that too often the Commission will give inappropriate weight to minor procedural issues to undo employer decision-making to address serious misconduct constituting sexual harassment. The reason for dismissing an employee, not whether the exact process was followed (a process which is incidentally not set out anywhere for employers to follow), should carry the most weight, and employers should be able to rely on our employment law system as a whole to back them when they take action on sexually harassing conduct.

[33] *Roelofs v Auto Classic (WA) Pty Ltd T/A Westcoast BMW* [2016] FWC 4954.

125. We emphasise this point; employers need the totality of our employment laws to back us when we take action on sexual harassment.

126. The Productivity Commission found there should be a greater focus on substance over procedure and said that the "Fair Work Act should be amended so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal".[34]

127. The Australian Chamber strongly supports this recommendation, and it should be taken up in this inquiry to give employers the tools we need to turn our values and beliefs opposing sexual harassment into actions, and take positive steps to ensure more Australians can work free from sexual harassment.

Recommendation 4: Properly balance unfair dismissal – procedural errors

The Fair Work Act should be amended so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal based on conduct that can or would constitute sexual harassment.

3.4 Those dismissed for sexual harassment should not be reinstated

128. A further concern, and potential impediment to the ability of employers to effectively manage for workplaces free from sexual harassment, is ability of the Fair Work Commission (and other state industrial relations tribunals) to substitute their decision making for the decisions of employers, and to reinstate employees, including those who have been found, following a thorough and independent investigation, to have acted inappropriately.

129. Unfortunately, there are countless examples where this has occurred in relation to serious misconduct involving a serious breaches of policies relating to sexual harassment and employee safety.

130. One example, in the NSW jurisdiction, involves a state government employee (with human resources responsibilities) who touched the breasts of five women at a work Christmas party.[35] One of the instances was described as follows:

> *[The Applicant] squeezed one of Ms I's breasts for a couple of seconds then squeezed one of Ms G's breasts for two or three seconds. He had moved closer to her until he was about ½ a metre away and lowered his head to her breast level. Ms G had objected vocally and*

[34] Productivity Commission 2015, Workplace Relations Framework, Final Report, Canberra, p. 31.
[35] *Public Service Association and Professional Officers' Association amalgamated Union of NSW (on behalf of Andrew McCaskill) and Department of Attorney General and Justice* [2014] NSWIRComm 1009.

> *emphatically. He touched Ms I's breast again and said "Hers are better". He turned back towards Ms G but she stepped back.*

131. The NSW Industrial Relations Commission ordered the employee to be reinstated, because it determined his dismissal to be harsh when assessed against a manager who engaged in similar behaviour (albeit involving less women) who had merely been demoted.

132. In another decision, the Fair Work Commission found there was a valid reason for dismissing a team leader for conduct at and following his work Christmas party, including intimidating and sexually harassing a number of colleagues and telling a board member to "fuck off". Such incidents included:

    a. Making unwelcomed propositions towards a female colleague.

    b. Unexpectedly kissing another female colleague on the mouth and saying he was going to go home and "dream" about her.

    c. Telling another female colleague "My mission tonight is to find out what colour knickers you have on".

133. The Commission considered that it was "abundantly clear" that kissing his colleague fell within the federal Sex Discrimination Act's s28A definition of sexual harassment, however it said the incident did not occur "in connection" with the team leader's employment, having taken place following the end of the work Christmas function.

134. However, the Commission ultimately found there was a valid reason for dismissal (unrelated to sexual harassment). Despite this, the Commission found the dismissal was harsh and unjust, for reasons including the purported lack of any significant ongoing workplace consequence of the team leader's behaviour, and the fact he was intoxicated because his employer had served unlimited free alcohol.

135. To return to the principles we set out in introduction, this decision represents the law failing to hold people to account for their own conduct, and (in this case for example) shifting responsibility to the employer for opening the bar to its staff at Christmas.

136. This does not meet community expectations, and in regard to sexual harassment, people at work need to be (more) personally accountable for their individual actions.

137. While the Fair Work Commission did not finalise a remedy at this point, it is apparent the Commission favoured reinstatement of the team leader to a different position, saying:

> ***[140]*** *I have earlier indicated that a proportionate response to Mr Keenan's misconduct would have been to demote him from the position of Team Leader (with a commensurate reduction in pay), issue him with a warning (perhaps a final warning), require him to make a written apology for his conduct, and ban him from attendance at any future Christmas functions or other functions where alcohol is served.*

138. Noting that the Commission was not empowered to make such an order, it instead recommended parties confer in an attempt to reach an appropriate agreement.

139. In doing so the Commission noted "An agreed outcome would not be confined by the impediments upon remedy imposed on the Commission by the FW Act, and would allow consideration to be given to the outcome identified in paragraph [139] above", that is, reinstatement as the primary remedy.

140. This is another clear example of the Commission sending a highly concerning signal about the acceptability of sexual harassment in Australian workplaces, and further muddying the water about the circumstances in which an employer's decision to take action in response to sexual harassment will be upheld. It is an example of the Commission seeking to substitute its decision making for that of the employer, and in doing so paying insufficient regard to the risks created by the harassing behaviour.

141. The Productivity Commission found: "While reinstatement should not be relinquished as a goal of the unfair dismissal provisions, the emphasis on reinstatement as the primary goal should be removed. Its realistic attainability depends very much on the context of the employee, the circumstances of the dismissal, and the employer, which requires case-by-case assessment."[36]

142. The Australian Chamber agrees, and submits that the Commission should not be empowered to reinstate employees dismissed for a valid reason involving a breach of sexual harassment policies / laws.

Recommendation 5: Properly balance unfair dismissal – reinstatement remedies

Where it is established that an employer has taken disciplinary action against an employee to protect the safety, health and welfare of other employees (or clients, patients or the general public), or to meet their legal liabilities under relevant legislation, the employee whose conduct placed persons at risk should not have access to reinstatement as a remedy.

3.5 Reduce scope to argue a dismissal for harassment is harsh

143. Another key difficulty raised by our unfair dismissal laws which has the potential to impact an employer's capacity to take necessary action in relation to sexual harassment is the trend of the Fair Work Commission to, despite having found there to be both a valid reason to dismiss an employee and that procedural fairness was afforded, deem a dismissal as "harsh" due to the offending employee's personal or economic circumstances, and to then award a remedy such as compensation and / or reinstatement.

144. In a recent decision,[37] the Commission found there was a valid reason for dismissing an employee who tagged two colleagues to a sexually explicit Facebook video and said they were "slamming" each other, and placed blobs of sorbolene cream on the desk of one of the colleagues tagged in the video, allegedly as a mock masturbation scene.

[36] Productivity Commission 2015, Workplace Relations Framework, Final Report, Canberra, p. 31.
[37] *Renton v Bendigo Health Care Group* [2016] FWC 9089.

145. In addition to finding the conduct constituted a valid reason for dismissal, the Commission also found the employee was afforded procedural fairness by the employer.

146. However, the Commission ultimately found the dismissal was harsh, taking into account "the economic and personal consequences of the decision in circumstances where [the employee] has young children including a child with Attention Deficit Hyperactivity Disorder for whom he shares joint care." The employee was awarded over $2,000 in compensation.

a. Such personal circumstances can have no bearing on the impact of the harassing conduct on those at risk of sexual harassment, nor on the capacity of employers to protect their people from such conduct.

b. It is of no comfort to someone damaged by a colleague's sexually harassing conduct that they may be older, less employable, or have familial responsibilities.

c. To be blunt, the perpetrator in this instance should have thought of his family and circumstances (and shown some empathy for others) before taking the harassing action. Having failed to do so, he should bear the consequences.

147. In the NSW jurisdiction,[38] the NSW Industrial Relations Commission found the dismissal of an employee was 'harsh', despite the employee being found to have stored more than 1,200 inappropriate and pornographic emails on her work computer.

148. The NSW Commission was satisfied there was a valid reason for the employer to dismiss the employee, and the employee was afforded procedural fairness. However, the Commission found the dismissal was harsh due to the employee's difficulty in obtaining alternative employment, her personal, family and financial circumstances. The employee was awarded eight weeks' pay.

a. Again, such personal circumstances can / should have no bearing on the impact of the conduct on those at risk of sexual harassment, nor on the capacity of employers to effectively protect their people from such conduct.

b. To be blunt, the perpetrator in this instance should have thought of her circumstances before taking the harassing action. Having failed to do so, she should bear the consequences.

149. In another example, the Fair Work Commission ordered that an operator be reinstated after he had been dismissed for making a series of lewd, sexist and inappropriate remarks over a two-way radio that were heard by more than 100 employees, after finding the dismissal to be 'harsh'.[39]

150. The Commission found that, in addition to making a series of "Islamophobic comments" including sympathising with a colleague about executing Muslims, the employee made the following remarks:

> *(1) …in response to comments by a colleague about the "rear end" of his truck getting "banged up", Mr Goodall said "that's no good getting your rear end banged up" and "Parish would like it".*

[38] *Bellenger v Mid North Coast Local Health District* [2017] NSWIRComm 1019 (24 April 2017).
[39] *Goodall v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2016] FWC 4129.

(2) …when talking about a colleague, Mr Goodall stated that "he'd probably like a good teabagging".

(3) …during a conversation about Volkswagen Beetle cars, Mr Goodall stated that "that's what, um, [Azn] calls his beetle, a dung beetle".

(4) …in response to a question about what book a colleague was reading, Mr Goodall stated "that book on 50 ways to eat cock".

(5) …in response to the comment "since when have you been covering your arse, Bounder", Mr Goodall stated "probably when you're walking round in the bathhouse Parish".

(6) …when talking about a colleague at the gym, Mr Goodall stated "have your jatz crackers fallen out?"

151. The Commission found there was a valid reason for dismissal, and the employee was afforded procedural fairness. However, it found the dismissal to be harsh due to the personal and economic consequences of the dismissal on him and his dependent children.

152. He is the father of four children and three of them are financially dependent on him (as the main breadwinner of the family), and he had difficulty finding comparable employment.

    a. Such familial and financial considerations are of course quite irrelevant to any persons who may have been harassed or damaged by the conduct.

153. The Commission ordered that the employee be reinstated. The decision, including the remedy of reinstatement, was upheld by a majority of the Full Bench.[40]

154. This case is another concerning example of the Fair Work Commission:

    a. Substituting its decision making for the decision of the employer – a decision that was carefully considered and made following an investigation into the alleged conduct.

    b. Overriding the decision of an employer to try to enforce its values and expectations of employees' conduct in the workplace, leaving the employee damned if they acted on the conduct (in the Fair Work system) or damned if they did not (in the anti-discrimination system).

    c. Placing people back into the workplace that the employer has reasonably determined breached appropriate standards of conduct and should no longer work at that workplace, and that present a threat to the health and wellbeing of others.

    d. Elevating the familial and financial circumstances of an individual above considerations around the valid reason for dismissal, and the flow on effects for the business, and the remainder of the workforce, including any people who may have been harassed or damaged by the conduct.

