DISCUSSION PAPER

Reforms to Sexual Harassment laws

1. INTRODUCTION

This discussion paper arises out of the #MeToo movement, which has created significant momentum for change to prevent sexual harassment and provide avenues for justice. In the context of significant media attention and a social media storm there was leadership from law firm Maurice Blackburn, which developed several legislative asks to make it easier for women to come forward and seek justice if they have experienced workplace sexual harassment. *Now Australia* was formed in March 2018 to help guide those currently experiencing sexual harassment or those with historical experiences of sexual harassment to the appropriate legal and psychological support. In May 2018 Unions NSW began to organise a roundtable discussion at NSW Parliament to discuss possible options for reform. Then in July 2018 the Australian Human Rights Commission (**AHRC**) announced a national inquiry into sexual harassment.

This discussion paper aims to give an outline of some potential reforms to sexual harassment laws in Australia and NSW. The nature of the issue does not lend itself to a single solution. A multi-pronged approach to reform is what is necessary. The paper challenges the current framework of dealing with sexual harassment and seeks to shift away from sexual harassment being treated as an individual issue with the burden being placed solely on the complainant, towards collective responses and solutions. Further the paper explores options for more pro-active responses to the prevention of sexual harassment.

The paper does not make recommendations, but rather identifies and briefly explores a number of ideas for reform as a starting point for discussion ahead of the roundtable at NSW Parliament, and the AHRC national inquiry into sexual harassment. Ultimately, the aim of this paper is to generate discussion and ideas that will feed into the national inquiry.

The paper will look at potential legislative reforms to the *Anti-Discrimination Act 1977* (NSW) (**AD Act**), the *Sex Discrimination Act 1984* (Cth) (**SD Act**), the *Fair Work Act 2009* (Cth) (**FW Act**), the *Industrial Relations Act 1996* (NSW) (**IR Act**), the *Work Health Safety Act 2011* (NSW) (**WHS Act**), and whistle-blower laws. The paper will also look at other legal and non-legal ideas for reform, including reforms that will help to protect low income and vulnerable workers.

2. THE PROBLEM

Despite Australia having legislation making sexual harassment unlawful for over 30 years, its prevalence has not reduced over this time.[1] It remains a widespread and commonplace problem. Data collected by the ABS indicates that one in two women and one in four men will be sexually harassed in their lifetime.[2] Surveys by the AHRC have found that just over one in five (21%) of people in Australia, which includes one third (33%) of women and 9% of men, have been sexually harassed since the age of 15. A majority (68%) of those people were harassed in the workplace.[3]

Women of colour, young adults (18-24), those with a disability, and LGBTI people are particular targets of sexual harassment.[4]

[1] Good L, and Cooper R (2016) 'But It's Your Job To Be Friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector, Gender, Work and Organization, 23 (5), 447-469.
[2] Australian Bureau of Statistics, Personal Safety Survey (2016).
[3] Australian Human Rights Commission, Working without fear: Results of the Sexual Harassment National Telephone Survey (2012).
[4] Australian Human Rights Commission, Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities (2017).

The AHRC has conducted three national sexual harassment phone surveys every 5 years since 2002 (results published in 2003, 2008 and 2012). The fourth survey is currently underway and results are expected in August 2018.

The 2012 survey found that one in four women (25%) and one in six men (16%) had experienced sexual harassment in the workplace in the previous 5 years.[5] These results are similar to figures collected in 2008 and 2003.[6] Although the results of the 2018 survey have not been released yet, the Sex Discrimination Commissioner Kate Jenkins says early indications show that the rates of workplace sexual harassment have "increased significantly" since the last survey in 2012.[7]

When harassment happens at work, most people will not report it or seek support. They fear retaliation, or they simply don't know what to do or where to go for help. Only 20% of people make a formal report or complaint, and only 29% seek support or advice.[8] The concerns regarding victimisation are backed up by the data, which shows that more people are experiencing negative consequences as a result of reporting sexual harassment. In 2012 nearly one-third (29%) of respondents who reported sexual harassment indicated that their complaint had a negative impact on them (eg., victimisation, demotion.) This was an increase from 2008 (22%) and 2003 (16%).

The 2018 survey will provide for the first time data on sexual harassment within major industry sectors, which will provide guidance to employers to develop more targeted interventions to prevent sexual harassment. It is already known that sexual harassment is a huge problem in the hospitality industry. A recent survey by Hospo Voice found that 89% of hospitality workers (with women making up 90% of those surveyed) have been sexually harassed at work, and 19% have been sexually assaulted.[9]

There are major problems with the current sexual harassment complaints system, including its accessibility, efficiency and affordability. In particular:

- It is highly individualised, with the onus being on people to come forward and make a complaint rather than employers having a responsibility to ensure that sexual harassment does not occur in their workplaces. This places a large burden on those that have been sexually harassed, who often have to repeatedly re-live the trauma through the complaints process.
- It is very costly to take a complaint beyond conciliation through to a hearing in a court, meaning it is unaffordable for many people.
- It is slow, and the length of time it takes to resolve complaints puts many people off lodging a complaint at all.

The above factors mean in practice the current system is inaccessible for many people. Even if significant reforms to the legal system are made, it is always going to be inaccessible to the most vulnerable people in our society. Arguably, a far more substantial emphasis needs to be put on prevention by the employer.

Professor Sara Charlesworth has observed that the anti-discrimination model puts an unreasonable burden on the individual to report and deal with sexual harassment.[10] This observation is backed up by a recent report of the House of Commons Women and Equalities Committee on Sexual Harassment in the Workplace (**the UK Report**)[11] which found that the burden of holding harassers and employers to account rested heavily with the individual. The UK report, which was published on

[5] Australian Human Rights Commission, Working without fear: Results of the Sexual Harassment National Telephone Survey (2012).
[6] The 2008 survey found that 22% of women had experienced sexual harassment in the workplace at some time. The 2003 survey found that 28% of women had experienced sexual harassment in the workplace at some time.
[7] Australian Human Rights Commission Media Release, 'National Inquiry into Sexual Harassment in Australian Workplaces,' 20 June 2018
[8] Australian Human Rights Commission, Working without fear: Results of the Sexual Harassment National Telephone Survey (2012).
[9] United Voice Victoria survey, 2017.
[10] "Put harassment regulation on same footing as OHS laws: Expert", Workplace Express, 30 July 2018.
[11] House of Commons, Women and Equalities Committee, Sexual Harassment in the Workplace, Fifth Report of Session 2017-19, 25 July 2018.

25 July 2018 following a 6 month parliamentary inquiry in the UK, recommends putting the onus on employers and regulators to tackle and prevent sexual harassment in the workplace.

Many of the issues identified in the UK Report are also issues in the Australian context. For example:

- There is currently little incentive for employers and regulators to take robust action to tackle and prevent sexual harassment in the workplace.
- There is a lack of appropriate support for people who make complaints within the workplace.
- This lack of action by employers and regulators means the burden of holding harassers and employers to account rests heavily on the individual.
- Many do not make a complaint for fear of victimisation, lack of trust in the process, or because the complaints system is inaccessible.
- There is a lack of data on sexual harassment claims which makes it hard to measure the extent of harassment and the effectiveness of remedies.

3. SUMMARY OF POTENTIAL SOLUTIONS

Arguably there needs to be a shift away from the individualised nature of the complaints system towards putting the onus on employers and regulators to prevent the conduct from occurring in the first place. This idea, of a positive duty being imposed on employers to prevent sexual harassment, is explored first. Second, ways in which to reform anti-discrimination, health and safety and industrial legislation which would make sexual harassment complaints easier to bring are explored. Finally, a range of other legal and non-legal reforms which may assist in addressing the magnitude of the problem are explored. These include protections for whistle-blowers, reforms to settlement agreements, ensuring access to justice for vulnerable and low income workers, strengthening the role of regulators, external oversight for employers and measures to empower bystanders.

4. A DUTY TO PREVENT SEXUAL HARASSMENT

Organisational and employer responses to sexual harassment have been hindered by the conceptual framing of sexual harassment as an individual issue.[12] In addition, the majority of responses to sexual harassment are informal, temporary and targeted to the immediate situation, and as such do not challenge the systemic problem.[13] A 2011 Australian study[14] found that only 16% of workers who experienced sexual harassment made a formal complaint. Of those who made a complaint, the majority (63%) reported to their manager, with only 5% reporting it to their union. About 20% did not make a complaint because they did not have any faith in the process. Of those who made a complaint, 36% reported a negative impact on the person making the complaint. Current processes are often perceived as hostile, adversarial, lacking confidentiality, risky and as falling on deaf ears.[15]

Aside from the general duty of care under Work Health and Safety legislation (which is discussed later), employers do not currently have a positive obligation to take steps to prevent sexual harassment of or by their employees.

Currently both state and federal anti-discrimination laws provide that an employer is not liable for unlawful sexual harassment by its employees if they have taken “all reasonable steps” to prevent those employees from contravening the legislation. Therefore, the “all reasonable steps” test only becomes relevant when employers are defending sexual harassment matters, rather than being a positive obligation on employers to prevent it from occurring in the first place.[16] The AD Act is even worse as NSW employers are only vicariously liable if they express or impliedly “authorise” the act.[17]

[12] McDonald, P, Charlesworth, S and Graham, T (2015), 'Developing a framework of effective prevention and response strategies in workplace sexual harassment', Asia Pacific Journal of Human Resources, vol. 53, no. 1, pp. 41-58.
[13] McDonald, Charlesworth and Graham (2015); Good and Cooper (2016).
[14] McDonald, P, Charlesworth, S and Cerise, S (2011), 'Below the "tip of the iceberg": Extra-legal responses to workplace sexual harassment', Women's Studies International Forum, vol. 34, no. 4, pp. 278-289.
[15] McDonald, Charlesworth and Graham (2015).
[16] The test for vicarious liability could be strengthened to require employers to take all **necessary** steps to prevent sexual harassment, not just all reasonable steps.
17 See section 53 of the Anti-Discrimination Act 1977 (NSW)

Taking all reasonable steps is generally considered to involve having appropriate policies, procedures and training that discourage and minimise the risk of sexual harassment in the workplace, and that deal with instances of sexual harassment in an appropriate manner. Policies should include details of sanctions which may be imposed and the procedure to make complaints about breaches of the policy. It is therefore relatively easy for employers to show they have taken all reasonable steps in order to escape liability in sexual harassment claims – they just need to have the right policies, procedures and training in place, but don't necessarily have to do anything to shift the culture or take positive steps to reduce the incidence of sexual harassment in their workplace. Unions report in recent years they have seen a decline in the quality of sexual harassment policies with employers increasingly taking a compliance (tick and flick) mentality.

