



**safe work australia**

# **Submission to the National Inquiry into Sexual Harassment in Australian Workplaces**

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## Introduction

1. Safe Work Australia (SWA) welcomes the opportunity to make a submission to the Australian Human Rights Commission to assist its National Inquiry into Sexual Harassment in Australian Workplaces (the National Inquiry).
2. Our submission seeks to inform the National Inquiry from a work health and safety (WHS) perspective by addressing the following Terms of Reference:
  - The current legal framework with respect to sexual harassment.
  - Existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally the impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers compensation claims, employee turnover and absenteeism.
3. SWA generally defines sexual harassment to include unwelcome sexual advances, requests for sexual favours or other unwelcome conduct of a sexual nature that could be expected to make a person feel offended, humiliated or intimidated.<sup>1</sup>
4. While there is no express definition of sexual harassment in the model WHS laws, sexual harassment is clearly within its scope. The model WHS laws require employers to eliminate or minimise all the risks to workers' and other persons' health and safety from sexual harassment. However, the model WHS laws do not preclude victims of workplace sexual harassment from seeking redress through other laws, for example, criminal or anti-discrimination laws.
5. SWA recognises that the results of the [National Survey](#) indicate a high rate of sexual harassment in Australian workplaces, with one in three people (33 per cent) having experienced sexual harassment at work in the last five years.
6. SWA has a strong interest in better understanding the key drivers and factors that influence negative workplace cultures where behaviours such as sexual harassment may be prevalent in order to tailor guidance and support for employers seeking to create positive and safe workplace cultures.

### Who is Safe Work Australia?

7. SWA is the Australian Government statutory agency with responsibility for national WHS and workers' compensation policy. We were established under the *Safe Work Australia Act 2008* (Cth) and are comprised of 15 Members: an independent Chair, nine Members representing the Commonwealth and each state and territory, two Members representing the interests of workers, two Members representing the interests of employers and the Chief Executive Officer of SWA.
8. Our key functions are to:
  - monitor and improve Australia's model WHS laws
  - lead national policy development on WHS and workers' compensation
  - collect, analyse and share WHS and workers' compensation data and research
  - provide guidance on how to manage WHS risks, and
  - support the implementation of the Australian Work Health and Safety Strategy 2012-2022 (the Australian Strategy).

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<sup>1</sup> Safe Work Australia's [Guide for preventing and responding to workplace bullying](#).

9. SWA is not a regulator—we do not implement or regulate WHS laws or manage workers' compensation schemes. The Commonwealth, state and territory governments are responsible for making, regulating and enforcing WHS laws and managing workers' compensation schemes in their respective jurisdictions.
10. SWA's vision is to achieve *healthy, safe and productive working lives*. All workers in Australia, regardless of the work they do or how they are engaged, have the right to a healthy and safe working environment.

## Model WHS laws

### Overview

11. SWA led the development of the model WHS laws in 2011 to harmonise the regulation of WHS in each Australian jurisdiction. The main object of the model WHS laws is to provide a balanced and nationally consistent framework to secure the health and safety of workers and workplaces, including the protection of workers and other persons against harm to their health, safety and welfare by eliminating or minimising risks arising from work.
12. The model WHS laws aim to provide all workers in Australia with the same standard of health and safety protection regardless of the work they do or where they work. The laws apply to all organisations regardless of size or industry. The laws are outcomes-based and provide organisations with the flexibility to tailor their approach to WHS to suit their circumstances.
13. The model WHS laws comprises a model WHS Act, model WHS Regulations and model Codes of Practice (model Codes):
  - The model WHS Act is broad in scope and application, covering 'persons conducting a business or undertaking' (PCBUs) and 'workers'; not just employers and employees. This reflects the policy intention to cover non-traditional, new and evolving working arrangements by moving away from a reliance on the traditional employer-employee relationship. The health and safety duties of PCBUs and workers are set out below.
  - The model WHS Act defines 'health' to mean physical and psychological health.<sup>2</sup> This means that the health and safety duties apply equally to eliminating or minimising risks to physical and psychological health in the workplace.
  - The model WHS Regulations set out detailed requirements that apply to specific work activities and hazards to meet health and safety duties.
  - The model Codes provide practical information on how the requirements of the model WHS Act and Regulations can be met by duty holders.
14. The model WHS laws are supported by a National Compliance and Enforcement Policy, which sets out guiding principles to support regulators in monitoring and enforcing compliance.
15. The model WHS laws have no force or effect as law on their own. For the laws to be legally binding in a jurisdiction, the relevant jurisdiction must separately implement them as their own laws.
16. The model WHS laws were implemented by the Commonwealth, the Australian Capital Territory, New South Wales, the Northern Territory and Queensland on 1 January 2012, and by South Australia and Tasmania on 1 January 2013.