[40] *Mt Arthur Coal v Goodall* [2016] FWCFB 5492.

155. In this regard, Commissioner Johns in his dissenting decision made some pertinent findings, including that "the finding that the "conduct was towards the lower end of the scale of seriousness" cannot, with respect, be taken seriously." He said "the reference to "teabagging" was a reference to a sexual act of male domination used to humiliate a sexual partner" and that the Commissioner at first instance "failed to properly characterise the teabagging comment as an incitement to engage in sexual assault."

156. Commissioner Johns went on to say:

> ***[91]*** *This is not a case of a difference of degree, impression or empirical judgment. There is extensive literature about the effects of discrimination, including in the workplace. Making jokes or comments that are inherently Islamophobic and homophobic is likely to negatively affect the mental health of people in the workplace ranging from anxiety to depression...*
>
> ***[92]*** *It is for this very reason that Mt Arthur has a Code of ... Conduct that expressly prohibits behaving in a way that is "offensive, insulting, intimidating, malicious or humiliating"... In implementing the policy, promulgating it and conducting training ...*
>
> *Mt Arthur was fulfilling its obligations as an employer under Federal and State legislation to ensure that its workplaces are free of discrimination and harassment.*
>
> ***[93]*** *In the face of a substantial and willful breach of that policy, Mt Arthur took the matter seriously, and ultimately concluded that it was a valid reason for termination... Requiring Mt Arthur to reinstate Mr Goodall in this context is plainly unjust. Mt Arthur took decisive action to eliminate Islamophobia and homophobia in its workplace. It should have been commended for its action, not punished by being required to take Mr Goodall back.*

157. These cases are just three examples of a trend whereby tribunal members have overturned an employer's valid termination and awarded a remedy, due to a determination of 'harshness' based on matters (a) beyond the employer's control, and (b) quite unrelated to the consequences of the actions for potential victims of sexual harassment (i.e. co-workers).

158. The message such decisions send is that where an employee seriously breaches an employer's policy or engages in clear serious misconduct such as sexual harassment, if they are older or their employment prospects are limited, they will retain their job, or at very least be financially compensated.

159. It sends a message that under the totality our existing employment laws, sexual harassment is acceptable and certain cohorts of people can and will get away with it. This is not acceptable to employers and it should not be acceptable to the Australian community. Change is needed.

160. Alternatively, it sends a message to employers that they are legally liable for conduct under one area of the law, that another area of the law increasingly precludes them from managing. Again, employers are not provided with any level of certainty about how they should go about dealing with such issues without either the risk of a costly claim, or real and unacceptable risks through an unacceptable perpetuation of harassing conduct.

161. This trend in particular shields the mid-career plus workforce from responsibility for their actions. As the *Everyone's Business* survey tells us, more than half of sexual harassers are over 40[41], showing that the unfair dismissal system is sending a greenlight on dismissing conduct to precisely the cohort of employees most at risk of committing such conduct.

162. Issues relating to the impact of the dismissal on the applicant and their family in deciding whether it was harsh, unjust or unreasonable should have no bearing on the tribunal's decision and each application should rest on its merits.

163. Such personal considerations for the perpetrator are fundamentally unrelated to the impact of the actions on the victims of harassment, there is no solace or mitigation for them in the age, re-employability or familial circumstances of the perpetrator that harmed them / placed them at risk.

164. We also note there is no qualification on the unwelcome nature of sexual harassment under s.28A of the Sex Discrimination Act, based on how old or re-employable the offender is.

165. The reality there is almost always going to be an element of hardship associated with termination of employment but where sexual harassment and other issues of serious misconduct are concerned, given employers' strict obligations under legislation and the expectations of the community, the courts and tribunals should be more cautious in, and more restricted in their capacity to, overturn the legitimate decisions of the employer. The policy aims of preventing sexual harassment should outweigh any concerns about personal impacts on perpetrators.

Recommendation 6: Properly balance unfair dismissal – harshness v merit

Where it is established that a dismissal has been effected to comply with sexual harassment laws (or with laws against discrimination or bullying), there should be no scope for the dismissal to be found to be harsh based on the personal circumstances of the individual ex-employee concerned / the perpetrator (for example that their age or personal circumstances may impede their capacity to find another job).

3.6 Deem valid cause where employers are acting on sexual harassment

166. An employer, who can be held accountable for employee actions that constitute sexual harassment in the workplace, must be able to discipline and if necessary end the employment of those who commit or are at genuine risk of committing sexual harassment.

167. Unfortunately, there have been examples of industrial relations tribunals finding that valid cause has not been established, despite the employer having taken action for the purpose of complying with laws against sexual harassment or workplace health and safety.

168. The following example, while in relation to compliance with safety obligations, illustrates this problem.

[41] Human Rights Commission (2018) *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, p.36.

169. In a 2017 matter, Mr Palmer, a product handler, was dismissed for serious safety breaches, including a breach of the *Occupational Health and Safety Act 2004* (Vic). The Commission found that Mr Palmer had "consistently demonstrated that he could not or would not comply with reasonable and fundamental site rules, directions and procedures, particularly those relating to safety, despite warnings he received along the way".[42] This conduct was found to be "ultimately inconsistent with the trust and confidence required in a continuing employment relationship". At first instance the Commission found Mr Palmer's conduct breached the Respondent's safety policies and provided valid reason for dismissal.

170. However, the Commission granted Mr Palmer permission to appeal, upheld the appeal, quashed the decision and order at first instance, and remitted the matter to be re-determined.[43] It was subsequently found that there was not a valid reason for Mr Palmer's dismissal.[44]

171. In particular, it was found that the employer's reliance on the unsafe work manoeuvre and Mr Palmer's failure to wear safety glasses did not individually or collectively constitute conduct sufficiently serious to justify termination of employment.

172. In an example relating more directly to sexual harassment, an employee was dismissed for poor performance, and was later found to have downloaded "hard core" pornographic material on his work mobile and laptop repeatedly.[45] His laptop also contained various images and a video of himself performing sex acts.

173. The Commission heard the man:

a) "*failed to treat other people with respect, failed to organise his time and concentrate on his work while at work, failed to ensure compliance with regulatory requirements, and failed to ensure that the workplace was free of sexual discrimination harassment*"; and

b) "*was a person who simply did not know the boundaries between what was appropriate or inappropriate conduct in the workplace*".

174. However, the Commission found there to be no valid reason for the dismissal. It ordered the employer to pay $10,000 in compensation.

175. These perverse outcomes are not in line with community expectations and can create a perception that there will be no consequences for individuals arising from their misconduct (such as not complying with directions / expectations concerning appropriate workplace behaviour). Such decisions also place employers at serious risk of breaching their legal obligations and becoming vicariously liable for an employee's actions, but at the same time unable to properly counsel, discipline or terminate employment to enforce the necessary standards of conduct.

176. The Australian Chamber maintains that the unfair dismissal provisions of the Fair Work Act operate in a manner that is not consistent with sexual harassment laws and expectations that employers will

[42] *Palmer v USG Boral Building Products Pty Ltd* [2017] FWC 147.
[43] *Palmer v USG Boral Building Products Pty Ltd* [2017] FWCFB 1929.
[44] *Palmer v USG Boral Building Products Pty Ltd* [2018] FWC 654.
[45] *Croft v Smarter Insurance Brokers Pty Ltd* [2016] FWC 6859.

take 'all reasonable steps' to prevent harassment. This is an important area that needs to be addressed to reduce the occurrence of sexual harassment in Australian workplaces.

Recommendation 7: Properly balance unfair dismissal – valid reason

Where it is established that a dismissal has been effected for the purposes of addressing sexual harassment, valid cause should be deemed to have been established, and procedural deficiencies should not be able to render that dismissal unfair and a former employee should not have access to compensation or reinstatement.

3.7 Avoid loopholes

177. Unfair dismissal is not the only cause of action under which ex-employees can contest their dismissal (or counselling and discipline, short of dismissal).

178. Broad 'general protections' provisions are also in place that create difficulties for employers and afford a very wide range of grounds for employees to dispute legitimate management actions. Members of the Australian Chamber have provided feedback that general protections claims are being made by ex-employees whose employment has been terminated where they cannot access unfair dismissal protections, and that the lack of a compensation cap may encourage some employees to press claims with little or no merit.

179. If the SDC is minded to adopt some or all of the abovementioned recommendations concerning the unfair dismissal provisions of the Fair Work Act, as we argue, it should also be mindful of the potential for the general protections provisions of the Fair Work Act to be used as a 'loophole' for those dismissed, counselled or disciplined who may, as a result, find the unfair dismissal regime less attractive.

Recommendation 8: Ensure adverse action claims are not used instead

Government also be urged to ensure the general protections provisions of the Fair Work Act cannot be used as an alternative avenue to circumvent revised parameters for pursuing unfair dismissal claims.

Australian Chamber of Commerce and Industry

4 SMALL BUSINESS AND SEXUAL HARASSMENT

4.1 Introduction

180. Australia, as with many countries:

a. Has had protections against sexual harassment since the 1980s.

b. Applies these protections in relation to employment in both smaller (Small to Medium Sized Enterprises, SMEs) and larger businesses.

181. **Better addressing sexual harassment in our small businesses must be one of the core aims coming from this inquiry**.

a. Small businesses employ approximately 97% of all working Australians.[46]

b. 93.5% of employers in Australia employ less than 20 people.[47]

182. One of the key outcomes of this inquiry should be practical, appropriate and efficacious additional / bespoke measures to improve SME awareness, appetite and capacity to better address and respond to sexual harassment in smaller workplaces.

183. SME owners and managers have the same range of values, empathies and commitments as those leading larger organisations, and they both harness the benefits of, and must manage the challenges of, the range of attitudes and behaviours that Australians inherently bring to work. Put another way, the attitudes and behaviours that lead to sexual harassment, and that combat harassment, are brought into SMEs and larger businesses equally.

184. One of the key foundations for this submission, and for the future of combatting sexual harassment across our community, is recognising the societal attitudes and behaviours that people bring to work, and the strengths and vulnerabilities this creates. Community values and attitudes seem particularly important for the experience of sexual harassment within SMEs, as:

a. Enterprises and workplaces are often located in the local communities that engender the attitudes and behaviours Australians bring to work.

b. Formal written policies and published value statements are less widely used in SMEs, and informal 'common sense' processes and approaches preponderate. Training on behavioural expectations and rights is also less common in SMEs, and must be so as SMEs lack the financial resources and complex team structures that allow larger businesses to train their staff in these areas.