A positive obligation could be imposed on employers to take all required steps to prevent sexual harassment by or of their employees. Such an obligation would require employers to take active and positive steps to prevent and reduce the risk of sexual harassment, and therefore could go a long way to helping organisations increase their awareness of any unlawful behaviour and begin to shift internal cultures.

Another consequence of introducing a prevention approach would be to shift the discussion away from whether the conduct identified strictly falls inside or outside the employer's area of responsibility. Unions report that, while the legislative definitions of sexual harassment are sound, there remain many disputes such as whether events where sexual harassment has taken place were "work events" and where to draw the line in relation to on-line sexual harassment. The UK Report recommends imposing a legal obligation to protect workers from sexual harassment, with breaches resulting in substantial financial penalties. The UK Report embraced a proposed solution contained in a recent UK Equality and Human Rights Commission (**EHRC**) report[18] that a mandatory duty should be placed on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace. The EHRC argued that the burden on individuals should be lifted by setting a clear expectation that employers must put in place protective measures, with the intention that those measures would ultimately remove the need for individuals to seek their own remedy or use whistle-blowing procedures.

The duty would clearly state that it is up to employers to take steps in the first place. Breach of the duty would constitute an unlawful act that would be subject to enforcement action by the EHRC and would carry substantial financial penalties. The EHRC therefore, would not necessarily need to be concerned with whether individual acts of harassment had occurred – their focus would be on whether the organisation was taking steps to protect their employees or not.

The EHRC noted that currently in the UK it is a defence for an employer facing a sexual harassment claim to show that they have taken reasonable steps to protect the person from harassment. Of course, they only use this once the claim has been brought, which does not create a culture of protection. A study in Australia has also found that grievance procedures can be ineffective because of the focus on risk management and managers trying to protect the employer from reputational risk and vicarious liability.[19]

The EHRC also suggested that anonymous and confidential reporting might help to improve employer practice and employee confidence, such as having independent support lines, advocacy services or anonymous hotlines in partnership with external organisations.

The UK Report recommended that the duty should be supported by a statutory code of practice on sexual harassment at work setting out what employers need to do to meet the duty, including steps to prevent and respond to sexual harassment. This could be considered when determining whether the duty had been breached. Tribunals should have discretion to apply an uplift in compensation of up to

[18] Equality and Human Rights Commission, Turning the Tables: Ending Sexual Harassment at Work, March 2018.
[19] McDonald, Charlesworth and Graham (2015).

25% in harassment claims where there had been a breach of mandatory elements of the statutory code.

The statutory code of practice would set out good practice guidance on matters including:

- reporting systems and procedures and what employers should provide as a minimum, including guidance on anonymous reporting;
- support for victims, including access to specialist support and steps that should be taken to prevent victimisation of complainants;
- how to investigate and record complaints, including a presumption that all complaints should be investigated unless there is a compelling reason not to;
- how to identify when sexual harassment allegations may include criminal offences and how to conduct any investigation in a manner which does not prejudice any potential police investigation and criminal prosecution;
- training, induction, risk assessments and other policies and practices; and
- alternative dispute resolution including mediation.

The UK Report noted that incentives for employers to comply are much stronger in other areas of corporate governance, such as data protection and preventing money laundering, because there are stringent regimes which place explicit obligations on organisations, with criminal and civil sanctions for non-compliance, including heavy fines. In order for a business to be able to show reasonable steps defences, they have to have undertaken proactive risk management and risk assessments in the workplace to identify low, medium and high risks, and then tailor their training and policies to those risks. The UK Report argued that we should be placing just as much importance on protecting people's safety and wellbeing at work as we do on these corporate governance issues. Currently, the EHRC cannot impose fines when enforcing the Equality Act. Neither can the equivalent bodies in Australia such as the AHRC and the Anti-Discrimination Board of NSW (**ADB**).

Professor Sara Charlesworth has recommended that Australia consider this approach, and that introducing a proactive duty for employers would remove an unreasonable burden on workers.[20] Law firm Maurice Blackburn have also called for a positive obligation to be imposed on employers to prevent sexual harassment. A breach of this duty should attract substantial financial penalties and be subject to enforcement by the appropriate regulator, such as the AHRC, to incentivise employers to take steps to prevent sexual harassment.

Such an approach, including a code of practice, would also assist in removing the significant confusion that Unions report still exists around what constitutes sexual harassment. While the definitions of sexual harassment in Federal and State legislation are sound, unions feel a duty to prevent sexual harassment, coupled with a code of practice would assist all parties better understand their rights and obligations. In addition to the matters identified above the code could include information on what behaviour is unacceptable, how to establish a good corporate culture that prevents sexual harassment, how to implement a risk management approach to prevent sexual harassment and what the different avenues for resolution are.

5. REFORMS TO ANTI-DISCRIMINATION LEGISLATION

a) Removing time limits

Both the SD Act and the AD Act contain restrictive time limits in which to make a complaint of sexual harassment. These time limits are a significant and unnecessary barrier for reporting sexual harassment, and removing them would allow more people to come forward.

[20] "Put harassment regulation on same footing as OHS laws: Expert", Workplace Express, 30 July 2018.

Many people who experience sexual harassment do not report their harassment straight away, as is common with all types of sexual offences.[21] Like other traumatic events, it can take months or even years to report sexual harassment, if it is reported at all. This is due to many factors, including trauma, embarrassment and shame, fear of not being believed, fear of being blamed, fear of retaliation or losing their job, or not knowing where to turn. The #MeToo movement has shown that it can often take people a long time to make a complaint. Time limits will also have a disproportionate impact on people who have been psychologically damaged by the sexual harassment they have experienced.[22]

Reports indicate that the majority of complainants are no longer in the workplace where the harassment took place when they make a complaint.[23] This indicates that the sexual harassment may have caused them to leave, and that it is unlikely people will complain while still in the same workplace. Therefore, it is important to ensure that people will have the option to complain after they leave. In addition, extending time limits would mean that complaints could be made when circumstances change, for example, the harasser moves on or changes teams.

In addition, the time limits may not allow enough time for people to try and resolve the matter within the workplace first, and then seek advice and guidance about whether to make a complaint to the AHRC or ADB.

Currently, time limits are as follows:

- When making a complaint to the AHRC, complainants must generally bring a complaint of sexual harassment within 6 months. Section 46PH of the *Australian Human Rights Commission Act 1986* (Cth) provides that the President of the AHRC may terminate a complaint if it was lodged more than 6 months after the conduct took place.
- When making a complaint to the ADB, complainants must generally bring a complaint of sexual harassment within 12 months. Section 89B of the AD Act provides that the President of the ADB may decline a complaint if the conduct occurred more than 12 months prior to the complaint being made.

The AHRC also used to allow 12 months for all complaints to be made, including sexual harassment complaints, but this was reduced to 6 months in 2017 by the Turnbull Government. Attorney General Christian Porter stated that it would lead to a more efficient complaints process and ensure unmeritorious or improper complaints were dismissed at the earliest opportunity.

Although the ADB and AHRC may not terminate all complaints which fall outside the time limit, the reality is that the older a claim the less likely it is to be accepted and dealt with, and employers will use the fact that it is older than 6 or 12 months to argue against the complaint proceeding. The existence of a time limit of 6 or 12 months will also discourage people from making complaints outside those limits, as it is another hurdle in an already very difficult process.

If the AHRC or ADB terminates/declines a complaint, the only option complainants have left is to take their case to court or a tribunal– the Federal Court/Federal Circuit Court for complaints made to the AHRC, and the NSW Civil and Administrative Tribunal (**NCAT**) for complaints made to the ADB. This can only happen if the court grants leave to deal with the application even though it was made out of time. This is a step that most people will not take due to the stress, trauma, money and time associated with litigation (and with the Federal Court and Federal Circuit Courts being costs jurisdictions). This means that complainants will have lost their opportunity to have access to alternative dispute resolution through confidential mediation and other processes. By extending or abolishing existing time frames, people would be able to seek justice when they are ready and strong enough to do so.

Longer and more reasonable time frames already exist for other breaches of employment law (eg., 6 years for a breach of contract or underpayment cases).

[21] UK House of Commons, Women and Equalities Committee, Sexual harassment in the Workplace, Fifth Report of Session 2017–19 (July 2018).
[22] UK House of Commons, Women and Equalities Committee, Sexual harassment in the Workplace, Fifth Report of Session 2017–19 (July 2018).
[23] McDonald, P and Charlesworth, S (2013), 'Settlement outcomes in sexual harassment complaints', Australasian Dispute Resolution Journal, vol. 24, no. 4, pp. 259-269.

A suggested reform would be for the time limits for bringing sexual harassment complaints to the AHRC and ADB to be abolished or extended to at least 6 years. This reform has been recommended by law firm Maurice Blackburn[24].

This reform would require discussion about whether time frames for all discrimination matters should also be extended, or whether sexual harassment cases should be treated differently. One possible outcome is to allow for any discrimination claim arising from treatment in the workplace to have at least a 6 year time limit, like other breaches of employment law.

b) Removing the cap on compensation in NSW

In NSW, there is a cap on damages for discrimination and harassment cases of $100,000 if a claim is brought to the ADB rather than the AHRC.[25] There is no such limit under the SD Act, or any other state legislation. NSW, Australia's most populous state, is out of line with the rest of Australia in this respect. All victims of sexual harassment should have the same opportunities to access financial compensation regardless of where they live or work to help them recover.