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<sup>2</sup> Section 4 of the model WHS Act.

17. The model WHS laws are yet to be implemented in the Victorian and Western Australian jurisdictions, however Western Australia undertook consultations in 2018 with a view to drafting new WHS laws based on the model WHS Act.

## PCBU duties

18. Under the model WHS Act, a PCBU owes the primary duty of care to ensure, so far as is reasonably practicable:

- the health and safety of workers (however engaged) while they are at work in the business or undertaking, and
- the health and safety of other persons carrying out work as part of conducting the business or undertaking.<sup>3</sup>

19. To ensure the health and safety of a person under the model WHS Act, the PCBU must do all that is reasonably practicable to eliminate risks to health and safety. If it not reasonably practicable to eliminate those risks, the PCBU must minimise those risks so far as reasonably practicable.<sup>4</sup>

20. This duty includes requirements to ensure, so far as is reasonably practicable:

- the provision and maintenance of a work environment that is without risk to health and safety
- the provision and maintenance of safe systems of work, and
- that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.<sup>5</sup>

21. The model WHS Act defines 'reasonably practicable' and sets out the matters that need to be taken into account for ensuring health and safety.<sup>6</sup> SWA's Guide: [\*How to determine what is reasonably practicable to meet a health and safety duty\*](#) provides general guidance on how to meet the standard of 'reasonably practicable' in this context.

22. The focus of the primary duty is not only the immediate causes of injury or illness but also covers what the PCBU knew or should have known about the risk, and the actions they took based on that knowledge to provide and maintain a work environment without risks to the health and safety of workers.

23. A 'PCBU' is defined broadly, covering businesses or undertakings conducted alone or with others, whether or not for profit or gain.<sup>7</sup> The phrase 'business or undertaking' covers businesses or undertakings conducted by persons including employers, principal or head contractors, franchisors and the Crown. PCBUs can include sole traders or self-employed persons, partners within a partnership, bodies corporate (companies), unincorporated bodies or associations and government departments or public authorities such as municipal councils, but excludes volunteer associations.

## Officer duties

24. Officers of PCBUs also have health and safety duties. An 'officer' includes an officer within the meaning of the *Corporations Act 2001* (Cth), an officer of the Crown or an officer of a

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<sup>3</sup> Subsections 19(1) and (2) of the model WHS Act.

<sup>4</sup> Section 17 of the model WHS Act.

<sup>5</sup> Paragraphs 19(3)(a), (c) and (g) of the model WHS Act.

<sup>6</sup> Section 18 of the model WHS Act.

<sup>7</sup> Section 5 of the model WHS Act.

public authority, other than an elected member of a local authority acting in that capacity such as a municipal council.<sup>8</sup>

25. Officers are required to exercise due diligence to ensure the business or undertaking complies with the model WHS laws, including the primary duty.<sup>9</sup>

26. 'Due diligence' includes, amongst other things, taking reasonable steps to:

- gain an understanding of the nature of the business or undertaking's operations, including the hazards and risks associated with those operations, and
- ensure the business or undertaking has and uses appropriate resources and processes to eliminate hazards or minimise these risks.<sup>10</sup>

### Worker duties

27. Workers are required to take reasonable care for their own health and safety by ensuring that their acts or omissions do not adversely affect the health and safety of themselves or other persons.<sup>11</sup> Workers must also comply, so far as they are reasonably able, with any reasonable instruction given by the PCBU in addition to cooperating with any reasonable policy or procedure of the PCBU in relation to health and safety at the workplace.<sup>12</sup> This includes policies relating to sexual harassment.