185. SMEs, as with all businesses, want to ensure a safe working environment, comply with their legal obligations and do the right thing by their people.

[46] ABS Counts of Australian Business 8165.0.
[47] ABS Catalogue No 8165.0 Counts of Australian Business, Released 20 February 2018, data to June 2017 (Latest currently available)

186. SMEs support the rights of all Australians to work free from unwanted sexual behaviours and advances contrary to both the law and the values and expectations of the Australian community. This is what SMEs tell us through their representative organisations.

187. However, there is a clear information, competence and resourcing gap between SMEs and larger businesses in capacities to manage for the elimination of sexual harassment.

a. Larger businesses have information, technical advice, processes and procedures on sexual harassment, as well as the financial resources often necessary to solve matters, that are simply inaccessible to SMEs. Organisational sophistication and resources deliver larger organisations a greater capacity to take some measures.

b. Larger businesses have a level of functional redundancy that creates time to proactively and reactively address sexual harassment.

c. Conversely, informality and direct supervision in SMEs can bring their own immediacy and strengths in combatting sexual harassment.

188. The differing capacities of smaller and larger enterprises is a particular challenge given the highly complex, even obtuse nature of sexual harassment law and practice, and the fact that much of the jurisprudence and best practices in this area come from large and complex organisations. With the best will in the world, this is a very challenging area of employment to manage for, and for busy SME proprietors, the common sense and practical values they try to use to run their business will often not be enough.

189. SMEs are also not part of the substantial and vibrant professional networks that have emerged on various dimensions of gender diversity which see positive exchanges of information and best practices between Australia's largest enterprises and key actors in this area such as the Human Rights Commission, WGEA and state tribunals. We don't attach this label in any way pejoratively, but there is clearly a diversity industry / diversity community of lawyers, executives, academics etc in Australia, which can be very positive in combatting sexual harassment, innovating and learning– but SMEs are not part of it.

190. The positive, regular exchange and dialogue between diversity leads of our major corporations and key agencies supporting the employment of women, including the HRC and the SDC, is not accessible to our SMEs, notwithstanding that they are subject to the same laws and liabilities as our largest enterprises.

191. This inquiry is real opportunity to do better on sexual harassment in this very substantial, if not dominant, subset of employment and workplaces in Australia. It is an opportunity to get more SMEs attuned to sexual harassment and better able deal with it.

4.2 Better understanding SMEs and sexual harassment

192. The inherently hidden or covert nature of much of sexual harassment is compounded in SMEs. There is a paucity of information on which to make sound policy and deliver improved assistance to SMEs and those who work in them. There is too much that we don't know regarding, for example:

a. The incidence and nature of sexual harassment in SMEs, and differences between SMEs by (for example) industry, period in business, profile and experience of proprietors etc.

b. Differences in sexual harassment between SMEs and larger organisations.

c. Any particular or disproportionate risk factors in SMEs / particular profiles of SMEs.

d. Strengths and weaknesses in how SMEs manage harassing behaviours and risks.

e. The resources and capacities of SMEs to manage for sexual harassment free workplaces.

193. We thank the Commission for the information on SMEs in *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces,* but with due respect, there is nowhere near enough, and the data in the report begs more questions. Section 4.2 of the Report[48] indicates that:

a. Organisations of 200 or more employees account for 39% of those sexually harassed.

b. Organisations of 20 to 199 employees account for 33% of those sexually harassed.

c. Organisations of 5 to 19 employees account for 19% of those sexually harassed.

d. Organisations of 1 to 4 employees account for 5% of those sexually harassed.

194. The Australian business community submits that:

a. There is a pressing need to close the information gap on sexual harassment and SMEs.

b. We need an improved information base to inform future initiatives and regulation in this area.

c. Until there is improved knowledge of what is going on in SMEs and the experiences of complainants / victims, and of employers and others working in SMEs, we should be very cautious in changing regulation or adding regulation / liabilities to SMEs.

[48] Human Rights Commission (2018) *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, p.64

Recommendation 9: Research Report on SMEs and Sexual Harassment

Further dedicated (quantitative and qualitative) research be undertaken into, at least the following:

- The incidence and nature of sexual harassment in SMEs.
- The familiarity of SME proprietors with sexual harassment, and how behaviours and risks can be managed.
- The financial and other capacities of SMEs to address sexual harassment (both behaviours and complaints processes).
- The financial and other capacities of SMEs to settle matters by agreement (exchange of the withdrawal of complaints for financial consideration), and to apply determinations.
- Any other considerations raised by sexual harassment in the context of SME employment.

This could be conducted as a pilot, focusing on a number of different sectors, for example a particular industry or area (including regional or remote areas), recognising that the small business sector is not homogenous.

This research should be undertaken with input and engagement from the SDC/HRC, state and territory anti-discrimination tribunals, the Australian Small Business and Family Enterprise Ombudsman, and the Australian Chamber network as Australia's largest and most representative voice for SMEs.

4.3 SMEs' capacities to take action on sexual harassment

195. It is widely recognised across many facets of our regulatory system that SMEs face unique challenges and often require appropriately targeted, designed and directed approaches to regulation, particularly in regard to employment. For about the same period as we have had statutory recognition of and protection against sexual harassment, we have also recognised the need to adjust / differentiate the operation of various areas of employment law and regulation for SMEs.

196. The limited capacities of SMEs to comply, and their unique challenges are recognised in other areas of Australia's employment laws, including criteria for considering the fairness of dismissal[49], and differentiating access to statutory redundancy pay by business size[50].

197. SMEs can have some particular strengths in managing for sexual harassment free workplaces, including:

    a. SME owners and managers work very directly and personally with their people, and will often be highly attuned to their welfare and wellbeing, and to interactions between staff. Put

[49] *Fair Work Act 2009*, s 387.
[50] *Fair Work Act 2009*, s 121(1)(b).

simply, those running SMEs can often directly observe more and act on more (and with more immediacy and informality) than leaders in larger, more complex organisations.

b. SME owners and managers can informally '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 to be frank, teaching some younger men learn 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.

c. SME owners and managers can very informally and with little fanfare extend opportunities for young women to enter into traditionally male dominated areas of employment, taking substantial and meaningful steps on diversity at the local community level. Low key decisions of SME proprietors at the local level to 'give girls a go' can achieve every bit as much as the best publicised corporate initiatives.

198. However, SMEs can also occasion some unique vulnerabilities / some unique challenges, including:

a. The sexual harasser can be the proprietor, and he/she may feel unrestrained and unaccountable in their personal actions when working 1:1 with their employees, in 'their business'. Risks created by authority, autonomy and privacy may well play out very damagingly in some SME environments.

b. An employee concerned about the behaviours of the boss or another staff member can feel they have no-one to talk to and nowhere to go in a very small organisation.

c. The informal and immediate nature of day to day relationships that can be a strength of SMEs can also create vulnerabilities and encourage unacceptable conduct.

d. 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. Problem people cannot be moved.

e. Those subject to harassment must work closely with those whose conduct they are objecting to, or whose conduct they have complained about.

199. The regulatory environment in Australia is complex and in too many cases not geared or appropriate to the realities of small business. Many areas of regulation are designed with large businesses in mind and ignore the unique needs and characteristics of small businesses. This impacts not only on the small businesses, but also those who regulation is designed to protect. This is compounded when litigation and the precedent that fleshes out how the law needs to be applied is shaped by large enterprise / large organisation cases (as it inevitably is).

200. It is important that regulation of sexual harassment be (more) appropriate to the circumstances and capacities of small businesses. SME employment is too significant a dimension of sexual harassment challenge to be ignored, or glossed over in one-size-fits-all approaches, shaped by what is possible in our largest and best resourced organisations.

201. The point of appropriately/better gearing regulation to smaller businesses is not to elevate the interests of SME proprietors over those of victims of harassment, rather it would acknowledge that measures to eliminate harassment will be more effective if sensitive to, and better geared to, the nature, size and capacities of enterprises. Australia can make a better response to sexual harassment if we attack it at two levels:

    a. A general response, which in practice has been most accessible and relevant in larger organisations.

    b. Bespoke regulation, information and assistance geared to the unique nature of smaller businesses.

202. The Productivity Commission found that small businesses especially value (and by implication consider that effectiveness lies in):

> *compliance requirements that are straightforward to find, understand and implement – this necessitates brevity, clarity and accessibility in the communication of compliance obligations…"*[51]

203. The regulatory framework surrounding the employment relationship in Australia, including the laws around sexual harassment fails to deliver on these objectives. Instead it is complex, with multiple jurisdictions and considerable overlap.

Recommendation 10: Review Scope for Bespoke Regulation for SMEs

Based on the findings of the proposed SMEs and Sexual Harassment Research Report (our preceding recommendation), input be sought on a bespoke / dedicated approach to sexual harassment complaints relating to employment in SMEs. Consideration should be given to bespoke / dedicated mechanisms for sexual harassment complaints against SMEs, addressing considerations such as:

- A less formal, less legalistic mechanism for dealing with complaints relating to employment in SMEs, with a greater emphasis on straightforward dispute settlement (where possible), rather than litigation and damages.
- Whether the Fair Work Commission (or a restructured, renamed Fair Work Commission) should undertake this dispute resolution role for SME employment.
- Differentiating relief available in cases of sexual harassment by business size, including consideration of capping compensation for some or all harassment claims against SMEs.
- The role of lawyers in addressing alleged harassment in SMEs, or whether there could be an exclusion in favour of more direct and less formal dispute settlement.
- Which claims relating to SME employment could be dealt with less formally or be subject to a cap on damages, and which if any should not.

[51] Productivity Commission 2013, *Regulator Engagement with Small Business*, Research Report, Canberra, p. 38.

4.4 Better informing SMEs on sexual harassment

204. Small business people, like the rest of the community are familiar with the general concept of sexual harassment, and to some extent that there are laws against it. Many would be likely to be able to identify the clearest and most obvious examples of sexual harassment, and the most heinous of conduct that is clearly unacceptable. Many female small business proprietors in particular will have the same experiences and propensity to have been exposed to harassment during the course of their working lives as women working for others.

205. However, sexual harassment, the needs and concerns of staff and the operation of the law extend beyond the most heinous and obvious cases, making managing harassment is complex and difficult (even in the largest and best resourced organisations), and this area of the law is complex, to some extent subjective and difficult to navigate.

206. The absence of dedicated human resources staff or staff with specialist skills to handle sexual harassment claims means that SMEs face considerable challenges in keeping across current laws, designing policies, monitoring and fostering positive workplace behaviours and properly dealing with concerns as they arise.