Courts in recent years have acknowledged that higher compensation for sexual harassment is needed,[26] given the harm that it can cause to physical and mental health and capacity to work. In the landmark case of *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, Ms Richardson was awarded $100,000 in general damages alone to compensate for pain and suffering. The damages cap in NSW is clearly outdated and has not kept up with developments in the common law and higher community standards that now recognise the damage that can be caused by sexual harassment.

The cap also functions as a significant disincentive to bring a claim with the ADB and therefore precludes workers from accessing the benefits of this jurisdiction, including the fact that it is a no costs jurisdiction. Law firm Maurice Blackburn has recommended that the cap be removed. This would be achieved by removing the words "*not exceeding $100,000*" from section 108(2)(a) of the AD Act.[27]

It is likely that in order to remove the cap for sexual harassment claims, the cap will need to be removed for all discrimination and harassment complaints. It may be difficult to justify removing the cap for only sexual harassment claims, in circumstances where all forms of discrimination can have significant adverse impacts on a victim's health and capacity to work, and where other jurisdictions in Australia have no such cap.

6. REFORMS TO THE *FAIR WORK ACT 2009* (CTH)

Sexual harassment is prohibited by the SD Act at a federal level and the AD Act at the NSW level. Conciliation processes in these jurisdictions, particularly the AHRC,[28] can be very lengthy and stretch for months. Many victims quit their jobs during this time due to the stress, the amount of time spent with no result and/or ongoing conduct. The UK Report noted that for many women, leaving their job was a more rational response than making a complaint, because what they want is for the behaviour to stop, and the way to make it stop is to leave the organisation.

There are a lack of options in Australia for urgent intervention that would stop the conduct, resolve the issue and allow people to stay in their jobs, except possibly the flawed anti-bullying jurisdiction which can grant orders to stop bullying (this jurisdiction is discussed later). There are also a lack of options for people on low incomes. The remedies available under anti-discrimination law also provide limited

[24] Maurice Blackburn, 'Time for Reform' (2018).
[25] Section 108 of the AD Act caps the compensation payable for discrimination or harassment complaints at $100,000.
[26] For example in the cases of *Vargara v Ewin* [2014] FCAFC 100 where Ms Ewin was awarded $476,163 to compensate for economic loss and pain and suffering; in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, Ms Richardson was awarded $130,000 - $30,000 in damages for economic loss and $100,000 for pain and suffering. This was a large increase in damages awarded for pain and suffering in comparison compared to previous cases.
[27] Maurice Blackburn, 'Time for Reform' (2018).
[28] AHRC figures show the average time for conciliations increased from 3.8 months to 4.3 months in the 12 months to June 2017.

deterrence. There are no civil penalties for the employers or the individuals involved in the contraventions and no ability to apply for an injunction.

Sexual harassment is not currently explicitly outlawed under industrial laws in the FW Act. The general protections under Part 3-1 of the FW Act prohibit an employer taking adverse action against an employee/prospective employee for a discriminatory reason i.e. because of a protected attribute, including their sex.[29] Whether this amounts to a prohibition on sexual harassment has been considered but not decided.[30] An adverse action claim can be made under the general protections provisions if there has been adverse treatment as a result of making a sexual harassment complaint or claim.[31]

Complainants in New Zealand have a choice of two different avenues: they can make a complaint under anti-discrimination laws contained in their *Human Rights Act 1993* or they can lodge a grievance against their employer under industrial laws contained in their *Employment Relations Act 2000*. Remedies include orders restraining the defendant from continuing or repeating the conduct, or from permitting others to engage in the conduct. The *Employment Relations Act* includes specific provisions on sexual harassment by employers and managers, harassment by people other than employers and managers, and provisions when steps are not taken to prevent a repetition of harassment. An equivalent to the grievance option in New Zealand could arguably be available in Australia if an Award or Enterprise Agreement covered sexual harassment and the dispute process gave access to arbitration before the Fair Work Commission (**FWC**). However this combination is rare.

Provisions could be introduced into the FW Act to give it the power to deal specifically with sexual harassment matters in the workplace. Given the vast majority (68%) of sexual harassment complaints relate to conduct in the workplace,[32] giving the FWC powers to deal with these matters can clearly be justified.

NSW currently refers its industrial relations powers to the Commonwealth, with the exception of public sector employees and those from local government. Certain state industrial laws still apply to employers and employees covered by the national system. It is important these referral powers are taken into account to ensure that any reforms to the FW Act in relation to sexual harassment have consistent coverage to the current FW Act.

In addition, the concept behind the discussed reforms to the FW Act could also be incorporated into the Industrial Relations Act 1996 (NSW), which would provide coverage to NSW public sector and local government employees.

a) Including sexual harassment as an adverse action under the general protections

One option could be to amend the FW Act so that it explicitly includes sexual harassment in the definition of adverse action, which would allow an employee to bring a general protections claim if they had been subject to sexual harassment in the workplace. Significantly, this would allow them to seek an injunction to stop the harassment, a remedy which does not currently exist in relation to sexual harassment. In addition, civil penalties are payable for breaches of the general protections, including for individuals involved in the contraventions. As discussed above, under anti-discrimination law there are no penalties for employers or individuals involved in unlawful conduct, meaning there is little incentive for employers to take action to prevent sexual harassment.

Having sexual harassment included in the general protections provisions would also mean applicants would have access to conciliation processes at the FWC, and then if those processes did not resolve

[29] Section 351 of the FW Act.

[30] *Wroughton v Catholic Education Office Diocese of Parramatta* (2015) 255 IR 284l [2015] FCA 1236. Justice Flick observed at [77] that "*...it may be noted that s 351(1) of the Fair Work Act does not itself employ the term "discrimination". Nor does s 351 contain any prohibition upon (in the present case) "sex discrimination", including "sexual harassment". The prohibition in s 351(1) is a prohibition upon an employer taking "adverse action against a person..."*

[31] Sections 340 and 341 of the FW Act prohibit the taking of adverse action (eg demotion, dismissal, alteration of position or conditions to their detriment) against an employee who makes complaints in relation to their employment.

[32] Australian Human Rights Commission, Working without fear: Results of the Sexual Harassment National Telephone Survey (2012).

the matter, they would have the option to proceed to a hearing in the Fair Work jurisdiction of the Federal Court or Federal Circuit Court, which would also be a no costs jurisdiction.

However, the general protections provisions have become increasingly technical, legalistic and difficult for applicants to prove their case, especially without the assistance of a lawyer. This means that even in a no costs jurisdiction, there could be substantial legal costs just bringing a complaint to conciliation in the FWC, let alone proceeding to a court.

b) Including sexual harassment in the anti-bullying jurisdiction

In 2014, a new part was inserted into the FW Act which gave the FWC jurisdiction to deal with bullying matters. Workers who have been bullied at work can apply to the FWC for an urgent order to stop the bullying. This part of the FW Act could be expanded to include sexual harassment matters, or arguably already includes sexual harassment that also meets the definition of bullying.

Giving those experiencing sexual harassment the option to make an application for an urgent stop order could help to stop conduct, prevent further conduct from occurring and keep complainants in their jobs.

Features of the anti-bullying jurisdiction which would work well in a sexual harassment context are:

- The definition of 'worker' is very broad ("an individual who performs work in any capacity"[33]), and includes employees, contractors, subcontractors, outworkers, apprentices, trainees, students and volunteers.
- The FWC must deal with applications promptly, within 14 days of the application being made.
- The FWC is given wide powers to make any order it considers appropriate to prevent future conduct.
- If orders are breached, civil penalties are payable.

However the anti-bullying jurisdiction has a few serious limitations (many of which arise out of its focus on stopping bullying and preventing future bullying, rather than providing redress for past conduct), including:

- a worker must still be employed to make an application (so there is no recourse for workers who have left their jobs because of bullying conduct);
- the bullying conduct must be repeated and a one off incident will not be sufficient to make an application;
- the conduct must create a risk to their health and safety and there must be a risk that the worker will continue to be bullied (so there is no recourse for workers who experienced bullying in the past);
- the FWC is prohibited from making orders for payment of monetary amounts – so it has no ability to award compensation or damages;
- it only applies to workers in constitutionally covered businesses, meaning some employees miss out – for example, public sector workers in NSW have no protection under the bullying laws.[34]

If sexual harassment matters were to be included in the anti-bullying jurisdiction, it would suffer from these same limitations. Some of these limitations could be addressed by combining the introduction of an anti-sexual harassment jurisdiction with the inclusion of sexual harassment as an adverse action under the general protections of the FW Act as outlined in 6 a). Alternatively, an entirely new section of the FW Act could combine the best elements of both and is outlined in 6 c).

c) A new part of the FW Act to deal with sexual harassment

Alternatively, a new part of the FW Act could be introduced to deal with sexual harassment matters. A new jurisdiction could learn from the limitations and failures of the anti- bullying laws, and the FWC could be given broad powers to make orders that sexual harassment stop, to conciliate, to arbitrate

[33] It adopts the definition in the *Work Health and Safety Act 2011* but does not include a member of the Defence Force.
[34] Workers working for unincorporated employers and corporations which are not "trading or financial" corporations are also not covered by the provisions.

and to award compensation. The jurisdiction could be available to any person who has experienced sexual harassment in the workplace, whether they are current or former workers, and whether the conduct is ongoing or not, a one-off incident or repeated conduct. It could also retain the broad definition of 'worker' used in the anti-bullying laws.

Any new jurisdiction could also be made to be accessible by all workers in Australia, and not limited to those working for constitutionally covered businesses or national system employers. This could be done by giving effect or further effect to ILO Convention 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities.[35]

A new FWC jurisdiction would be better for those needing a no costs jurisdiction, who can't afford the fees associated with taking a matter to the Federal Circuit Court or Federal Court. It would be a good option for workers who are represented by their union and hence do not need to pay legal fees. It could potentially address one of the big barriers of pursuing sexual harassment claims to and beyond the conciliation stage, namely cost and companies/individuals strategically using deep pocket litigation to outspend complainants. This may assist in more complaints being heard to completion, and prevent complainants from having to settle with remedies they are not happy with, or that don't reflect anything near the true nature of their loss.