28. A 'worker' is defined broadly to mean a person who carries out work in any capacity for a PCBU and includes employees, contractors, subcontractors and their employees, employees of labour hire companies, outworkers, apprentices and trainees, work experience students and volunteers.<sup>13</sup>

### Management of WHS risks

29. The model WHS laws require PCBUs to manage risks from hazards, including work-related psychosocial hazards, so far as is reasonably practicable.

30. SWA's model Code of Practice: *How to manage work health and safety risks* provides guidance on how to manage WHS risks, including a step-by-step process that PCBUs can apply to the management of both physical and psychological risks. SWA's Guide: *Work-related psychological health and safety: A systematic approach to meeting your duties* also sets out a similar risk management process but applies it to psychological risks specifically.

31. The risk management process, which is illustrated in Figure 1 below, involves:

- **identifying hazards**—finding out what could cause harm, considering the physical and psychological hazards
- **assessing risks, if necessary**—understanding the nature of the harm that could be caused by the physical and psychological hazards, how serious the harm could be and the likelihood of it happening
- **controlling risks**—implementing the most effective control measures that are reasonably practicable in the circumstances and ensuring they remain effective over time, and
- **reviewing hazards and control measures**—to ensure they are working as planned and implemented.

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<sup>8</sup> Section 4 of the model WHS Act.

<sup>9</sup> Subsection 27(1) of the model WHS Act.

<sup>10</sup> Subsection 27(5) of the model WHS Act.

<sup>11</sup> Paragraphs 28(a) and (b) of the model WHS Act.

<sup>12</sup> Paragraphs 28(c) and (d) of the model WHS Act.

<sup>13</sup> Section 7 of the model WHS Act.

**Figure 1. The risk management process**



### **Consultation and issue resolution**

32. Consultation with workers and other duty holders is another key element of providing a healthy and safe work environment and should occur throughout the risk management process.
33. PCBUs are required to, so far as is reasonably practicable, consult with workers and health and safety representatives (HSRs). This duty is described in more detail in the model Code of Practice: *Work health and safety consultation, cooperation and coordination*, which recognises workers' input and participation as a crucial part of effective consultation and can improve decision-making about WHS matters.
34. Consultation on WHS matters involves sharing information on hazards and risks, giving workers a reasonable opportunity to express their views, raise issues and contribute to the decision-making process and taking those views into account. It is important to respect the privacy of workers and keep information confidential where it is necessary. Consultation also requires advising workers (and HSRs) of the outcomes as soon as possible, providing information to help them understand the reasons for the final decision or course of action.
35. The model WHS Act requires that, where an issue or conflict arises which may cause physical or psychological harm to individuals in the workplace, reasonable efforts to achieve a timely, final and effective resolution must be made using any agreed issue resolution procedures or, in the absence of agreed procedures, the default procedure prescribed by the model WHS Regulations.<sup>14</sup>

<sup>14</sup> Section 23 of the model WHS Regulations.