207. Many SMEs also operate without the formality of written policies and processes, and instead rely on the power of direct instruction and the continuous monitoring that comes from the proprietor working with staff. Neither approach is inherently more valid, and both formality and informality can play a powerful role in ensuring workplace behaviours and conduct meet expectations.

208. Recent research found that "small business people want to do the right thing, especially by their staff – the team that can contribute so much to business success. Yet it can be challenging to understand their obligations and navigate employment laws".[52]

209. This study found that the daily life of many small business operators is characterised by constant challenges and lack of time. These small business operators spoke of juggling multiple roles whilst contending with a fast paced marketplace, demanding customers, the increased burden of administration, and the ongoing challenges of retaining good staff. Many were acutely aware that their skill set was anchored in their profession of choice and did not necessarily extend to all of the specialist skills required to operate a business (and to comply with employment law). Most did not have any pretence about having the skills of a lawyer, accountant or human resource professional. Knowledge in these areas had largely been gained through years of experience and trial and error, in conjunction with a 'common sense' approach borne out of the practical demands of their business.[53]

210. Research from the WHS field[54] underscores the competence and capacity of SME proprietors to comply with regulation, but also that the burden and accumulation of such regulation across various areas makes this very difficult.

[52] Bruce Bilson, Agile Advisory, Working Better for Small Business, Report from the Connect & Engage small business consultation program, 6 July 2018.
[53] Sweeny Research, Citizen Co-Design with Small Business Owners, 13 August 2014.
[54] See McKeown, T and Mazzarol, T (2018), Enabling Safe and Healthy Workplaces for Small Businesses, Small Enterprise Association of Australia and New Zealand, pp.9, 10.

211. This adds up to a situation in which a complex and, to some extent, opaque body of law (albeit dealing with behaviours that common sense and empathy should tell people are unacceptable) is colliding with a small business community that is already finding legal compliance challenging across a range of areas, and that is already juggling too many areas of liability and obligation. Small businesses need encouragement to prioritise ensuring their workplaces are free from harassment, and they need sensible, well considered, well designed support to do so.

212. One of the AHRC's functions is to "to promote an understanding and acceptance, and the public discussion, of human rights in Australia"[55], being in this case compliance with Division 3 of the *Sex Discrimination Act 1984*.

213. There is an opportunity to be far more effective in performing this function in relation to sexual harassment and SMEs.

214. Support for small businesses should not be through an avalanche of additional guidance materials, or shortened or 'dumbed down' documents. Instead, guidance should be designed in such a way that it is easy to access and use for those who are time and resource poor.

215. Small businesses need help in translating the regulations (and precedent) into their own context and help in implementing them. This is particularly the case given the increasing changing nature of the boundaries of what constitutes the workplace, which complicates matters even further.

216. Feedback from some Australian Chamber members indicates that 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.

217. We are seeing various regulators developing the capabilities of their own staff to better provide information and support compliance, which is welcome and will be even more welcome if it extends to a greater capacity to engage with SMEs and their people.

218. It may be worthwhile for research to be conducted into how to best raise awareness and engage with individuals and businesses in the sexual harassment context. In particular, how to best provide education and supporting guidance clarifying duties and expectations in the context of the increasing use of social media, changing boundaries between the workplace and social life and the growing number of Australians forming (and ending) relationships with peers in the workplace.

219. Better understanding and adapting to a regulator's audience seems to be a growing area of good practice. Safe Work Australia (SWA) recently commissioned ORIMA Research to conduct research with key external audiences to help understand their communication needs and preferences[56], and has adapted its approach.

[55] *Australian Human Rights Commission Act 1986*, s.11(g).
[56] See Safe Work Australia, Annual Report 17-18, pp 80, 165.

220. SWA found, for example, that its Virtual Seminar Series (VSS) was considered a very useful information source. This involves free online seminars that features national and industry experts, academics and business leaders who share their experience and knowledge in relation to best practice in work health and safety. The seminars come in a variety of formats, from live broadcasts, to videos, podcasts, and come with supporting materials such as transcripts, infographics and research papers.

221. Attendance at training courses and conferences takes time and money, which can be a challenge for small businesses or those located in regional or rural areas. The VSS is a resource that is not subject to the same constraints, and appeared to be well-used. The WHS material from SWA was viewed over 70 000 times (October 2014 - March 2015) from people around Australia and overseas.

222. SWA recognises that small business owners often learn most effectively from hearing about the approaches used by other small businesses. SWA has a suite of case studies from small business owners and regulators sharing their success stories achieving positive outcomes in WHS. The 2014 VSS featured programme items and additional links targeted to small business owners. Of note were the examples highlighted by SafeWork SA from small business owners on seven steps they took to achieve good work health and safety outcomes and bottom-line improvements[57].

223. The Fair Work Commission also recently commissioned SME specific research and is looking to adapt its services for an SME audience where appropriate[58].

224. The Australian Chamber respectfully submits that the AHRC/SDC should consider commissioning an independent stocktake of its information resources in terms of format and content to examine whether they meet the needs of smaller employers (as one subset of those to assist, along of course with those experiencing harassment, larger organisations etc). As many small business owners are from a non-English speaking background, the stocktake should also include a review of the types of information that are available in Languages Other Than English.

225. We also encourage active cooperation with the ASBFEO, and harnessing their learnings on how best to communicate with SMEs.

[57] See Safe Work Australia, The second progress report on The Australian Work Health and Safety Strategy 2012-2022, 1 October 2013-31 October 2014, p 7.
[58] Bruce Bilson, Agile Advisory, Working Better for Small Business, Report from the Connect & Engage small business consultation program.

Recommendation 11: Ongoing information Campaign for SMEs on sexual harassment

A national campaign should be conducted to promote increased understanding amongst SME proprietors and managers of what constitutes sexual harassment, their responsibilities, what their employees are entitled to expect and not expect at work, how to provide a safe and harassment free workplace, and some of the particular risks for SMEs, including the economic consequences of a sexual harassment claim

This needs to be deliberately designed for SMEs, and not simply be a re-packaging of existing materials that have been most relevant to Australia's largest organisations.

This might be way of an advertising campaign raising awareness and then directing interested SMEs to a supporting website for further detail and tools. Examples and ideas will also be important to making this resonate with SMEs.

Concurrently such a campaign may also have the wilder aim of simply promoting an understanding of sexual harassment in the SME context and that it is unacceptable and may be actionable.

Given that there were over 89,000 new businesses entering the market sector in the last year on record,[59] the campaign should be ongoing. This will also ensure a sustained focus on sexual harassment. (Any such campaign would need to be properly focus tested to ensure messages were appropriate and effective for an SME audience, which our network may be able to assist with).

4.5 Industry engagement and partnerships

226. The Australian Chamber commends industry engagement initiatives as best practice for government when seeking to engage employers, particularly SMEs with laws and regulation. These are critical tools for promoting compliance and changing / improving behaviours and experiences, particular in SMEs.

227. Regulators have pursued a range of successful initiatives in partnership with those who represent business, with areas of obtuse of opaque law and regulation potentially very ripe for such approaches. Business organisations such as chambers of commerce and industry associations are trusted by small business people who often fear government, fear regulators and in particular fear organisations with prosecutorial powers or through which they are effectively sued by those aggrieved against them.

228. We strongly encourage this inquiry to recommend engagement and collaboration with business organisations in relation to sexual harassment.

229. A number of research papers have demonstrated the unique intermediary role of industry associations, particular for SMEs.[60]

[59] Analysis of ABS 8165 – Counts of Australian Businesses, including Entries and Exits, June 2014 to June 2018.
[60] See, for example, Mercer, R., *Evaluation of model work health and safety (WHS) laws: non-employing, small and medium business interviews*, (2014), Safe Work Australia.

230. Greater use of partnerships to provide information and promotion though employer networks would increase the effectiveness of campaigns on sexual harassment and help disseminate tailored information to industry / SMEs in greater numbers.

231. This may be additionally relevant were sexual harassment laws to change, and the liabilities and responsibilities of employers change in the wake of this inquiry. Disseminating information through / with business organisations seems a particularly effective mechanism in instances where an area of law is little known amongst small businesses, is thought of as the preserve of larger businesses, provokes fear amongst small businesses, or seems so potentially threatening to small businesses that they find it easier to ignore rather than engage. Efforts to do better on sexual harassment would seem particularly apt for such an approach.

232. A related example concerning WHS laws demonstrates the strong relationship with industry associations who facilitate numerous information activities such as seminars and briefings on issues.

Hospitality Sector WHS engagement example

Between 26 February – 26 June 2013, SafeWork SA partnered with the SA Hospitality industry associations to deliver rounds of WHS presentations. Overall, there were:

- 12 presentations in total
- 7 metropolitan
- 5 regional
- Total of 346 persons booked with a 80% conversation rate for attendance
- Total of 181 different organisations represented

The feedback overall was excellent with businesses indicating a high degree of compliance and awareness following the engagement with / through their business organisations.

Recommendation 12: Harness the Power of SME Representatives

Consideration be given to partnering with established employer networks and organisations to promote increased awareness of sexual harassment, the benefits for SMEs of eliminating sexual harassment / risks of not doing so, how SMEs should approach sexual harassment, and any other changes or priorities arising from this inquiry. This would see such business organisations funded to deliver services and information for (and with) government, potentially on a tendered basis.

4.6 Small Business Champions of Change

233. Many of Australia's largest enterprises are taking world leading initiatives on diversity, and are creating cultures (backed by sophisticated procedures) that are making sexual harassment at work less acceptable and hopefully in time less prevalent. This is not to claim sexual harassment is solved

or risks eradicated in any workplace, however many millions of dollars are being spent in our leading corporate organisations to live up to their stated values, change cultures and indeed change the gender composition and face of organisations.

234. One key part of this work is the public role of leaders, and their importance in transforming organisations (concurrently with Australian boards and management becoming more gender diverse). This is the Male Champions of Change model, and there is no better encapsulation of it than that of the former SDC[61]:

> *A message from Elizabeth Broderick*
>
> *In most nations, men largely occupy the seats of power. Relying exclusively on women to lead change on gender equality is therefore illogical. We need decent, powerful men to step up beside women to create a more gender equal world.*
>
> *The Male Champions of Change strategy is about male leaders advocating for and acting to advance gender equality.*
>
> *As one of the Male Champions of Change said: "Let's not pretend that there aren't already established norms that advantage men. Men invented the system. Men largely run the system. Men need to change the system."*
>
> *Through the Male Champions of Change strategy decent, powerful men work together to understand gender equality issues and lead action to accelerate progress.*
>
> *They step up beside women and work collectively to disrupt the status quo.*
>
> *We are heartened by the many leaders from across the world who – inspired by this concept – are replicating the strategy. We welcome your commitment and offer our experience and resources to assist you.*
>
> *We know that no two Male Champions of Change groups will be the same. Differing social, cultural and regulatory contexts will make customisation of the strategy critical.*
>
> *By sharing our approach, we hope to encourage the formation of many more Male Champions of Change groups to support this extraordinary opportunity for inspiring and collective leadership.*
>
> *Together we can help create unstoppable momentum for a gender equal world.*

235. While the Male Champions of Change strategy is commendable, what ASX100 companies, universities, police forces and the army can do is irrelevant to SMEs, quite remote from their experience and not at all persuasive given their vastly different financial and time capacities. The commitment of a CEO of a massive business is not at all relevant or impactful to the experience of someone running an SME, and it cannot persuade them of anything.