Litigation tends to entrench parties in adversarial positions – perhaps giving the FWC broad powers to deal with the matter in flexible and tailored ways could bring about a different approach with an equal emphasis on prevention and redress for past conduct.

d) Standard clauses in Enterprise Agreements and Awards

Another option would be for employers, unions and other parties to the bargaining process to negotiate standard clauses in Enterprise Agreements and Awards regarding sexual harassment. Such clauses could be mandated by the FW Act like dispute settlement procedures and consultation clauses. Sexual harassment clauses already exist in some agreements and awards, but it is unclear how widespread they are currently, and how well utilised existing clauses are.

As of 2012, according to Unions NSW data, ten unions (36%) reported having a standard bargaining claim and clause regarding sexual harassment. Five unions reported having negotiated provisions regarding sexual harassment into more than 75% of their agreements, and 6 other unions reported achieving this claim in about 50% of agreements. The clauses varied, but all required the employer to have a sexual harassment policy in place. Some also provided for alternative dispute resolution involving union consultation, and/or the ability for the dispute to be heard by the FWC.

Having these clauses could be another way in which to give employees access to the FWC and therefore have their complaint dealt with more efficiently and cheaply than the current complaints process. Clauses regarding sexual harassment may also make it more likely that employers actually address any cultural issues in their workplace which increase the incidence of sexual harassment, and may also make employees more aware of their rights and their options to complain.

7. REFORMS TO WHS LEGISLATION AND THE WORK HEALTH SAFETY ACT 2011 (NSW)

Sexual harassment in the workplace is a serious health and safety concern. Work Health and Safety (**WHS**) legislation covers sexual harassment as it covers all risks to health and safety. The legislation requires that risks be identified, assessed and eliminated where reasonably practicable, or minimised (this is known as '**risk management**').

There can be no doubt that sexual harassment is a risk to health and safety and should be subject to risk management as required under the WHS legislation.

[35] Done at Geneva on 23 June 1981 [1991] ATS 7. This is the basis under which Part 6-4, Division 2 of the FW Act dealing with Termination of Employment was enacted.

It should be noted that **health** is defined to include both *physical* and *psychological* elements. Therefore, in the context of sexual harassment, the risk of psychological injury due to such harassment (as well as physical injury) is a risk employers need to manage.

Further, the WHS legislation applies not just to "employees" - the controller of a workplace (called a Person Conducting a Business or Undertaking - **PCBU**) owes an obligation to all participants including paid workers, volunteers, contractors and those on-site as part of the supply chain. This is significant in relation to sexual harassment that might emanate from customers or other workplace actors that are not co-workers.

Unions NSW supports PCBUs taking action to eliminate risks once they are identified, as opposed to a human resources approach where incidents are reported as part of a complaints process. This does not mean fair and impartial investigations should not occur following complaints, however where risks like sexual harassment are identified, they must be eliminated or minimised in every instance, thereby preventing or minimising the risk of harm.

When sexual harassment does occur, the failure of the PCBU to prevent or minimise it could be seen as a breach of their duty of care outlined in section 19 of the *Work Health and Safety Act 2011* (NSW) (**the WHS Act**), or one of the other requirements to identify hazards and manage health and safety risks set out in the *Work Health & Safety Regulation 2017* (NSW) (**the Regulation**). This means an Inspector or trained Health and Safety Representative (**HSR**) could require an employer to take corrective action to prevent such injuries arising in the future. This also means the Regulator (SafeWork NSW) could prosecute the PCBU for failing to meet their obligations. It should be noted that prosecutions of any kind are extremely rare. Unions NSW is not aware of any prosecutions for sexual harassment.

In order for the employer to meet their duty of care to provide a safe workplace, including one free from sexual harassment, the employer's implementation of risk management must be done in consultation with the workers. A HSR is a mechanism for that consultation to occur.

It is also worth considering the introduction of roving HSRs to address sexual harassment. These HSRs would work across a number of small-medium workplaces in an industry and be provided with access to workplaces for the purpose of investigating and following up health and safety issues raised by workers. Roving HSRs would assist reduce health and safety hazards in small-medium workplaces or in mobile workforces where it is unlikely the workforce will have a dedicated HSR.

There are also legislative obligations on people in workplaces to act to prohibit sexual harassment. A person at a workplace must take reasonable care for their own health and safety and **take reasonable care that their behaviour does not adversely affect the health and safety of others**. They must comply with reasonable instructions that allow the PCBU to comply with the WHS Act and, if they are a worker, any reasonable WHS policy or procedure from the PCBU. (See sections 28 and 29 of the Regulation). These legislative obligations could also require bystanders to step-up.

The flow-chart at Appendix A shows how the legislation in its current form could be used to attempt to address sexual harassment.

Despite the obvious applicability of WHS legislation to sexual harassment, Unions NSW is not aware of it being used extensively and is not aware of any prosecutions by the Regulator.

This may be for several reasons: the approach of the NSW Regulator (SafeWork NSW), the legislative prohibitions on multiple actions, and the fact that the current legislation simply doesn't reference sexual harassment explicitly as a health and safety risk.

Approach of the Regulator

The Regulator appears to have a hands-off view when it comes to sexual harassment. This is not inconsistent with the approach of the Regulator generally, which has adopted a policy approach to "work with" employers rather than issue improvement notices and take prosecutions. All enforcement mechanisms available to the Regulator have fallen alarmingly in recent years.

In relation to sexual harassment, a spokesperson for SafeWork NSW recently told OHS Alert that workplace harassment has a specific meaning under the AD Act and the SD Act making it different from bullying within the meaning of WHS laws.[36] The spokesperson said: "Under anti-discrimination legislation, harassment in the workplace is any form of behaviour that is not wanted that offends, humiliates or intimidates, and creates a hostile environment. Sexual harassment in the workplace is a type of sex discrimination and is against the law. Complaints for harassment and sexual harassment in the workplace can be taken up with supervisors or managers, unions, equal employment opportunity officers or alternatively the NSW Anti-Discrimination Board."

The spokesperson also noted that if SafeWork does receive a complaint of workplace sexual harassment, customer care staff discuss the issues with the caller and, once it has been determined that harassment is occurring, direct the caller to the ADB. A SafeWork inspector "might attend the workplace to identify any ongoing risks to workers and review the employer's policies and systems for dealing with workplace harassment and bullying."

The spokesperson also noted that workers unable to work as a result of harassment in the workplace can make a claim for workers compensation with their employer's workers compensation insurer, and that other agencies may also be able to assist, such as the AHRC, community justice centres and the National Association of Community Legal Centres.

These comments made by SafeWork NSW are very concerning as they reveal an attitude and approach that sees sexual harassment as a matter to be dealt with under anti-discrimination laws or in the workers compensation system if there has been an injury preventing the person from working. The approach of SafeWork NSW would seem to be to refer sexual harassment matters to other bodies, and to not take any action beyond a possible inspection at the workplace. Although SafeWork NSW clearly acknowledges the impact of sexual harassment on worker health and safety risks, through their reference to workers compensation, they refuse to take responsibility for sexual harassment as a health and safety risk. SafeWork NSW does not appear to contemplate the possibility that it could require employers to take corrective action or prosecute the PCBU for failing to meet their obligations.

These comments are confirmed by guidance issued by SafeWork Australia about Workplace Bullying,[37] which clearly excludes sexual harassment from the definition of bullying, and positions it as a matter which is not covered by the WHS legislation, but rather under anti-discrimination laws, and recommends contacting the AHRC, the FWC and state/territory anti-discrimination agencies.[38]

The findings of the UK Report in this respect are instructive. The inquiry expressed deep concerns over the failure of WHS regulators in the UK to treat harassment as a serious health and safety issue. The Report expressed "astonishment" at the approach of the Health and Safety Executive (**HSE**), which did not see tackling or investigating sexual harassment as part of its remit. The HSE's view was that there is no specific duty under health and safety legislation regarding sexual harassment, and that it was for the EHRC and the police to enforce the law on sexual harassment. The HSE agreed that it "had a role in making sure that workplaces have practices that keep people safe from violence at work," but did not agree that this included responsibility for sexual harassment – the most common form of violence against women. The UK report concluded that "HSE's analysis of the potential for harm caused by sexual harassment appears to be cursory and ill-informed. We suspect that this issue has simply been ignored, as it has been by employers themselves, but we are perplexed that it continues to reject the suggestion that it should now be taking action."[39]

It would appear that the Regulator in NSW is also failing to treat sexual harassment as a serious health and safety issue and is therefore failing in its responsibility. Arguably, this will continue to occur without reform to the WHS legislation, a change in the attitude by the Regulator in relation to their enforcement role and a significant increase in resources to allow more Inspectors to be visiting more

[36] 'Harassment must be treated as major OHS issue: inquiry,' OHS Alert, 30 July 2018.
[37] Guide for Preventing and Responding to Workplace Bullying, SafeWork Australia, May 2016
[38] Guide for Preventing and Responding to Workplace Bullying, SafeWork Australia, May 2016, page 7.
[39] House of Commons, Women and Equalities Committee, Sexual Harassment in the Workplace, Fifth Report of Session 2017-19, 25 July 2018, pp19-20.

workplaces to ensure compliance with the law. Allowing unions and/or individuals to take prosecutions for a failure to meet WHS duties, including a new duty to prevent sexual harassment (and claim a moiety for costs), would also improve enforcement. The ability for unions to take prosecutions was removed in 2011. Individuals have never had that right; accept in relation to claims for discrimination for raising a WHS issue (section 112).

Prohibition on multiple actions

The prohibition on multiple actions may also lead to the WHS legislation not being utilised in respect of sexual harassment matters. Section 115 of the WHS Act prohibits a person commencing civil proceedings in relation to discriminatory conduct taken for a prohibited reason (eg, a person raised WHS issues or concerns) if that person took action for the same matter elsewhere and didn't withdraw it, or if they took action elsewhere and that action failed. S115 also prohibits recovery of compensation in civil proceedings if the person has received compensation for the same matter elsewhere.