## Compliance and enforcement

36. Ensuring compliance with the model WHS laws by enforcing its provisions is central to its effective operation.
37. The model WHS Act sets out the functions of the regulator, which include:
- monitoring and enforcing compliance with the WHS Act and Regulations
  - providing WHS advice and information to duty holders and the community
  - fostering and promoting WHS
  - conducting and defending legal proceedings under the WHS Act, and
  - advising and making recommendations to the minister responsible for the WHS laws.<sup>15</sup>
38. The model WHS Act confers a general power on the regulator to do all things necessary or convenient to be done for or in connection with the performance of its functions.<sup>16</sup> The regulator is also empowered to obtain information, documents and evidence to assist it to monitor or enforce compliance with the model WHS Act.<sup>17</sup>
39. The model WHS Act enables the regulator to appoint inspectors to perform functions and exercise powers to assist it secure compliance with the model WHS laws. These functions and powers include providing information and advice about compliance with the WHS Act and Regulations, assisting in resolving WHS issues, requiring compliance with the WHS Act by issuing notices, investigating contraventions of the WHS Act and assisting in prosecuting offences.<sup>18</sup> Part 10 of the model WHS Act sets out the different kinds of notices that inspectors can issue such as improvement notices to remedy or prevent contraventions of the WHS Act and infringement notices to impose a fine for certain prescribed offences, amongst others.
40. In carrying out their functions, inspectors have broad powers to enter workplaces to inspect and examine anything (including documents), make enquiries, take measurements, conduct tests and make sketches or recordings.<sup>19</sup> When entering a workplace, inspectors are also empowered to require the production of documents and answers to questions.<sup>20</sup>

## Penalties

41. The model WHS Act provides for a range of criminal offences for non-compliance and imposes penalties based on the severity of the conduct. Where a person engages in reckless conduct that exposes an individual to a risk of death or serious injury or illness without reasonable excuse, the person will be liable for the Category 1 offence, with a penalty of five years imprisonment and maximum fines of \$3 million for a body corporate, \$600 000 for a PCBU as an individual or officer and \$300,000 for a worker.<sup>21</sup>
42. Category 2 and 3 offences involve less culpability than Category 1 offences, as there is no fault element.<sup>22</sup> For both, a person commits an offence if they fail to comply with a health and safety duty. Category 2 offences go one step further, providing that the person would only commit an offence if the failure to comply with the health and safety duty exposed an individual to a risk of death or serious injury or illness.

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<sup>15</sup> Section 152 of the model WHS Act.

<sup>16</sup> Section 153 of the model WHS Act.

<sup>17</sup> Section 155 of the model WHS Act.

<sup>18</sup> Section 160 of the model WHS Act.

<sup>19</sup> Section 165 of the model WHS Act.

<sup>20</sup> Section 171 of the model WHS Act.

<sup>21</sup> Section 31 of the model WHS Act.

<sup>22</sup> See sections 32 and 33 of the model WHS Act.



## Sexual harassment – application of the model WHS laws

43. While there is no express definition of sexual harassment in the model WHS laws, these laws apply to sexual harassment as a type of behaviour that poses physical and psychological risks to the health and safety of workers and other persons in the workplace.
44. Sexual harassment forms part of a range of behaviours, including bullying, other forms of harassment, discrimination and occupational violence and aggression, that may indicate poor working relationships or an unsafe working environment.
45. These behaviours are examples of psychosocial hazards, which are hazards or factors in the design or management of work that increase the risk of work-related stress, leading to psychological or physical harm. Examples of these kinds of harm include mental health conditions such as anxiety, depression or post-traumatic stress disorder, or musculoskeletal disorders such as muscle pain.
46. Sexual harassment that involves physical conduct such as physical assault also poses risks to physical and psychological health.
47. Workers are likely to be exposed to a combination of psychosocial hazards in the workplace. A list of other common psychosocial hazards are described in more detail in SWA's Guide: [Work-related psychological health and safety: A systematic approach to meeting your duties](#).
48. The focus of the model WHS laws is on prevention, requiring duty holders to manage the risks to health and safety that arise from it (as with any other physical or psychological risk).
49. Practical and effective management of the WHS risks arising from workplace sexual harassment starts with a commitment from management and other persons who operate or manage the business or undertaking, including officers.
50. The antecedent risks that may give rise to incidents of workplace sexual harassment must also be managed in accordance with the model WHS Act. Examples of these types of risks that should be identified, managed and controlled may include an organisational culture that tolerates or enables inappropriate behaviour such as sexualised comments or inappropriate physical contact.
51. Managing these risks in a WHS context could include developing and implementing a well-communicated workplace sexual harassment policy that makes it clear that the PCBU is committed to ensuring a healthy and safe work environment free from sexual harassment. Consultation, ongoing monitoring and review of this policy is crucial to ensuring its effectiveness.
52. We consider that the model WHS laws, as described at pages 4 to 8 of this submission, provides a clear, flexible and robust legislative framework for the elimination and management of all WHS risks, including those arising from workplace sexual harassment.
53. In terms of more specific guidance, SWA has not developed resources on workplace sexual harassment specifically. However, SWA's [Guide for preventing and responding to workplace bullying](#) and [Dealing with workplace bullying – a worker's guide](#) refer to unlawful discrimination or sexual harassment as unreasonable behaviours, while specifying that, in isolation, these behaviours do not amount to 'bullying'.
54. These guides define 'sexual harassment' as unwelcome sexual advances, requests for sexual favours or other unwelcome conduct of a sexual nature that could reasonably be expected to offend, humiliate or intimidate.<sup>23</sup> The guides refer readers to the Australian Human Rights Commission, the Fair Work Commission and state and territory anti-