[61] Male Champions of Change, A message from Elizabeth Broderick.

236. Those running SMEs need to hear messages from, and want to emulate, those who they can relate to, not those whose financial capacities and organisational sophistication are stratospheric by comparison. All of us need to see ourselves in those whose examples we could or should follow.

237. Elizabeth Broderick points out that "the Male Champions of Change strategy is about male leaders advocating for and acting to advance gender equality". It seems to us that the prevalence and impact of sexual harassment in smaller businesses could be positively changed by the small business community receiving similar messages and leadership and messages from their own role models (irrespective of gender), and those who resonate with their experience. This may not be limited to sexual harassment and could be part of a wider message relating to greater gender diversity in SMEs, including 'giving more girls a go' at jobs and training opportunities in their local communities, in particular in traditionally male dominated industries.

238. An interesting dimension of this may be profile. Many of the major CEOs forming the Male Champions are high profile, influential voices in the large business community. Their voices and commitments carry weight by virtue of who they are, and the organisations they lead. This 'celebrity' element is not inherently part of SMEs and would be a challenge for an SMEs Champions initiative. Consideration may therefore be given to a higher profile figure to be the face of such an initiative, who would in turn be relevant to SMEs or be a former SME person. Just as an example, consideration could be given to a suitable figure from the media / TV with an SME background, to act in public role to bring forward SME voices and experience.

Recommendation 13: Small Business Champions of Change

The SDC and Australian Small Business and Family Enterprise Ombudsman work to pilot Small Business Champions of Change. These champions might (for example) tell their story and explain why they consider it's important that work in their SME be free from sexual harassment, or indeed their personal stories, when they realised this was important, what they have done etc.

239. In implementing this recommendation, consideration could be given to:

a. Ensuring that the public commitment of SMEs to diversity and non-discrimination means something, and that others get on board and follow their example. This is why a measure more funding and promotion is required for an SME group than the initiatives of our largest business, which they self-fund and support through engagement with the already engaged policy and professional communities in this area (the diversity industry) / Male Champions of Change.

b. A public face for any campaign / SME Champions of Change, and a visible patron or public champion to take this forward. A TV personality or famous person with a background in small business may be useful (see above).

c. Ensuring there are small businesses engaged from all sub sectors – and that champions not come solely from 'Blokey' trades (although there may be some role for such voices).

d. A big sibling / little sibling approach in which the established Male Champions of Change, and some of their leading organisations might provide talent, sponsorship, mentorship etc to the fledgling small business group.

240. The SDC would not need to be alone in this task. It is widely recognised that SMEs listen and trust their representative organisations. Implementation of this recommendation should include engagement with, and work to secure the support of, SME organisations, and consideration could be given to scope to convene such a network with existing organisations representing SMEs (who could indeed tender to run such a network/s). Therefore, consideration should be given to government funding existing chambers of commerce / industry organisations to convene an SMEs Champions of Change group (perhaps on a tendered basis).

5 OTHER MATTERS

241. As outlined in Section 1.3:

a. It is very difficult for any party to address the conclusions and proposals that will be recommended by other interests in advance of seeing those proposals, how they are prosecuted, consulting with members, and properly evaluating them.

b. It is vitally important that key interests in the sexual harassment system have an opportunity to analyse and respond to any proposed new or changed law, particularly those who would be subject to new or changed regulation (in this instance, employers, but also employees and their representatives).

242. For this reason, we urge the SDC to issue an Exposure Draft prior to concluding finalised recommendations in this inquiry. Alternatively, inquiry should specifically recommend to government that it invite additional submissions on the specific ideas and concepts arising from this inquiry (see Recommendation 1).

243. This said there are a limited set of additional considerations upon which we can provide some assistance to the inquiry at this stage, noting that this is inherently limited without seeing what others ask the SDC to do.

5.1 Non - Disclosure Agreements

244. Non-disclosure agreements (NDAs) often found in settlement agreements perform an important function in the management of sexual harassment allegations in Australian workplaces. Standard confidentiality clauses contained in NDAs prohibit parties to the agreement from disclosing certain facts about a matter such as the identity of parties involved, allegations and settlement amounts.

245. The SDC took the initiative in November 2018, to call on Australian employers to make a partial waiver of Non-Disclosure Agreements (NDAs) so parties to NDAs are able to make confidential submissions to the National Inquiry.

246. However, some may argue to this inquiry that going forward there should be changes to or new limitations how NDAs operate, unrelated to / well after the inquiry. This subsection seeks to proactively engage with any such propositions, were they to be advanced.

247. Whilst recent media attention around the use of NDAs has been negative, their use and purpose is often without ill intention. NDAs can and do serve an important role for all parties involved in sexual harassment complaints. They come in a variety of forms, can serve different functions and the motivations behind the desire to enter into a confidentiality arrangement can vary greatly based on factual circumstances and between parties.

248. As the SDC indicated in November 2018: *"We know NDAs can be beneficial, enabling all parties to put the unpleasantness of a dispute behind them.*[62]

249. Some may argue that there should be limits on the use of NDAs. However, we fear that this would misunderstand both the complex nature of sexual harassment matters, the value of NDAs to the various parties to these matters, including complainants, and the probable effect of any ban or limitations placed on their use. The effect of any changes to the accessibility of NDAs (or their ability to operate as agreed) on willingness to raise concerns and access rights needs to be carefully understood prior to any such course of action being considered.

250. Both complainants and companies often have legitimate interests in settling workplace sexual harassment complaints before they resort to invasive, exhausting and expensive lawsuits. NDAs also serve an important role in maintaining respectful and productive workplace relations after a settlement has been finalised.

251. There are many real reasons why victims of sexual harassment do not wish to be identified or air their grievances in public. In fact, many complainants make the judgement that signing an NDA is genuinely in their own best interests, because they value the guarantee of privacy. This may be privacy from family and friends who may treat them differently or might suffer from unwanted attention themselves, privacy from colleague who may otherwise find out from witnesses or the accused or privacy from future employers or even entire industries / their professions.

252. There is also the completely understandable aversion to undergoing an expensive, time consuming and potentially humiliating and demoralising public trial. Private settlements protect victims from all the painful ugliness that comes with litigation in the public eye by providing a route to resolution than entails less trauma and expense than going to court.

253. NDAs are also a choice, and one many of those exposed to harassment value. To the extent NDAs facilitate payouts or settlements, this can be very important for those subject to harassment. Some will want to exit a workplace and find work elsewhere, and monies can help facilitate this. Others will place value in a 'pay-out' as a personal validation, as restorative, or simply as part of moving on. The point being, the choice of an NDA as part of a financial settlement needs to remain open to employers and employees.

254. Removing or restricting capacities to enter NDAs also risks the privacy of complainants. Complainants will often value scope to use an NDA to protect their privacy and have some control over what is and is not communicated about them. Fear of open communication or an inability to take control of one's privacy through an NDA risks the unintended consequence of dis-incentivising rather than encouraging claimants to come forward for fear of public exposure.

[62] https://www.humanrights.gov.au/news/stories/national-workplace-sexual-harassment-inquiry-submission-deadline-extended

255. Signing an NDA is often tied to claimants receiving compensation – thus providing them with a path to financial redress without themselves having to face costly and drawn out legal battles to prove their case. Employers would undoubtedly be less inclined to enter into such settlement arrangements were confidentiality for the business not able to be preserved.

256. Individuals who experience sexual harassment should have the right to seek justice, whether it be public or not, and many chose to define justice for themselves as a payment negotiated with an employer. Any moves to ban or restrict NDAs risk marginalising rather than empowering those who sexual harassment protections aim to protect.

257. It is a practical reality that for some businesses they will need to settle both worthy and unmeritorious claims for the sake of commercial certainty. For example, an employer may well decide for commercial reasons to settle a claim brought by an employee, despite the fact that it appears on investigation to have no merit / insufficient evidence to justify action. Such a situation may arise for example where the claim can be settled for a relatively small sum and fighting it would be costly and take up a disproportionate amount of management time. The employer may well want to insist on an NDA in order to avoid such a situation becoming known to others in the business.

258. Such cases also highlight the value of NDAs to individuals who are wrongly or misguidedly accused of sexual harassment. Whilst uncommon, cases involving false or misguided accusations can potentially have devastating impacts on a respondent's reputation and career when made public, even where a court has cleared them of any wrongdoing. For this reason, NDAs are important as they are not only cheaper and quicker than going to court but allow the falsely or misguidedly accused to keep their reputation intact.

259. It is also important to note that there are currently already obligations on employers to disclose wrongdoing where the employer has "knowledge or belief" of the commission of a "serious indictable offence" defined as an offence which is punishable by a sentence of imprisonment of five years or more, which could include the offence of sexual assault. For example, under section 316(1) of the *New South Wales Crimes Act 1900* such a failure to report by an individual or a corporate entity without reasonable excuse is a criminal offence punishable by up to 5 years imprisonment. NDAs cannot free any employer from having to meet their obligations under the law, nor could they stop an employee being able to report a crime. Clarifying this, may strengthen the future use of NDAs for all concerned.

260. The Australian Chamber strongly opposes any push to ban or restrict the use of NDAs, to the extent that may be proposed in this inquiry. Rather than making NDAs unlawful or restricting their practice, we suggest that the following additional safeguards be considered in respect of confidentiality clauses in workers' contracts and specific settlement agreements, where such agreements deal with issues of sexual harassment.

5.1.1 Improved information for those considering NDAs

261. It is clear that the laws surrounding NDAs could be better communicated to parties entering into such arrangements, as a lack of awareness and enforcement has allowed confidentiality clauses to be misunderstood or even misused in some cases. Greater clarity around the extent of the requirements in an NDA and the scope of the NDA may be useful.

262. A simple one-page information document / fact sheet could be developed, which may be required to be given to all parties before they enter into an NDA. This would ensure that workers make an informed decision when they sign a confidentiality agreement and that they do so in full knowledge of the NDAs limitation.