It is common for legislation to disallow multiple actions – for example section 10(4) of the SD Act provides that where a person has made a complaint, instituted a proceeding or **taken any other action** under the law of a State or Territory regarding the same matter, they cannot bring a complaint to the AHRC.[40] However this could potentially mean pursuing a claim for discrimination due to raising concerns about sexual harassment under the WHS legislation might prevent a claim in relation to that sexual harassment being made under discrimination or industrial relations laws. These are separate claims that should not be caught be a prohibition on multiple actions and is an area where law reform might be needed.

Potential reforms to WHS legislation

The WHS legislation (including the WHS Act in NSW) could be amended to explicitly include workplace violence and harassment (including sexual harassment) as a health and safety risk that employers and the Regulator have an obligation to prevent and manage. This could be done under section 19 (Duty of Care) with the definitions and minimum requirements inserted into the Regulation.

This has been done in several jurisdictions in Canada, including Ontario and New Brunswick. The Occupational Health and Safety Act in Ontario now includes a definition of workplace harassment and sexual harassment. The Act provides that employers must:

- Prepare and review a policy on workplace harassment at least annually, regardless of the size of the workplace or the number of workers;
    - If six or more workers are regularly employed at the workplace, the policy must be in writing and it must be posted in a conspicuous place in the workplace;
    - The policy must consider workplace harassment from all sources such as customers, clients, employers, supervisors, workers, strangers and domestic/intimate partners, and should encourage workers to bring forward workplace harassment concerns, whether their own, or information about workplace harassment that they have witnessed (ie bystanders);
- Develop and maintain a program to implement the workplace harassment policy. The program must be in writing, and must be developed and maintained in consultation with the joint health and safety committee or health and safety representative;

[40] Section 10(4) provides in full:
Where:
(a) a law of a State or Territory deals with a matter dealt with by this Act; and
(b) a person has made a complaint, instituted a proceeding or taken any other action under that law in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act;
the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of Part II of this Act.

- Review the workplace harassment program as often as necessary, but at least annually, to ensure that it adequately implements the workplace harassment policy; and
- Provide appropriate information and instruction to workers on the contents of the workplace harassment policy and program.

New Brunswick recently introduced new regulations under the General Regulations – Occupational Health and Safety Act which aim to identify and prevent workplace violence and harassment, including sexual harassment. These new regulations will take effect from 1 September 2018. The regulations introduce a new set of obligations for employers, including requiring **all** employers to:

- Establish a written code of practice with respect to workplace harassment (eg., a policy);
- Review the harassment policy on an annual basis in consultation with the joint health and safety committee;
- Provide training to all employees regarding the harassment policy, and keep and provide training records to the regulator on request.

8. REFORMS TO WHISTLE-BLOWER LAWS

Whistle-blower legislation in Australia is very fragmented. Significant inconsistencies exist not only between various pieces of Commonwealth public and private sector whistle-blower legislation, but also across the various pieces of legislation that apply to different parts of the private sector. Therefore, whistle-blowers have very different protections depending on whether they work in the public or private sector, and which piece of legislation they are covered by. These different regimes are very difficult for whistle-blowers to navigate, with differences and gaps in the protections available. As such, the private sector whistle-blower laws have rarely been utilised by whistle-blowers to seek protection or compensation, or by regulators to prosecute offences under them.

The strongest protections are available to workers in the public sector under the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**). These protections are comprehensive and were developed in a unified way and are more widely used than private sector protections. The PID Act protects disclosures regarding Commonwealth criminal and civil offences, contraventions of a Commonwealth, state or territory law, breaches of registered or mandatory professional standards and codes of conduct and a broad range of other matters including maladministration, corruption, abuse of public trust, wastage, or danger to health, safety or the environment.

For workers in the private sector, there is some protection under the *Corporations Act 2001* (Cth) (**Corps Act**) and the *Fair Work (Registered Organisations) Act 2009* (Cth) (**FWRO Act**).

The Corps Act makes it a criminal offence to victimise a whistle-blower or terminate their employment based on the disclosure of certain information. However, the protection offered by the Corps Act is very narrow:

- The protection only applies to contraventions of the Corps Act.
- It protects only current officers, employees, contractors and employees of contractors, and not people who may have had their employment recently terminated.
- Relevant disclosures can only be made to ASIC or the company's auditor, director, secretary or senior manager or a person authorised to receive whistle-blower disclosures.

The FWRO Act gives protection for disclosures regarding Commonwealth criminal and civil offences, and contraventions of the FWRO Act, FW Act or the *Competition and Consumer Act 2010* (Cth).

Workers in the private sector can only make protected disclosures about contraventions of particular Acts, none of which include anti-discrimination legislation, and therefore currently have very limited ability to make protected disclosures about sexual harassment.

The Federal Government is currently legislating further whistle-blower protections, designed to boost protections for people who speak out about misconduct in the private sector. The Report of the

Parliamentary Joint Committee on Corporations and Financial Services on Whistle-blower Protections[41] recommended that as part of the reforms, the private sector definition of disclosable conduct should be expanded to include a breach of any Commonwealth, state or territory law.

Many have called for protections for corporate whistle-blowers to be strengthened to bring them completely into line with those in the public sector[42]. Some suggestions for reform that have been put forward include:

- The development of a single private sector Whistle-blower Act;
- The establishment of an independent whistle-blower protection agency that could support whistle-blowers, assess and prioritise the treatment of whistle-blowing allegations, conduct investigations of reprisals, and oversee the implementation of the whistle-blower regime for both the public and private sectors; and
- The introduction of a reward-based scheme for whistle-blowers which would help ensure that disclosures are dealt with in a timely and effective manner and to provide adequate financial compensation to reduce the significant personal and professional burden on those who speak out[43].

A dedicated external avenue for people to report sexual harassment, anonymously or otherwise, may also be a possibility. It is notable that recently, the Fair Work Ombudsman (**FWO**) launched an anonymous tip-off service for cases of staff underpayment. Bodies such as the AHRC and the ADB could do the same for sexual harassment complaints. It may be an existing reporting mechanism called SARA (Sexual Assault Report Anonymously) could be used. SARA allows people to report a sexual assault and sexual harassment anonymously with information provided being passed on to police, allowing them to identify trends.

Whistle-blower protection could also ensure complainants or bystanders are not disadvantaged by lodging a complaint. Too often it is the complainant asked to change shifts, work from home or use their leave entitlements when an allegation of sexual harassment is made. All parties deserve procedural fairness as well as protection from being disadvantaged and whistle-blower protection could achieve this.

Whistle-blower protection could also give the advantage of possibly protecting targets of sexual harassment from defamation action, which has already been a feature of the #metoo movement in Australia. Australia's defamation laws are not covered in this discussion paper, but this is an area that many have argued need reform, including the Senate Select Committee on the Future of Public Interest Journalism. A report published by the Committee in February 2017 noted that Australia's defamation and libel laws play a significant part in curtailing the efforts of journalists to pursue public interest stories. The report recommended that "the Commonwealth work with state and territory jurisdictions through the Council of Australian Governments to complete a review of Australian defamation laws, and subsequently develop and implement any recommendations for harmonisationand reform, with a view to promoting appropriate balance between public interest journalism and protection of individuals from reputational harm." [44]

9. REFORMS RELATING TO SETTLEMENT AGREEMENTS

a) Confidentiality/non-disparagement clauses in settlement agreements

Employers and employees entering into separation or settlement agreements have traditionally agreed to clauses that prohibit disclosure of the agreement or the circumstances leading up to it. Settlements of sexual harassment claims are no different and are almost always subject to a confidentiality clause. Often, confidentiality clauses apply to the negotiations leading up to a

[41] Report of the Parliamentary Joint Committee on Corporations and Financial Services on Whistleblower Protections, September 2017.

[42] Including Maurice Blackburn, 'Time for Reform', 2018

[43] Maurice Blackburn, 'Time for Reform', 2018

[44] Report of the Senate Select Committee into the Future of Public Interest Journalism, February 2018.

settlement, the terms of the agreement, and any conduct that led to the entering into of the settlement agreement. While the terms of these agreements can vary in strictness, at the very least they will usually mean that the matters cannot be talked about and that the identity of the perpetrator and the settlement amount cannot be disclosed.[45] These kinds of settlements usually also involve a non-disparagement clause, which prevents the parties from saying anything negative about each other.

There are potential benefits to confidentiality/non-disparagement clauses for both parties. The perpetrator protects their reputation by avoiding proceedings being brought against them, and the complainant avoids having to take legal action and re-living traumatic experiences in a public setting. Complainants may also fear that their future career prospects may be damaged if they are seen to have a reputation for suing.

While these clauses can provide valuable closure for both the employer and employee, their use in the sexual harassment context leads to situations where serial offenders are able to pay money, silence their victims, and engage in unlawful conduct repeatedly. Their victims are unable to speak out publicly to identify them, meaning the perpetrators remain protected and the unlawful conduct is able to continue. Confidentiality/non-disparagement clauses allow perpetrators to conceal and continue longstanding patterns of sexual misconduct, and prevent discussion of the accusations among complainants, co-workers and the public. This is especially true of cases involving the most serious abusers, as employers have a big incentive to settle the most egregious claims to avoid high damages and negative publicity. This means the worst cases will never see the light of day. As such, the #MeToo movement has generated criticism of the use of confidentiality clauses in relation to sexual harassment matters. This criticism has led to new trends in the law that discourage confidentiality clauses in this context.

This is a complex area, as confidentiality agreements are one of the biggest incentives for people accused of sexual harassment to settle a case before it goes to court. Most complaints of sexual harassment are settled before court proceedings commence, due to the difficulties associated with litigation. Removing confidentiality may mean that far less cases are settled and therefore that far fewer complainants receive any type of justice. Any move to discourage confidentiality clauses could have unintended consequences, such as dis-incentivising employers and individuals to settle sexual harassment cases if they have no prospect of keeping the allegations confidential. Another possible outcome might be a reduction in the amount employers are willing to pay for a settlement that does not include confidentiality. Another possible outcome may be that any public airing of the allegations against the harasser may be met by a public attack on the veracity of the complainant, or other "undesirable" facts or circumstances about them.