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<sup>23</sup> Guide for preventing and responding to workplace bullying

discrimination, equal opportunity and human rights agencies for advice and assistance in dealing with incidents of sexual harassment in the workplace.

### **Case law on sexual harassment as a WHS issue**

55. To date, as far as we are aware, no prosecutions have been brought for non-compliance with the model WHS laws in relation to sexual harassment.
56. However, in *Australian Nurses Federation v Minister administering the Tasmanian State Service Act*,<sup>24</sup> the then Australian Industrial Relations Commission found that it had jurisdiction to hear an industrial dispute that involved sexual harassment because it considered keeping employees safe from sexual harassment is a WHS issue.
57. There have been cases where an employee has taken action against the employer for a breach of the employer's common law duty of care, for example, the failure to provide a safe working environment resulting in psychological and physical injuries in *Mathews v Winslow Constructors (Vic) Pty Ltd*.<sup>25</sup>
58. Additionally, in *Collins v Smith (Human Rights)*,<sup>26</sup> the Victorian Civil and Administrative Tribunal found that an entitlement to compensation under Victoria's workers' compensation scheme does not "fetter" the Tribunal's ability to award damages under the *Equal Opportunity Act 2010* (Vic) to a worker who was sexually harassed by their manager and suffered psychological injury, in this case, post-traumatic stress disorder.

### **Review of the model WHS laws**

59. WHS ministers asked SWA to review the content and operation of the model WHS laws in 2018 (the Review). The Review's Terms of Reference focused on assessing whether the model WHS laws are achieving the objects of the model WHS Act, particularly in relation to concepts that were new or a significant change to most jurisdictions. This included the WHS duties framework, penalties and enforcement measures, and consultation, participation and representation provisions.
60. SWA appointed an independent reviewer, Ms Marie Boland, to conduct the Review. Ms Boland carried out a public consultation process over the first half of 2018, which included a call for written submissions, online discussion forums and face-to-face consultations across each state and territory.
61. The Review was completed in December 2018 and Ms Boland's report has been provided to WHS ministers for their consideration. The Review report is available on our [website](#).
62. In the consultation process, while a few stakeholders called for a greater focus on sexual harassment in the model WHS laws, a larger number of stakeholders raised concern about the management of all risks to psychological health, believing the model WHS laws do not sufficiently focus on psychological risk.
63. Ms Boland found that the model WHS laws are largely operating as intended but recommended areas for improvement, including the management of psychological risks. Ms Boland recommended the model WHS Regulations be amended to deal with how duty holders identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.
64. It is anticipated that WHS ministers will formally respond to the recommendations later in 2019.