263. This could be done in partnership with the Law Council / state legal bodies as a professional practice document, promoted through the legal profession. It would also be actively promoted by the SDC and state and territory anti-discrimination bodies. This might include a simple, plain language, Q and A / Facts on what an NDA is and is not, what is being agreed, and what can and accept be done after executing the agreement. It would also clarify for example, rights to legal advice regarding an NDA, after entering an NDA, rights to report crimes etc.

264. There has been considerable work in a number of legal jurisdictions on standard form contracts and simplified information for the community entering contracts that could be applied in this area. This could also be promoted through the increasing emphasis on continuing legal education, and the employment law chapters of legal societies etc.

Recommendation 14: NDA Information Statement

Consideration be given to a requirement / practice direction that all parties prior to signing an NDA be provided with a simple, clear one page information statement which sets out the law surrounding the signing of a confidentiality agreement, the limitations of the agreement and each parties' rights and responsibilities.

5.1.2 Legal Advice

265. There has been some commentary around the potential for an unequal power dynamic between employers and employees when signing an NDA. It has long been the practice in the UK that statutory rights to make employment claims cannot be waived unless the individual has received independent legal advice on an agreement for such a waiver.

266. Mandatory statutory requirements for legal advice have previously been used in instances where there is a potential threat that the power dynamic between the parties will possibly lead to an unequitable outcome. For example, it is currently a requirement for franchisee before they enter into a franchising agreement with a franchisor that they first seek independent professional advice.

267. In practice, this would need to be operationalised as a complainant having to reminded of their right to seek legal advice and being given an opportunity to take such advice before any deed could be executed.

268. Cost will be an issue for some people, and the SDC may want to consider this. We note the important role played by community legal services, who may be able to assist, and if necessary may need additional support from government to do so.

Recommendation 15: Legal advice

Further consideration be given to operationalising a requirement that non-disclosure agreements regarding sexual harassment proceed only after all parties have been reminded of their rights to seek legal advice on the proposed NDA and being given a reasonable period to do so.

5.1.3 Cooling Off Period

269. Consideration could also be given to making the inclusion of a confidentiality provision in an NDA / NDAs generally subject to a cooling off period for the settlement of workplace sexual harassment complaints, as is currently the law in some parts of the United States, which are subject to a 7-day cooling off period after signing.

270. This would provide all parties to an NDA with a further safeguard, allowing all parties in a less emotional and highly charged environment additional time away from the workplace to properly consider the effect of the agreement which they have entered into.

271. It would also allow all parties the opportunity to seek any legal advice (or further legal advice) or review at leisure all implications of the settlement.

Recommendation 16: Mandatory cooling off period for non-disclosure agreements

There should be a requirement that non-disclosure agreements regarding sexual harassment complaints be subject to a mandatory cooling off period, able to be triggered by any party to the agreement.

5.2 One stop shop for workplace sexual harassment complaints

272. This complex system of multiple bodies with differing and overlapping powers, different rules, different timeframes, different grounds applying under different schemes and differing responsibilities is very difficult to navigate, particularly for those subject to sexual harassment.

273. Faced with this confusion and complexity, some potential complainants may not pursue legitimate claims.

274. At the same time, this complexity only adds to the compliance costs for respondents, particularly employers who potential have to deal with multiple jurisdictions.

275. When it comes to the handling of unlawful workplace sexual harassment complaints, which constitute sex discrimination, there is currently an overlap between the discrimination jurisdiction of the AHRC and the Fair Work Commission (FWC). The sharing of this responsibility has created a complex, confusing and legalistic framework that is difficult to navigate for complainants and respondents alike.

276. Most complaints of unlawful discrimination (including involving sexual harassment) concern workplaces. Employment related discrimination is the largest category of complaints to the AHRC, accounting for more than 50% of complaints.

277. Similarly the Fair Work Commission is empowered to conciliate (and in some instances arbitrate) complaints related to sexual harassment including unfair dismissal and adverse action on almost identical grounds to the AHRC together with additional grounds such as because a person has a workplace right that they have exercised (e.g. an adverse action claim under the general protections provisions if there has been adverse treatment as a result of making a workplace complaint about an instance of sexual harassment).

278. If matters do not get resolved by conciliation, the complaint generally needs to take action through the courts.

279. There are also various state laws dealing with sexual harassment and tribunals and other bodies to deal with similar discrimination based workplace sexual harassment disputes.

280. There may be scope for some consolidation in this area, and the development of a one stop shop for at least the initial / pre-court stage of sexual harassment matters, (the conciliation phase), during which the emphasis should be matters such as (a) developing a shared understanding of facts and events, (b) clarifying positions and outcomes sought and (c) attempting to resolve matters without proceeding to the courts (which may or may not involve a financial agreement between the parties).

281. We understand that more detailed proposals to this effect may come from other quarters, and we look forward to an opportunity engage with any more detailed proposal that the SDC may receive, and provide employer input.

Recommendation 17: National One-Stop Shop for Sexual Harassment Complaints

Consideration should be given to:

- Scope to consolidate the existing responsibilities of the SDC and state and territory anti-discrimination bodies for the conciliation of claims of sexual harassment into a single, national conciliation body.

- This function being undertaken by the Fair Work Commission (with an expanded role in this area) which could potentially assume the role of claims lodgement and initial conciliation / dispute settlement in relation to a wider range of employment matters beyond its historical workplace relations jurisdiction.

282. There may be other areas of the workplace sexual harassment jurisdiction where overlap and duplication could be removed from the current legislative arrangements in order to simplify and streamline the path to resolution.

283. Consideration could be given to amending the Fair Work Act such that sexual harassment complaints could be dealt with by the Fair Work Commission in a similar manner to bullying complaints. Consideration could be given to allowing for orders restraining a party from continuing or repeating conduct, or from permitting others to engage in conduct. This might provide both current employees and employers with an option for urgent intervention that would stop the alleged conduct, resolve the issue and keep claimants who might otherwise choose to leave a workplace in their jobs.

    a. We would need to carefully consider and contribute to the further development of such an option to ensure the Fair Work Commission was required to take into account appropriate factors when considering the terms of any order.

    b. Employers should be provided with an opportunity to be heard in relation to any potential orders.

284. However, in order for this type of reform to be considered it will also be necessary to consider the overlap that would be created between such a new jurisdiction and the current non-binding conciliation role being performed by the AHRC.

285. We are aware that a number of other submissions are likely to make other Fair Work Act and jurisdictional reform suggestions.

286. As discussed in Section 1, it is vitally important that major proposals coming out of this inquiry such as new or amended jurisdictions that the SDC may wish to take forward be opened for feedback from other key interested parties. For this reason we again emphasise that an initial exposure draft and an invitation for a limited and a tightly focussed second round of submissions to inform final recommendations to government would give those engaged in the inquiry process the best opportunity to engage with those ideas.

5.3 Sexual harassment provisions in enterprise agreements

287. One of the questions the ACTU put to (largely) union members in its sexual harassment survey[63] assessed employees' desire to see sexual harassment addressed in enterprise agreements, as follows:

[63] ACTU, Sexual Harassment in Australian Workplaces Survey, p.8.

What more could be done by employers	%
Mandatory training of all staff on preventing sexual harassment	50.1
Institute an effective complaints mechanism	46.5
Provide more information about preventative measures, including the workplace policy	45.5
Clear workplace policy on the prevention and prohibition of sexual harassment	43.7
Sexual harassment is treated as a Workplace Health & Safety issue at my workplace	31.7
Have a clause in our enterprise agreement on preventing sexual harassment	26.6

288. Some employers and unions may choose to go down this path, noting however that an agreement cannot of itself change the application of the law in regard to sexual harassment, nor change employer responsibilities and liabilities.

289. However, we did find one example of an agreement which seems to not be beneficial in this area, and we very strongly question the inclusion of clauses such as the following in any enterprise agreement:

> *Should there be an occurrence where a complaint of discrimination or sexual harassment has been received, the Company Consultative Committee where it has been established shall be responsible for assessing and reviewing the complaint matter, with the complete co-operation of management.*[64]
>
> *(And in an earlier clause of the agreement) The Consultative Committee will be made up of an equal number of management representatives and Employee representatives elected by the Employees. The parties agree that there will be a maximum of three representatives from management and three from the site workforce.*

290. This appears to indicate that any complaint of sexual harassment by an individual must proceed to a collective committee of her/his peers. The dangers of this are obvious, including:

a. The employee's right to confidentiality and a level of agency in what is done about their experience is overridden.

b. The Consultative Committee may well comprise persons of the opposite gender, or who are friends with the alleged perpetrator, or have an interest in somehow taking sides.

291. We are not clear that such an agreement accords with what would be expected of an employer under sexual harassment / anti-discrimination legislation, however it does seem clear that not exposing an individual's complaint to the collective consultative committee would breach the agreement.

292. We repeat our point from Section 4 of this submission, again employers are damned if they do and damned if they don't, and the real persons who suffer are the potential victims of harassment. It is difficult to see how the approach in this agreement could be positive, or even lawful.

[64] Liebherr-Australia pty. ltd. / CFMEU Greenfield Agreement 2018 [2019] FWCA 234, Appendix A

293. Furthermore:

a. Sexual harassment is inherently an individual rather than collective matter. The definition of sexual harassment[65] is an individual one, based on a person, not a collective of persons in the workplace. Unwelcome-ness, offence, humiliation or intimidation are individual not collective.

b. No employee should rely on a collective representative or process to be able to access information on act on concerns in this area. Some may wish to pursue matters through 'their' union, many will not, and we cannot force such a collective process.

c. Addressing sexual harassment in enterprise (collective) agreements should not become a vehicle to raise disputes in the Fair Work Commission alleging a particular harassment matter breaches the agreement, with the aim of empowering the Commission to 'solve' the matter as a dispute under the agreement. The Fair Work Commission may be able to play some expanded role in this area, but this should only be by way of expanded engagement with individual not collective grievances. A collective dispute based approach would seem retrograde and unhelpful in this area

d. (Note) This is not to in any way discount the important services that unions offer their members on sexual harassment, or scope for unions to represent employees as individuals. This should not however collectivise matters that are inherently individual in nature, and unions are well placed to assume the role of agent or representative in relation to individuals.

294. We also note that even amongst a survey population of overwhelmingly union members, who are more likely to work under enterprise agreements than employees generally and be more familiar with them, only roughly a quarter supported such an approach in the ACTU survey.

295. Collective bargaining / enterprise agreements does not seem fertile ground to give rise to useful future actions on the highly individualised concerns around sexual harassment.

5.4 UK House of Commons Inquiry

296. In early 2018, the UK House of Commons Women and Equalities Committee launched a six-month inquiry into sexual harassment in workplaces and in public.