However, the lack of any accountability and the ability to silence complainants (potentially for life) is a huge concern and a contributing factor to the ongoing concealment of the extent of the problem. The systemic and widespread nature of sexual harassment (both at particular workplaces and in workplaces generally) makes it a matter that is of genuine concern to the broader community and a valid subject of public interest.

Therefore, this issue is something that should at least be the subject of debate, to reflect on who actually benefits from confidentiality and non-disparagement clauses. A big question to be considered is whether these clauses can or should be enforced when they implicate public health and safety, and where there is a significant public interest in preventing repeat offenders – ie., is their enforcement contrary to public policy? Harassers in the workplace pose a threat to the safety and well-being of others, both inside and outside of that workplace, making it an issue of public importance. Complainants being able to disclose the circumstances to the public is essential in order to protect other people from the abuser. This is of particular concern where, as is often the case in sexual harassment matters, the complainant exits the workplace after agreeing to settlement terms and the perpetrator stays on, potentially putting other employees at risk. This is potentially in breach of the

[45] Standalone non-disclosure agreements, whilst rare in Australia, could also potentially be used to keep such conduct out of the public domain.

employer's obligation under WHS legislation to provide a safe workplace and the implied contractual term that employers have an obligation to provide their employees with a safe place of work.

Confidentiality and non-disparagement clauses, while allowing the complainant to have closure and not have to continue to re-live the experience through court proceedings, do nothing to protect other people from becoming targeted, and allow people like Harvey Weinstein to continue to avoid facing scrutiny or consequences. Harvey Weinstein avoided widespread public knowledge of his unlawful conduct for over 30 years, and had settlement agreements with at least 8 victims. Therefore, the question needs to be asked whether employers should be able to use confidentiality/non-disparagement clauses to keep sexual harassment claims secret. Employers also should be asking whether their long term interests may be better served by dealing with the harasser, rather than seeing a short term fix of silencing the complainant.

Proposals in the USA

This has been an area of experimentation in the United States recently. Sparked by the #MeToo movement, multiple state legislatures are proposing new laws prohibiting employers from including non-disclosure agreements and confidentiality clauses in the settlement of sexual harassment claims. It is likely that these states, and others in due course, will pass some form of legislation to preclude the use of confidentiality provisions in settlement agreements involving sexual harassment allegations.

<u>California's proposed Bill would:</u>

- Prohibit settlement agreements that prevent the disclosure of factual information related to a lawsuit where the claimant alleges sexual assault, workplace sexual harassment, or discrimination based on sex, or a failure to prevent such conduct.
- Prohibit confidentiality provisions for claims of sexual harassment/sex discrimination in the context of service or professional relationships (such as relationships with physicians, therapists, teachers and lawyers.)
- Allow a confidentiality provision if the claimant requested its inclusion.
- Allow clauses that prohibit the disclosure of the amount paid in settlement of a claim.

<u>New York's proposed Bill would:</u>

- Invalidate any settlement agreement with the purpose or effect of concealing the details relating to claims of sexual harassment and the admitted perpetrator.
- Provide that if an individual or company paid any money in connection with a settlement agreement to resolve a sexual harassment claim, the allegations would be deemed as admitted by the settling party.

<u>New Jersey's proposed Bill would:</u>

- Make any agreement which sought to conceal the details relating to a claim of discrimination, retaliation or harassment unenforceable and against public policy.

Note: This Bill is the broadest that has been proposed in the US as it would prohibit the use of confidentiality provisions in any discrimination/retaliation claims, not just sexual harassment claims.

<u>Pennsylvania's proposed Bill would:</u>

- Ban agreements that do any of the following:
    - prohibit public disclosure of names of people accused of sexual harassment;
    - suppress information that may be relevant to a sexual harassment investigation; or
    - impair the ability of a victim to report a sexual harassment claim.
- Grant confidentiality to victims making allegations of abuse (giving victims similar rights to those of minors in child welfare cases, who are permitted to bring cases using initials or other identifiers.)

<u>Washington's Bill (which took effect from 7 June 2018):</u>

- Prohibits employers from requiring employees to sign, as a condition of employment, a non-disclosure agreement that prevents disclosure of sexual harassment or assault occurring in the workplace.
- Still permits settlement agreements relating to allegations of sexual harassment to contain confidentiality provisions, making it the narrowest of all of the Bills proposed.

Tax reform

A new tax law was passed by Congress in December 2017 (Tax Cuts and Jobs Act), which disallows the tax deduction of any settlement or payment related to sexual harassment/abuse (including lawyer's fees), if the settlement or payment is conditional upon a confidentiality clause or non disclosure agreement. Therefore, employers will not be able to deduct the amount of the settlement or the lawyers' fees incurred as a business expense if the settlement is subject to a confidentiality clause. An unintended consequence of the Bill seems to be that, on its face, it appears to apply equally to sexual harassment complainants, potentially eliminating their ability to deduct legal fees incurred in pursuing sexual harassment claims. The effect on employers will be that they will need to weigh the necessity of a non-disclosure provision on a case-by-case basis, and decide whether confidentiality or a tax deduction is more valuable.

Findings of the UK House of Commons Report

The UK Report considered the use of non-disclosure agreements (**NDAs**). Evidence given to the inquiry from employment lawyers were that NDAs were important to enable victims of sexual harassment to get a settlement, and that in many cases no settlement would be agreed without an NDA. The report acknowledged there was a place for NDAs in settlement agreements – a complainant may feel it is in their own best interests, because they can avoid the trauma of going to court, or because they value the guarantee of privacy.

However, the report expressed serious concerns about the unethical use of NDAs, and found that they are used unfairly by some employers and members of the legal profession to threaten, bully and silence sexual harassment targets,[46] and that some are designed to prevent workers from making disclosures in the public interest under UK whistle-blowing laws.[47] The report found there was insufficient oversight and regulation of their use, and stated that it is unacceptable that some NDAs are used to prevent or dissuade people from reporting sexual harassment to the police, regulators or other appropriate bodies or individuals. The report noted that the regulator for the legal profession had issued some guidance on reporting sexual harassment and was considering issuing guidance on NDAs.

The report recommended cleaning up the use of NDAs by:

- Enacting legislation requiring the use of standard, approved, plain English confidentiality clauses, which set out the meaning, limit and effect of such clauses, including a clear explanation of what disclosures are protected under whistle-blowing laws, and making it an offence to misuse such clauses; and
- Extending whistle-blowing protections so that disclosures of sexual harassment matters to the police, regulators such as the EHRC and HSE, and any court or tribunal are protected;
- Anyone using NDAs unethically or otherwise misusing them (eg., employers, professional advisors, lawyers) must face strong and appropriate sanctions.

b) Other terms of settlement

Terms of settlement could also include policy and educational requirements of employers.[48] This would place greater obligations on employers to change the culture and processes in workplaces and

[46] For example, victims being told they must sign an NDA in exchange for no money to avoid being badmouthed (including to new employers) and in order to obtain a reference; victims fearing (incorrectly) they would go to jail if they broke the agreement; victims being too fearful of the potential repercussions of breaking an NDA to give even anonymous evidence to the UK inquiry.
[47] Under these laws, protected disclosures include disclosures about malpractice, breaches of the law, miscarriages of justice, dangers to health, safety and the environment, or the cover up of any such behaviour.
[48] McDonald, P and Charlesworth, S (2013), 'Settlement outcomes in sexual harassment complaints', Australasian Dispute Resolution Journal, vol. 24, no. 4, pp. 259-269.

go some way towards generating systemic change out of an individualised complaints process. While this is already occurring in some instances, it should be further encouraged and a model settlement clause drafted and promulgated. However, it has been found that while employers agree to policies and organisational change in deeds of settlement, these are not enforceable or monitored by anti-discrimination commissions.[49]

Therefore, in order for this to be as successful as possible, anti-discrimination commissions such as the AHRC and ADB could be given the statutory powers to monitor compliance with settlement terms[50] that seek to change the culture and processes in workplaces. However, it would not necessarily be in the best interest of complainants for these statutory bodies to have powers to monitor compliance with all terms of settlement, particularly confidentiality or non-disclosure terms. An alternative could be to make this another reporting requirement for companies reporting to the Workplace Gender Equality Agency (**WGEA**) – as part of reporting sexual harassment complaints, they must also report compliance with terms of settlement requiring them to undertake policy changes, education and training (discussed below at section 11a).

c) Improved access to data and transparency of settlements

Academics in Australia have raised concerns with the current reporting of sexual harassment complaints.[51] There is no systematic reporting of de-identified settlement data, and they are rarely evaluated and/or published. This prevents those experiencing sexual harassment from acquiring relevant information that could be used to guide their expectations of claims, evaluate the fairness of their settlement amounts, or provide a deterrent to individuals and workplaces. Practitioners have reported that often complainants have very little knowledge of what settlement terms they want, and that it changes throughout the process. Complainants who are vulnerable (such as those who are young, Indigenous, migrants or in precarious work) have a particularly poor knowledge of their rights, and little capacity or means to assert them, and so are likely to take smaller settlements. All of this points to the capacity of publicly available information and data on settlement outcomes to assist complainants in the process.

It is noteworthy that the UK Report found that better data is required in relation to sexual harassment claims so that the extent of harassment and effectiveness of remedies can be more easily measured.

The statutory commissions such as the AHRC and the ADB publish data on settlement outcomes on an ad hoc and sporadic basis. As of 2013, the AHRC website had published 67 sexual harassment complaints that had a mean settlement sum of $5,087.[52] The website hasn't been updated since 2016.

The overwhelmingly small settlement sums that are published on the websites are likely to shape the expectations of victims in terms of financial compensation and possible redress.

The statutory commissions should be required to aggregate and report de-identified conciliation/settlement outcomes from sexual harassment claims in a consistent and timely way so that people can access data about other matters and the outcomes in them, including financial and non-financial remedies.