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<sup>24</sup> (1995) EOC 92-768.

<sup>25</sup> [2015] VSC 728.

<sup>26</sup> [2015] VCAT 1992.

## Workers' compensation

65. Employees are eligible to claim for the impacts of physical or psychological injuries under jurisdictional workers' compensation schemes. Each scheme has different rules in relation to coverage. No workers' compensation schemes compensate for loss or suffering outside of medical costs and time off work.
66. SWA undertakes research and policy projects to improve Australia's workers' compensation arrangements, with a particular focus on return to work and strengthening the connection with enhanced WHS outcomes. However, SWA does not oversee, regulate or enforce workers' compensation laws, which is the responsibility of the Commonwealth, state and territory governments.
67. There are 11 main workers' compensation schemes operating in Australia—three Commonwealth schemes and one for each of the eight Australian states and territories. Workers' compensation arrangements, including entitlements, vary between schemes.
68. SWA compiles the Report: *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (the Comparison Report). The Comparison Report provides information about the coverage, benefits, return to work, self-insurance, common law, dispute resolution and cross border arrangements under each scheme.
69. Of particular interest for the purposes of the National Inquiry may be the tables on the definition of injury and employment contribution (Tables 2.4d and 3.9), exclusionary provisions for psychological injuries (Table 3.14) and common law provisions (Table 4.6) in the 26<sup>th</sup> edition of the Comparison Report, which can be accessed on SWA's website [here](#).
70. While the Comparison Report provides useful background information relevant to the National Inquiry, it is recommended that individual [workers' compensation authorities](#) be contacted to provide information about current scheme arrangements and provisions.

## The Australian Strategy

71. As stated in our Introduction, one of SWA's key functions is to support the implementation of the [Australian Strategy](#).
72. The Australian Strategy is a 10-year framework that aims to drive key national activities to achieve improvement in WHS in Australia. It was launched in 2012 following endorsement by the Workplace Relations Ministers' Council, the Australian Council of Trade Unions, the Australian Chamber of Commerce and Industry and the Australian Industry Group.
73. The Australian Strategy promotes a collaborative approach between the Commonwealth, state and territory governments, industry, unions and other organisations to achieve its vision of healthy, safe and productive working lives.
74. The Australian Strategy has seven national action areas, one of which is 'Leadership and culture'. Following the [mid-term review](#) of the Australian Strategy in 2017, this action area was updated in 2018 to explicitly reference 'harassment' (along with 'bullying' and 'occupational violence') and to state that these hazards require organisational and community leadership to reduce incidence and impact.
75. Mental health conditions are identified as one of the six priority work-related conditions based on the severity of consequences for workers. 'Mental health conditions' include 'work-related psychological injury', which is work-related psychological harm that could result in a loss of function and may be compensable, and includes psychological harm suffered as a result of workplace sexual harassment.
76. SWA Members have identified data collection, support for vulnerable workers and occupational violence as key areas of national focus for the next Australian Strategy.

## Data

### The National Survey findings

77. The results of the [National Survey](#) indicate a high rate of sexual harassment in Australian workplaces, with one in three people (33 per cent) having experienced sexual harassment at work in the last five years.
78. The National Survey identified low rates of reporting of incidents, with fewer than one in five people (17 per cent) who experienced sexual harassment at work in the last five years making a formal report or complaint. And while more than one-third of people (37 per cent) witnessed or heard about sexual harassment of someone else in their workplace, only 35 per cent of those people took action to prevent or reduce the harm from this harassment.
79. The National Survey found that the impact of workplace sexual harassment on the mental health of workers is pervasive. Of those who had been sexually harassed at work in the last five years, more than one-third (36 per cent) identified that it negatively affected their mental health or caused them stress.