297. This was of course a UK inquiry into experiences under a different legal system, and with a different history of regulation and practice in this area, and a different society to that of Australia. While to some extent the root causes of sexual harassment in power imbalances and poor attitudes may be universal (one of the points of the #MeToo movement) this does not make conclusions and recommendations from one national and legal context transplantable into another, even in systems with as much shared lineage as Australia and the UK. Considerable care and critical faculty needs to be exercised, and in particular it cannot be assumed that:

[65] Sex Discrimination Act 1984 (Cth) - s28A

a. Any regulatory failures or inadequacies that justified remedial recommendations in the UK apply in Australia.

b. Remedial recommendations from the UK can be divorced from their context, and that they can or should be transplanted into Australia.

298. There is also a significant basis for caution in considering both the relevance of the UK report and recommendations for Australia, and the veracity and impact of what was recommended in that country. We understand the UK Government has greeted the inquiry recommendations in that country with caution, emphasising the need for more facts before determining any changes to law and practice, and the need to consult further and consider further what has been recommended to it.

299. The Inquiry's Report (UK Report) released in July 2018 found that sexual harassment is "*widespread and commonplace*" in the UK, and that in practice legal protections are not always available to workers. The Committee's Final report recommended a number of priorities to the UK Government, including:

a. **Statutory duty:** Introducing a new duty on employers to prevent harassment, supported by a statutory code of practice outlining the steps they can take to do this and ensuring that interns, volunteers and those harassed by third parties have access to the same legal protections and remedies as those directly employed.

i. Equal Opportunity laws around Australia (including the *Sexual Discrimination Act 1984* (Cth)) already currently place a duty on employers to take "all reasonable steps to prevent" sexual harassment in the workplace. Employers who fail to take all reasonable steps may potentially be found vicariously liable for the actions of any employees or agent that may be in breach of the Sex Discrimination Act (including workplace sexual harassment).

ii. In practice, Australian employers must already actively implement precautionary measures to minimise risks of sexual harassment and respond appropriately when harassment does occur. This is generally considered to involve having appropriate policies, procedures and training that discourages and minimises any risk of sexual harassment from occurring.

iii. The UK Report stated that incentives for compliance are stronger in other areas of corporate governance, such as data protection and the preventing of money laundering because of the regimes in place, which place obligations on organisations.

iv. We do not agree that there are insufficient incentives for Australian employers to take robust action to tackle and prevent unwanted sexual behaviours in the workplace. In addition to the legal rationale for preventing sexual harassment, there is also a clear business case: a poor organisational culture and failure to deal with sexual harassment allegations leads to employees being dissatisfied with work, having a low opinion of their mangers, absenting themselves or wanting to leave (as outlined in Section 1).

v. As a result of these current duties, we do not believe there is any cause to add a new or additional duty onto employers to respond to sexual harassment. The current obligations are sufficient, and this inquiry is an opportunity to better promote and support them, and to review and in some areas adjust structures and processes that support compliance and responding to complaints.

vi. In addition, in 2011, Australia's Federal sexual harassment laws were amended to explicitly apply to volunteers, contract workers, commission agents and partners. Meaning that volunteers in organisations in Australia already have the same legal rights, protections and remedies against sexual harassment as paid staff, obviating the UK finding and rendering it inapplicable in the Australian context.

b. **The role for regulators**: A recommendation to set out the actions regulators will take to help tackle sexual harassment, including the enforcement action they will take and making it clear to those they regulate that sexual harassment is a breach of professional standards and a reportable offence with sanctions.

i. As set out above in this final section, consideration should be given to a one-stop shop (through the Fair Work Commission) to better deal with workplace sexual harassment complaints and any related actions.

ii. This would go a long way towards assisting all parties involved in such claims in understanding the regulator responsible and the steps that can be taken where a claim is made, and how claims can be addressed under the current legislative and penalty regime. This may be an appropriate response for Australia to improve the performance of institutions in this area.

c. **Enforcement processes**: The UK inquiry canvassed a statutory code of practice on managing sexual harassment; changes to processes for taking forward tribunal cases, extending time limits for submitting claims, punitive damages for employers, and measures to reduce costs for employees.

i. As noted above, important innovations are underway in this area through voluntary, industry driven codes of practice, and the policies and procedures of individual enterprises. Also above, we commend to the inquiry options to extend these innovations to smaller enterprises.

ii. Imposing a single mandatory code, as appears to have been recommended by the UK, is not warranted in Australia, and risks replacing signals, processes and initiatives appropriate to the challenges of particular workplaces with bureaucratic, one-size-fits-all procedures imposed at the central level.

iii. We are concerned that this is not only inconsistent with the culture and experience of how Australia approaches sexual harassment, but more importantly that a centralised approach would be less effective than industry and workplace driven initiatives.

iv. Alternatively, were there to be a single code of practice, there would need to be some incentive or recognition for employers that apply it. Under section 385 of the Fair Work Act, a small business employer is protected against unfair dismissal claims where that employer follows the small business fair dismissal code. Were Australia to follow the UK in adopting a statutory code of practice, employers should be immune from liability where they comply with the code, and as we emphasise throughout this submission, the liability and accountability should rest entirely with the person or persons committing sexual harassment.

v. Despite the current six-month time limit to lodge complaints with the AHRC, unlike the UK, under Australian law there is discretion for the AHRC to permit earlier incidents to be pursued. This discretion by the AHRC is also reviewable by the Administrative appeals tribunal. Thus, the UK recommendations for an extended period to lodge claims are clearly inapplicable.

d. **Non-disclosure agreements**: The UK recommendations would require the use of standard, plain English confidentiality clauses, which set out the meaning, limit and effect of the clause, and making it an offence to misuse such clauses; and extending whistleblowing protections so that disclosures to the police and regulators such as the EHRC are protected.

i. The UK Report acknowledged that there is a place for NDAs in dealing with workplace sexual harassment claims particularly as there may be times when a complainant makes the judgement that signing an NDA is genuinely in their own best interests.

ii. As stated above, under NDAs (Section 5.1), we see some productive potential for better practices in the use of NDAs, but emphasise scope for this to be driven as a recommended practice by the legal profession. Greater information, including simplified information for the users of NDAs, along with an identification of sound and professional practice would go a long way to addressing any concerns raised in this country comparable to those raised in the UK.

iii. We note the UK report found "a lack of understanding on the part of individuals as to what the real effect of the non-disclosure or confidentiality provision is". Prior to research, this is likely to also apply in Australia in many cases. However, we do not believe that standard confidentiality clauses are the right solution. As outlined above, we consider that individuals could be better informed of their rights, the effect of entering into a NDA, and which rights cannot be abrogated before signing through the provision of a simple, clear, information statement being required to be provided to all parties before they enter into an NDA rather than through standard clauses. This would ensure signatories to NDA are properly informed without constraining agreements which often require individual tailoring and drafting based on the particularly circumstances and needs and wants of the parties involved including the victim.

e. **Robust data**: The UK inquiry highlighted the need for further data on the extent of sexual harassment in the workplace and on the number of employment tribunal claims involving complaints of harassment of a sexual nature. This concern is shared by employers, as set

out in Chapters 1 and 2, in relation to small business in particular. Critically, this data is needed for sound policy and caution needs to be exercised in considering any significant changes to how to regulate sexual harassment in Australia without the evidence on which evidence-based policy could validly be erected. As also set out above, we commend the SDC on the *Everyone's Business* survey, however there is more we need to know before embarking on any changes key areas.

5.5 The role of sexual harassment and safety regulation

300. As outlined above, the UK Report contained a recommendation that "a mandatory duty should be placed on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace".

301. We understand there has been some isolated academic discussion in Australia in relation to whether Australia should change work health and safety legislation to explicitly include sexual harassment as a risk that employers and the regulator have an obligation to prevent and manage.[66]

302. Proactive duties already apply in health and safety laws and regulations. For example, under the model WHS laws, all employers have a duty to protect the health (both physical and psychological), safety and welfare of all workers at work. WHS laws require a proactive and preventative approach to managing health and safety risks in the workplace. Workers unable to work because of psychological injury as a result of harassment in the workplace can make a claim for workers' compensation with their employer's workers' compensation insurer.

303. Multiple or overlapping obligations across different areas of the law, different regulators, and different statutes detract from, rather than advance, compliance and the protective purposes of regulation. We consider that the existing relationship between sexual harassment laws and work health and safety laws is broadly the right one, in which the primary weight and responsibility on employers and on regulators to provide / promote harassment free workplaces arises under sexual harassment legislation. Which is analogous to hazard-specific legislation in this context.

304. In addition, there are already other comprehensive, and overlapping, obligations on employers in Australia in relation to sexual harassment. In practice this means that Australian employers must already actively implement reasonable precautionary measures to minimise risks of sexual harassment occurring and to respond appropriately when harassment does occur. As just one example, we already see some employers take action against those who have committed sexual harassment without a complaint having been made where they have observed or have otherwise been made aware of unacceptable conduct occurring (noting however the unreliability of such actions given our unbalanced and impractical unfair dismissal regime, see Section 3).[67]

305. Given the robustness of the current sexual harassment system, law and process, it is questionable what would be added by grafting an additional safety focus onto sexual harassment. The Australian Chamber considers that we do not need to change the relationship between sexual harassment and safety law, and that any additional access to the safety jurisdiction that operates parallel to the current

[66] See, *Workplace Express*, Put harassment regulation on same footing as OHS laws: Expert.
[67] See, for example, *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156.

laws risks a wasteful and confusing duplication of resources that would confuse business, and detract from and delay employer actions in this area.

306. The primary response to sexual harassment should continue to be through the current system and the *Sex Discrimination Act 1984* (or an improved, streamlined system in the specific area of sexual harassment).

5.5.1 Resolving any jurisdictional ambiguity

307. If there is any ambiguity regarding the role of sexual harassment vs safety laws, or indeed between the role of federal and state laws in in this area, we have well established mechanisms to address it (see below recommendation).

308. It is unacceptable to permit duplication or competing actions and jurisdictions in relation to this serious issue. This is the type of regulatory failure negatively impacts on employers, causes confusion and delays, costs money and detracts from what can be done to combat sexual harassment.

Recommendation 18: Identify and resolve any jurisdictional ambiguity

Any ambiguities, overlap or friction between jurisdictions, law and responsibilities in relation to sexual harassment be identified and reported to the Australian Government, and formally communicated to COAG, the Council of Attorneys-General (CAG), or other intergovernmental bodies as appropriate for consideration and resolution.

Governments be urged to put clear and transparent intergovernmental arrangements in place (such as through MOU's or intergovernmental agreements) to clarify and delineate areas of regulatory responsibility.

Where appropriate, consideration be given to amending legislation for greater clarity and delineation.

Role clarity extend not just in relation to claims and legal processes but also in relation to promotion, information, support for employees, legal advice, statistical collection etc to ensure greatest return for users of the system from government spending in this area.