In addition, academics have noted that often complaints which are negotiated privately with lawyers, outside of AHRC/ADB processes, are often settled for much higher amounts.[53] However, these outcomes are of course never reported. It is worth considering whether law firms who deal with sexual harassment matters would be willing to agree to report de-identified settlement data being published in a centralised forum.

[49] McDonald and Charlesworth (2013).
[50] The Advisory, Conciliation and Arbitration Service in the UK has this function, and the Equal Employment Opportunity Commission in the USA also has this function.
[51] McDonald and Charlesworth (2013).
[52] McDonald and Charlesworth (2013).
[53] McDonald and Charlesworth (2013).

10. ACCESS TO JUSTICE FOR LOW INCOME AND VULNERABLE WORKERS

The current system is really only accessible for people who can afford to pay legal fees, and who have the strength and energy to pursue a complaint through adversarial processes. Even for this group access remains a problem, with only 20% of people making a formal complaint.[54] In addition, and as noted above, wait times at the AHRC are too long and can be a disincentive to making a complaint, and by the time a conciliation is scheduled, many will have moved on from the workplace where the harassment occurred. Giving workers access to the FWC may go some way towards improving access to justice through quicker and cheaper processes, but the reality is that many of the most vulnerable workers will still be unable to access justice. A mix of top down and bottom up strategies are necessary to improve access to justice.

a) Increased funding/specialist services

One option to help rectify this could be to increase resources to the AHRC, the ADB, SafeWork NSW, Legal Aid and CLCs such as the Women's Legal Service NSW and Wirringa Baiya Aboriginal Womens Legal Centre to deal with sexual harassment complaints.

Another option in NSW could be to set up and fund a Working Women's Centre to act as an advocacy and advice body for working women. Such a service used to exist in NSW, and these centres still operate in Queensland, South Australia and the Northern Territory. The Centres are not for profit community organisations that provide information, advocacy, support and advice to women on work related issues, including discrimination and sexual harassment. As well as providing legal assistance, such as helping women make a complaint, and advocating for women up to the conciliation stage, they also provide information and informal support and advice, and therefore seem to have a broader remit than a CLC. Such centres might be more appealing options for many women who do not wish to make a complaint or take an adversarial approach, but wish to speak to someone with experience about how to handle the situation. It can therefore provide a 'softer' entry to advice. An Australian study found that vulnerable workers are more likely to try and solve workplace issues informally,[55] and another Australian article noted the importance of organisations such as Working Women Queensland in providing pro bono assistance to vulnerable workers such as young temporary migrant workers.[56]

The centres give particular attention to vulnerable and low income women (eg., ATSI women, women from CALD communities, migrants/visa holders/international students, women with disabilities, women in regional/remote/rural areas, women with family responsibilities, women of mature age and young women, women in insecure work, women experiencing domestic/family violence and women experiencing mental health issues), but do not appear to have a strict means test to access the service.

In 2008 the Department of Employment, Education and Workplace Relations conducted a review of Working Women's Centres. They concluded:

> "*The Centres are robust community service providers whose strength lies in their specialist workplace relations expertise and holistic client-centred approach to service delivery. They provide high quality, ethical services to women in vulnerable employment, covering issues across state and federal jurisdictions, by delivering specialist advice, information and casework services to women and valuable policy and advocacy services to government on issues for women in the workplace.*
>
> *The Centres are highly valued by unions, government and non-government agencies for supporting women whom no one else can support. They are very well regarded for their application of a holistic approach to assisting women with workplace relations difficulties, and*

[54] Australian Human Rights Commission, Working without fear: Results of the Sexual Harassment National Telephone Survey (2012).
[55] Good and Cooper (2016).
[56] Howe, J. (2016) 'Examining a temporary migrant worker's ability to make a complaint of sexual harassment', *Alternative Law Journal*, vol 41, 12, pp 102-104.

for the linking and capacity-building role they play in the sector, that builds social capital in the community."[57]

In Canada, the union Unifor has promoted a system of embedding Women's Advocates in workplaces[58]. A Women's Advocate is a specially trained workplace representative who assists women with concerns such as workplace harassment, intimate violence and abuse. The Women's Advocate is not a counsellor but rather provides support for women seeking workplace and community resources. The Program is a joint union/management workplace initiative focussed on creating healthy, respectful and safe workplaces. Such a program could be considered here.

Enhanced advice and support

As discussed previously, unions report there remains significant confusion around what constitutes sexual harassment. Enhanced advice and support is desperately needed, through a code of practice and other mechanisms. Union right of entry is essential. Not all workplaces have HSRs or delegates and the ability for a union representative to be able to enter a workplace to investigate suspected cases of sexual harassment is vital. Such advice and support must be supplemented by online resources so sexual harassment targets can get the help they need when they need it. Artificial intelligence apps and chat-bots could also be considered.

A public awareness campaign should also be considered to increase reporting. Such a campaign could help reduce the confusion about what is acceptable behaviour and let people know where they can go for advice and support. The campaign could also encourage bystanders to step up..

b) Insecure and emerging forms of work

An Australian study noted that vulnerable employees are identified by age, sector, background and the security of their job. They found that vulnerability is particularly linked to the lack of security in a job.[59] It is well known that sexual harassment is associated particularly with insecure forms of work, including casual work, in industries such as hospitality and retail. A potential solution to this could be reforms to industrial laws that provide greater job security. This includes the right for casual workers (many of whom are women) who have been working on a regular and systematic basis for six consecutive months to convert to permanent work if they choose.

The rise of gig work also creates new sexual harassment risks. New ways of working must be explicitly considered in any reforms to ensure, as far as possible, they are future-proofed.

c) Temporary migrant workers

Temporary migrant workers are some of the most vulnerable to exploitation and the least able to seek help or redress due to their reliance on employers for the maintenance of their visa and therefore their continued legal status in the country. This creates a large power imbalance that many employers are taking advantage of.

The Report of the Fair Work Ombudsman in 2016 into 417 visas[60] (**the FWO report**) found a large number of 417 (working holiday) visa workers experienced exploitation, particularly while completing the requirement to undertake the mandatory 88 days of farm work to obtain a second year 417 visa. The report identified sexual harassment as a problem and noted that "the desire for a second year visa extension can drive vulnerable workers to agree to work for below minimum entitlements and in some circumstance, enter into potentially unsafe situations." The FWO Report identified

[57] Booth, A. (2009) Report of a Review of Community-Based Employment Advice Services, Prepared for the Fair Work Ombudsman

[58] Unfior .'What if we had a Women's Advocate in all Unifor workplaces', available at: https://www.unifor.org/sites/default/files/documents/document/unifor-wa-broch-eng_final_web.pdf

[59] Good and Cooper (2016).

[60] Fair Work Ombudsman, 2016, Inquiry into the wages and conditions of people working under the 417 working holiday program.

underpayment, non-payment, unlawful deductions, sexual harassment and unsafe working conditions as forms of exploitation commonly experienced by 417 visa holders. The FWO report found that 59% of visa holders who were applying for the second year visa said they would be too concerned to speak up against exploitation, harassment, or conditions for fear their employers would not sign off on their 88 days of work.

Factors that make it particularly difficult for some temporary migrant workers to make a complaint or seek help are that they are young, unaware of their rights under Australian law, possess limited English language skills and have little wealth or income.[61] Adding to the seriousness of this situation is that while working the 88 days to secure a second year visa, many young workers are working in extremely remote and isolated areas, where they cannot easily seek help or assistance. The FWO Report found that "safety concerns are raised particularly where young workers – especially females with limited English travelling alone – are encouraged through the 417 second year visa requirements to travel to remote areas to undertake specified [88 days farm] work."

The impact of sponsorship arrangements on the power relationship between Temporary Skill Shortage (**TSS**) visa holders and their sponsors can also be substantial and make it very unlikely that an employee would report sexual harassment or other exploitation.[62] The promise of permanent residency has a significant impact on migrant workers' unlikeliness to report poor wages and conditions.[63]

One solution which should be strongly considered is an amnesty for migrant workers on visas who experience sexual harassment, where reporting that sexual harassment could result in their visa being cancelled. For TSS visa holders, this should include a grace period during which they can find a new sponsor. For 417 visa holders, if they were sexually harassed during their 88 days of farm work, they should automatically have their visa extended for the second year (ie., have an exemption from the requirement for 88 days of farm work.)

Another and better solution might be to entirely scrap the requirement for 88 days of farm work in order to obtain a second working holiday visa, given the evidence that the existence of this requirement is a recipe for exploitation in many and various forms.

d) Third party sexual harassment

Hospitality, retail, teaching, health, community and public services are some of the industries most affected by third party sexual harassment – that is sexual harassment perpetrated by third parties such as customers, patrons, clients, students, parents, visitors, service users and patients.

As noted at the start of this paper, one of the industries most affected by sexual harassment is hospitality. This is undoubtedly due in part to two key factors – the role of alcohol in fuelling unlawful behaviour and the unequal power relationship between customers and the employees serving them. The imbalance in power makes it very difficult for employees to complain, including because they fear retribution from their managers.[64] Customer perpetrated harassment also affects approximately 11% of women working in retail according to the SDA. There are obvious difficulties in addressing the issue as it is hard to identify perpetrators and take action as they may not be seen again. The SDA's current approach is to recommend reporting the incident, follow up the company to ensure support is provided, and request that a banning notice be issued where possible or appropriate.

A number of pubs and clubs have taken steps to try and prevent sexual harassment of patrons, like providing reporting mechanisms for staff and encouraging staff to observe any instances of harassment.[65] However, this often overlooks the problem of staff experiencing harassment from customers and patrons.

[61] Howe (2016).
[62] Howe (2016).
[63] Howe (2016).
[64] Good and Cooper (2016).
[65] Fileborn, B, (2017) 'Staff can't be the ones that play judge and jury': Young adults' suggestions for preventing unwanted sexual attention in pubs and clubs, Australian & New Zealand Journal of Criminology, 50(2) 213–233.