### National Data Set for Compensation-based Statistics

80. The National Data Set for Compensation-based Statistics (NDS) is compiled annually by SWA and includes information on all workers' compensation claims made through the jurisdictional schemes.
81. The data includes information on the 'mechanism of injury or disease', which identifies the overall action, exposure or event that resulted in the injury or disease being compensated for. One of the mechanisms is mental stress of which 'other harassment' is a subcategory and specifically includes victims of sexual or racial harassment by a person or persons.<sup>27</sup> However, this subcategory is unable to be disaggregated further to isolate only sexual harassment claims.
82. While the NDS data can provide an indication of the extent of workplace harassment compensated through workers' compensation schemes, it is unable to provide information on the overall prevalence of sexual harassment in Australian workplaces for the following reasons:
  - The NDS data only covers those who are eligible for workers' compensation and only where a claim is made and accepted.
  - Workers' compensation is only available to people with a compensable workplace injury or disease. In the case of workplace harassment, workers' compensation data would generally only include information on workers diagnosed with conditions such as anxiety or depression resulting from the harassment.
83. The NDS data provided below should be read with the above caveats in mind:
  - While 'other harassment' claims account for only a very small proportion of all claims (on average around 140 claims per year between 2012-13 and 2016-17), the data supports the findings of the National Survey in relation to the impact of harassment on the mental health of employees. The average time lost for 'other harassment' claims was significantly higher than all accepted workers' compensation claims generally—8.4 weeks compared to 0.7 weeks.
  - In line with the longer time off work, the data shows that 'other harassment' claims are more costly. The median or typical compensation paid for 'other harassment' claims was

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<sup>27</sup> Victoria does not code the mental stress claims down to more detailed categories, hence the data for 'other harassment' does not include claims from Victoria.

over five times higher than all accepted workers' compensation claims generally—\$14,073 compared to \$2,448.

- When compared by gender, 'other harassment' claims by women accounted for a greater proportion of all mental stress claims. The frequency rate of 'other harassment' claims for women was also nearly five times the frequency rate for men—1.9 claims per 100 million hours worked compared to 0.4 claims per 100 million hours worked.
- In terms of industries, the health care and social assistance industry had the highest frequency rate (2.1 claims per 100 million hours worked) of 'other harassment' claims, followed by education and training (2.0 claims per 100 million hours worked) and public administration and safety (1.8 claims per 100 million hours worked). The frequency rate in each of these industries was about twice the Australian average rate for 'other harassment' claims.
- When comparing occupations, health and welfare support workers had a frequency rate of 5.1 claims per 100 million hours worked—which was five times the Australian average for 'other harassment' claims. This was followed by other labourers (4.9 claims per 100 million hours worked) and carers and aides (2.8 claims per 100 million hours worked).

## **Conclusion – sexual harassment and the broader legal framework**

84. WHS laws forms part of a broader legal framework of duties and obligations that apply to workplace sexual harassment.
85. To respond to incidents of workplace sexual harassment, employers are required to be aware of and comply with Commonwealth, state and territory laws, including the *Sex Discrimination Act 1984* (Cth), state and territory anti-discrimination and equal opportunity legislation, WHS and workers' compensation laws, the *Fair Work Act 2009* (Cth), state and territory industrial laws, and privacy and defamation laws.
86. Further, in addition to the above listed laws, an employee who has suffered a psychological or physical injury from exposure to sexual harassment may have a basis to take action against their employer for a breach of the employer's common law duty of care. At common law, an employer has a duty to take reasonable care to protect workers against foreseeable injuries arising out of employment, which is owed in either contract or tort. A successful claim under common law may have an impact on whether a victim is required to pay back a claim awarded under a workers' compensation scheme.
87. The evidence collected from the National Inquiry through submissions, stakeholder consultation and the National Survey indicate confusion about how these different legal frameworks interact in different jurisdictions. This is both from the perspective of a victim making a complaint, seeking redress or both, and from employers responding to incidents.
88. Examining how these different frameworks work and intersect in practice, including the agencies responsible for administering those frameworks, may be a useful next step to improving responses to and reducing incidents of workplace sexual harassment.