(Nothing in this recommendation should be taken to suggest that workers' compensation laws not apply in instances of compensable injury arising from sexual harassment).

Australian Chamber of Commerce and Industry

6 RECOMMENDATIONS

Recommendation 1: Invite further input on an Exposure Draft prior to the final report

The SDC deliver recommendations to government in a two stage process:

Stage 1: Issue an initial public Exposure Draft of *proposed* conclusions and recommendations, and invite a time limited, directed further round of input on them.

Stage 2: Then, based on responses to the proposed recommendations, deliver a *final* report, setting out finalised / refined conclusions and recommendations to government, taking into account the input on the Exposure Draft.

Recommendation 2: Continue to actively encourage changes in wider societal attitudes

The SDC's recommendations to government(s) should include building on already successful campaigns and providing additional and ongoing funding for initiatives to change societal attitudes and behaviours.

Government(s) should deliver an advertising campaign (or other comparable initiative) to prevent sexual harassment across the community / change attitudes and behaviours as a key predicate to reducing its incidence in workplaces. Such programs should seek to:

- Educate Australians about what constitutes sexual harassment.
- Educate Australians about what types of behaviour are and are not appropriate in any context.
- Promote respectful relationships and appropriate behaviours.
- Promote a culture in which victims of sexual harassment are treated with respect.
- Promote bystanders and peers calling out sexual harassment.

Recommendation 3: Encourage further industry driven initiatives

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 SMEs lacking capacity to do so on a stand-alone basis.

Recommendation 4: Properly balance unfair dismissal – procedural errors

The Fair Work Act should be amended so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal based on conduct that can or would constitute sexual harassment.

Recommendation 5: Properly balance unfair dismissal – reinstatement remedies

Where it is established that an employer has taken disciplinary action against an employee to protect the safety, health and welfare of other employees (or clients, patients or the general public), or to meet their legal liabilities under relevant legislation, the employee whose conduct placed persons at risk should not have access to reinstatement as a remedy.

Recommendation 6: Properly balance unfair dismissal – harshness v merit

Where it is established that a dismissal has been effected to comply with sexual harassment laws (or with laws against discrimination or bullying), there should be no scope for the dismissal to be found to be harsh based on the personal circumstances of the individual ex-employee concerned / the perpetrator (for example that their age or personal circumstances may impede their capacity to find another job).

Recommendation 7: Properly balance unfair dismissal – valid reason

Where it is established that a dismissal has been effected for the purposes of addressing sexual harassment, valid cause should be deemed to have been established, and procedural deficiencies should not be able to render that dismissal unfair and a former employee should not have access to compensation or reinstatement.

Recommendation 8: Ensure adverse action claims are not used instead

Government also be urged to ensure the general protections provisions of the Fair Work Act cannot be used as an alternative avenue to circumvent revised parameters for pursuing unfair dismissal claims.

Recommendation 9: Research Report on SMEs and Sexual Harassment

Further dedicated (quantitative and qualitative) research be undertaken into, at least the following:

- The incidence and nature of sexual harassment in SMEs.
- The familiarity of SME proprietors with sexual harassment, and how behaviours and risks can be managed.
- The financial and other capacities of SMEs to address sexual harassment (both behaviours and complaints processes).
- The financial and other capacities of SMEs to settle matters by agreement (exchange of the withdrawal of complaints for financial consideration), and to apply determinations.
- Any other considerations raised by sexual harassment in the context of SME employment.

This could be conducted as a pilot, focusing on a number of different sectors, for example a particular industry or area (including regional or remote areas), recognising that the small business sector is not homogenous.

This research should be undertaken with input and engagement from the SDC/HRC, state and territory anti-discrimination tribunals, the Australian Small Business and Family Enterprise Ombudsman, and the Australian Chamber network as Australia's largest and most representative voice for SMEs.

Recommendation 10: Review Scope for Bespoke Regulation for SMEs

Based on the findings of the proposed SMEs and Sexual Harassment Research Report (our preceding recommendation), input be sought on a bespoke / dedicated approach to sexual harassment complaints relating to employment in SMEs. Consideration should be given to bespoke / dedicated mechanisms for sexual harassment complaints against SMEs, addressing considerations such as:

- A less formal, less legalistic mechanism for dealing with complaints relating to employment in SMEs, with a greater emphasis on straightforward dispute settlement (where possible), rather than litigation and damages.
- Whether the Fair Work Commission (or a restructured, renamed Fair Work Commission) should undertake this dispute resolution role for SME employment.
- Differentiating relief available in cases of sexual harassment by business size, including consideration of capping compensation for some or all harassment claims against SMEs.
- The role of lawyers in addressing alleged harassment in SMEs, or whether there could be an exclusion in favour of more direct and less formal dispute settlement.

- Which claims relating to SME employment could be dealt with less formally or be subject to a cap on damages, and which if any should not.

Recommendation 11: Ongoing information Campaign for SMEs on sexual harassment

A national campaign should be conducted to promote increased understanding amongst SME proprietors and managers of what constitutes sexual harassment, their responsibilities, what their employees are entitled to expect and not expect at work, how to provide a safe and harassment free workplace, and some of the particular risks for SMEs, including the economic consequences of a sexual harassment claim

This needs to be deliberately designed for SMEs, and not simply be a re-packaging of existing materials that have been most relevant to Australia's largest organisations.

This might be way of an advertising campaign raising awareness and then directing interested SMEs to a supporting website for further detail and tools. Examples and ideas will also be important to making this resonate with SMEs.

Concurrently such a campaign may also have the wilder aim of simply promoting an understanding of sexual harassment in the SME context and that it is unacceptable and may be actionable.

Given that there were over 89,000 new businesses entering the market sector in the last year on record,[68] the campaign should be ongoing. This will also ensure a sustained focus on sexual harassment. (Any such campaign would need to be properly focus tested to ensure messages were appropriate and effective for an SME audience, which our network may be able to assist with).

Recommendation 12: Harness the Power of SME Representatives

Consideration be given to partnering with established employer networks and organisations to promote increased awareness of sexual harassment, the benefits for SMEs of eliminating sexual harassment / risks of not doing so, how SMEs should approach sexual harassment, and any other changes or priorities arising from this inquiry. This would see such business organisations funded to deliver services and information for (and with) government, potentially on a tendered basis.

Recommendation 13: Small Business Champions of Change

The SDC and Australian Small Business and Family Enterprise Ombudsman work to pilot Small Business Champions of Change. These champions might (for example) tell their story and explain why they consider it's important that work in their SME be free from sexual harassment, or indeed their personal stories, when they realised this was important, what they have done etc.

[68] Analysis of ABS 8165 – Counts of Australian Businesses, including Entries and Exits, June 2014 to June 2018.

Recommendation 14: NDA Information Statement

Consideration be given to a requirement / practice direction that all parties prior to signing an NDA be provided with a simple, clear one page information statement which sets out the law surrounding the signing of a confidentiality agreement, the limitations of the agreement and each parties' rights and responsibilities.

Recommendation 15: Legal advice

Further consideration be given to operationalising a requirement that non-disclosure agreements regarding sexual harassment proceed only after all parties have been reminded of their rights to seek legal advice on the proposed NDA and being given a reasonable period to do so.

Recommendation 16: Mandatory cooling off period for non-disclosure agreements

There should be a requirement that non-disclosure agreements regarding sexual harassment complaints be subject to a mandatory cooling off period, able to be triggered by any party to the agreement.

Recommendation 17: National One-Stop Shop for Sexual Harassment Complaints

Consideration should be given to:

- Scope to consolidate the existing responsibilities of the SDC and state and territory anti-discrimination bodies for the conciliation of claims of sexual harassment into a single, national conciliation body.

- This function being undertaken by the Fair Work Commission (with an expanded role in this area) which could potentially assume the role of claims lodgement and initial conciliation / dispute settlement in relation to a wider range of employment matters beyond its historical workplace relations jurisdiction.

Recommendation 18: Identify and resolve any jurisdictional ambiguity

Any ambiguities, overlap or friction between jurisdictions, law and responsibilities in relation to sexual harassment be identified and reported to the Australian Government, and formally communicated to COAG, the Council of Attorneys-General (CAG), or other intergovernmental bodies as appropriate for consideration and resolution.

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7 ABOUT THE AUSTRALIAN CHAMBER

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

OUR MEMBERS

Australian Chamber of Commerce and Industry

CHAMBER

Business SA Chamber of Commerce and Industry South Australia
Canberra Business Chamber
Chamber of Commerce Northern Territory
CCIQ Powering business potential
Chamber of Commerce and Industry WA
NSW Business Chamber
TCCI Invigorating Business
Victorian Chamber of Commerce and Industry

INDUSTRY ASSOCIATION

accord
AMCA
Animal Medicines Australia
afa Great advice for more Australians
ais nsw
Australia Arab Chamber of Commerce & Industry
AADA
Australian Beverages
ADA Australian Dental Association
ADIA Australian Dental Industry Association
AFEI Australian Federation of Employers & Industries
Australian Gift & Homewares Association
AHA
aicm Australian Institute of Credit Management
Australian Made
AMPC
AMMA Australian Resources & Energy Group
AMTA Australian Mobile Telecommunications Association
apmf Australian Paint Manufacturers' Federation Inc.
ARIA Australian Recording Industry Association
ARITA
Australian Retailers Association
ARTA
ASMI Australian Self Medication Industry
Australian Steel Institute
ATEC Australian Tourism Export Council
ATIC Australian Tourism Industry Council
ATA Australian Trucking Association
AVA Australian Veterinary Association
BIC Bus Industry Confederation moving people
Business Council of Co-operatives and Mutuals
Caravan Industry Association of Australia
Cement Concrete & Aggregates Australia
Chemistry Australia
CAA
CMAA
Consult Australia
COPHE Council Of Private Higher Education
CPA Australia
CLIK Credit Union International Association Australasia
Customer Owned Banking Association
Direct Selling Australia
Exhibition & Event Association of Australasia
Fitness Australia
Franchisee Federation Australia
HIA
LFRA Large Format Retail Association
Live Performance Australia
Master Builders Australia
master plumbers Expert. Committed. Professional.
MTAA Medical Technology Association of Australia
Medicines Australia
NALSPA
NDS National Disability Services
neca national electrical and communications association
nesa national employment services association
National Fire Industry Association
NRA National Retail Association
NRMA MYNRMA.COM.AU
NSW HCA The voice of the Hire Car Industry
NSW Taxi Council
Outdoor Media Association
The Pharmacy Guild of Australia
ppca
Primerus The World's Finest Law Firms
rcsa Leading in the World of Work
Restaurant & Catering
S P
The Tax Institute
Think Brick Australia
VACC You're in good hands