In a 2016 Australian study,[66] hospitality employees considered the enforcement of RSA laws, where drunken behaviour from patrons is treated with zero tolerance. Due to the existence of heavy fines that can be issued during on-the-spot inspections, licensees take their responsibility very seriously. Some interviewees in the study working in bars cited harassment as a sign of intoxication and as such could form a basis for the removal of patrons under RSA laws.

One way to tackle the prevalence of sexual harassment in the hospitality industry might be to include sexual harassment within the RSA training, and an explicit recommendation in that training for zero tolerance of this behaviour, and a removal of patrons who engage in that behaviour towards staff or other patrons.

The Equality Act 2010 in the UK originally contained provisions which made employers liable for failing to protect workers from third party harassment if they were aware that harassment had previously occurred on two occasions and had failed to take reasonable steps to prevent it from happening again. In 2012, those provisions were repealed. The UK Report noted that there was widespread support in the inquiry for introduction of measures that were similar to those that were repealed, with many arguing that the 'three strikes' element of the original provision should be discarded, and that a single instance of harassment should be sufficient for action. Many also recommended that the government should prepare guidance to help employers and employees understand this duty.

The SD Act (section 28G) and the AD Act (section 22F) both cover third party harassment and make it unlawful for a person receiving goods or services to sexually harass another person in the course of receiving those goods or services. However, these protections are in a separate section of the Acts to the protections that apply to employment, and perhaps are therefore not well known. The provisions appear to have been barely used. These provisions could be strengthened (along the lines recommended by the UK Report) to make it clear that employers are also liable for third party harassment of their employees, and provide guidance and resources about how to prevent and respond to third party harassment.

11. THE ROLE OF REGULATORS

A big theme of the UK Report was that regulators should be required to take a more active role in relation to sexual harassment. The UK Report stated:

"We find the passivity and indifference of regulators in the face of widespread workplace sexual harassment to be not only surprising, but gravely irresponsible. We have been surprised and disappointed by the failure of regulators to take an active interest in employers' actions to protect workers from sexual harassment. It suggests that these bodies may not have been having due regard to the need to eliminate discrimination, including sexual harassment…"[67]

In particular, the UK Report expressed "astonishment" that the HSE, the regulator for health and safety in the UK, did not see tackling or investigating sexual harassment as part of its remit. As discussed above at section 6, this appears to be an approach shared by the Australian regulators, such as SafeWork NSW.

The UK Report argued that regulators are uniquely placed to oversee employer action to protect workers from sexual harassment and noted that several regulators in the UK have responsibility for overseeing this aspect of employers' activities. They argued that the HSE in particular needed to take up its share of the burden in holding employers to account if they failed to take reasonable steps to protect workers from sexual harassment. They suggested this could include issuing guidance on actions employers can take, undertaking specific risk assessments and investigating reports of particularly poor practice.

The UK Report also recommended the following measures:

[66] Good and Cooper (2016).

[67] House of Commons, Women and Equalities Committee, Sexual Harassment in the Workplace, Fifth Report of Session 2017-19, 25 July 2018, p19.

- That the government require all regulators to put in place an action plan setting out what they will do to ensure that the employers they regulate take action to protect workers from sexual harassment in the workplace;
- Regulators must make it clear that sexual harassment by regulated persons is a breach of regulatory requirements and that such breaches must be reported to the appropriate regulator;
- Perpetration of or failure to address sexual harassment in the workplace must be recognised as grounds for failing a 'fit and proper person' test or having professional credentials removed;
- Regulators should set out the sanctions for perpetrators of sexual harassment;
- People who have experienced sexual harassment should not be under any obligation to report, nor should they face any sanctions for failing to report, to their regulator.

One option could be to give relevant bodies in Australia (such as the AHRC) the power to investigate and enforce the legislation governing sexual harassment. Sexual harassment could be put on a similar footing to safety breaches, which can be investigated and enforced by SafeWork NSW, and the underpayment of wages/serious exploitation, which can be investigated and enforced by the FWO. Unions could also play a part in bringing prosecutions. As part of enforcement, these regulators are able to issue fines for non-compliance, which can be an effective deterrent. Giving the AHRC these powers would allow it to intervene early and actually enforce the legislation that it oversees. Alternatively reforms to the FW Act and SafeWork NSW could empower the FWO and SafeWork NSW to undertake investigative and enforcement activities. It should be noted that such enforcement activities need commitment from those bodies to such a pro-active approach as well as the resources to implement it effectively.

Currently, in relation to specific complaints, the AHRC's powers are limited to resolving complaints through investigation and conciliation and inquiring into complaints of breaches of human rights and workplace discrimination. However, in regards to the latter function, if the AHRC finds that there has been a breach of human rights or that workplace discrimination has occurred, their power is limited to preparing a report on the complaint and recommendations for action for the Attorney General. The report may then be tabled in Parliament. Therefore, there is a real gap in meaningful enforcement of anti-discrimination legislation.

12. OTHER POSSIBLE REFORMS

a) External oversight for employers

Requiring companies to formally report sexual harassment complaints/claims and statistics to both their boards and to an external organisation could also help to increase company awareness and shift workplace cultures.

There is a lack of data regarding sexual harassment and a requirement to report complaints would give a much better idea of how widespread the problem is, and which industries or companies are the most affected by sexual harassment. It would also identify organisations and individuals who are repeat offenders. This transparency would give companies and employers a real incentive to change culture and practice, make their workplaces safer, and give them useful data to act on and guide workplace change.

Current reporting requirements to WGEA could easily be expanded to include the reporting of sexual harassment complaints and statistics. This has been recommended by law firm Maurice Blackburn[68]. Reporting, however, only does so much. Reporting by employers needs to be subject to some oversight and investigation. For example, if an employer says they have no sexual harassment policy but one is under development or if they report a consistent number of sexual harassment complaints, this should be followed up.

[68] Maurice Blackburn, 'Time for Reform' (2018).

b) Empowering bystanders

Given the many challenges facing targets in reporting incidents of sexual harassment, empowering bystanders to speak up is potentially a powerful way to tackle the problem. A 2016 Australian study[69] found that the most common bystander approach in cases of sexual harassment was inaction, with 34% of bystanders taking no action. The next most common response (32%) were "low immediacy, low involvement" actions such as sympathising with the target, acknowledging the behaviour was sexual harassment and sharing their own experiences and providing private advice. Only 5% of bystanders took direct and immediate action – eg., challenging the harasser at the time of the incident, reporting the harassment. The study concluded that bystander intervention relies on people feeling safe to take action and having protection from many of the same reprisals that targets of sexual harassment themselves anticipate and experience if they say something.

The study recommended that these protections should be explicitly defined and mandated throughout organisations. For example, the ability of bystanders to make complaints on behalf of others and the protections that will be afforded to them as a result of making a complaint could be included in grievance policies. Protection could also be delivered by strong whistle-blower laws as outlined in section 7 above.

One approach could be for employers to establish direct, confidential and/or anonymous lines for reporting incidents of sexual harassment. As noted in section 4 above, this was recommended by the EHRC in the UK, who argued that anonymous and confidential reporting might help to improve employer practice and employee confidence, and suggested mechanisms such as independent support lines, advocacy services or anonymous hotlines in partnership with external organisations. Another approach could be to train staff to speak up using bystander intervention training modelled on programs such as the Green Dot Violence Prevention Program, which was designed to encourage bystanders to do something when they witness sexual violence.[70] A report of the U.S. Equal Employment Opportunity Commission stated that this kind of bystander intervention training could be effective in the workplace.[71]

A 2012 report published by the AHRC on Bystander Approaches to Sexual Harassment in the Workplace[72] recommended the following:

- Bystander training for all employees to increase recognition of sexual harassment and the different forms of bystander involvement;
- Preserving the anonymity of and otherwise supporting bystanders who disclose and address the risks of victimisation to the bystander;
- Provide multiple communication channels for bystanders and targets;
- Enlist the support of bystanders to assist targets of sexual harassment in the longer term;
- Monitor and evaluate bystander strategies.

c) Street harassment outlawed in France – food for thought

It is worth noting a fairly novel approach taken in France in an attempt to tackle street harassment. On 2 August 2018, French lawmakers voted to outlaw gender based street harassment as part of tougher legislation to fight sexual violence. Incidents of gender based harassment (including sexual harassment) on the street and on public transit are now subject to fines of up to 750 euros. Behaviour that will be punished under the new legislation includes cat-calling, insulting, intimidating, threatening and following women in public spaces.

The newly passed legislation also:

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[69] McDonald, Charlesworth and Graham (2016).
[70] https://greendot.tamu.edu/
[71] Equal Employment Opportunity Commission, Select Task Force On The Study Of Harassment In The Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, June 2016.
[72] Paula McDonald and Michael Flood, Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace, AHRC, June 2012

- Gives underage rape victims an extra 10 years to file complaints against their assailants, meaning they now have 30 years beginning when they turn 18.
- Introduces possible prison time and a fine of up to 15,000 euros for the act of taking pictures or videos under clothing without consent (known as “up-skirting”).

13. CONCLUSION

The #MeToo movement is a powerful wake-up call that despite 30 years of the Sex Discrimination Act, sexual harassment is alive and well in our workplaces. Unions NSW hopes this discussion paper has sparked some ideas for reform that can see sexual harassment confined to history.

Appendix A

Worker requests an HSR be elected
PCBU facilitates discussion of WHS consultation model
HSR elected to represent their work group. They have powers to inspect, conduct risk assessments, investigate complaints/incidents, support workers (see Section 68 of the Regulation for more detail)
HSR can represent workers and monitor compliance with the law (including proper risk management strategies to prevent sexual harassment)
HSR requests training
Once trained an HSR has additional powers including:
cease work orders ;
the ability to issue a Provisional Improvement Notice (PIN) to the PCBU
Sexual harassment allegation
HSR can investigate the incident
HSR can issue a PIN if the PCBU is in breach of the Act and there are actions they could take to rectify the situation
Where there is a serious risk to health and safety, the HSR can issue a cease work order. In any event, workers can cease work where they have a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard. This could include sexual harassment.