



Submission to the national inquiry into sexual harassment in Australian workplaces

FEBRUARY 2019



Victorian Equal Opportunity
& Human Rights Commission

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Executive summary

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the National Inquiry into Sexual Harassment in Australian Workplaces and the opportunity to make this submission.

Sexual harassment is widespread

Everyone has a right to live free from sexual harassment.

Yet, sexual harassment continues to be widespread in Victoria and across the rest of the country, resulting in profound impacts on individuals, organisations and society in general. While most of the harassment reported to the Commission takes place in workplaces, it also occurs in education, the provision of goods and services as well as in other settings.

Sexual harassment is gendered and requires an intersectional approach

While women, men and non-binary people experience sexual harassment, the harassment we hear about is gendered in nature. Like in previous years, in 2017–18 most complainants of workplace sexual harassment were women (81.4 per cent), while most harassers were men (96.5 per cent).

In addition to women, the sexual harassment that is reported to the Commission affected certain groups more than others, including young people; people who identify as lesbian, gay, bisexual, trans or intersex (LGBTI); Aboriginal and Torres Strait Islander people; and people from multicultural and multifaith backgrounds. It is therefore important that an intersectional lens is applied to work that addresses sexual harassment.

Sexual harassment is a systemic problem, not an individual one

Sexual harassment is a systemic problem, not an individual one, and is driven primarily by gender inequality, including pervasive attitudes that condone violence against women and structural power imbalances. Effective responses to sexual harassment therefore demand a focus on primary

prevention and systemic change, and not just on individual responses.

The current regulatory system for addressing sexual harassment individualises the harm of harassment and places too heavy a burden on victims/survivors to enforce the law, often at great personal cost to them. The system must change.

Stronger regulation and enforcement powers are needed

Change begins with strengthening legal protections against sexual harassment and ensuring regulators have the full range of tools needed to enforce those protections.

The positive legal duty in Victoria's Equal Opportunity Act is a critical tool to encourage employers and others to proactively prevent sexual harassment, rather than simply react to complaints. This duty requires employers to take 'reasonable and proportionate measures' to eliminate sexual harassment (and discrimination and victimisation) in their workplaces. It requires employers to be proactive about prevention, rather than simply reacting to complaints.

It is a duty that should be included in all anti-discrimination laws in Australia.

If accompanied by appropriate enforcement powers, which are currently missing in Victoria's Equal Opportunity Act, the positive duty would help to deliver systemic change and alleviate the present burden on victims/survivors.

Efforts to address sexual harassment would also benefit from complementary regulation. It is important for regulators with oversight of sexual harassment to continue to work cooperatively to share information and build capacity in relation to sexual harassment, including at work, and to provide support and referrals to victims/survivors.

Dispute resolution services would benefit from additional resourcing

Anti-discrimination commissions provide a victim-centric service for resolving sexual harassment complaints. However, many commissions, including our own, are unable to keep up with demand within existing budgets, which means people must wait before dispute resolution can begin. An increase in funding would enable us to better promote dispute resolution services, improve access to online information and referrals, resolve more complaints, and do so more quickly.

The Commission is considering options for improving our enquiry and dispute resolution service, and ways to better capture and publish data to inform systemic responses. For example, we are considering offering a restorative engagement pathway for sexual harassment, piloting an online reporting platform, and ways to encourage respondents to include systemic actions in settlement agreements.

Education and support are key to workplace cultural change

As the key driver of workplace sexual harassment is gender inequality, preventing it requires broad social change – specifically dismantling social norms, practices and systems that support gender inequality and violence against women. Education (both for workplaces and the broader community) is one essential component in this and is one of the Commission’s core legislative functions.

Anti-discrimination commissions should be properly resourced to provide support and guidance to employers to address sexual harassment and discharge their positive duty. This includes delivering a service that focuses on building a commitment to changing the workforce culture, empowering bystanders to take supportive action, and implementing robust policies, plans and processes. Investment in high-quality, tailored education and training is key.

Responses should address the heightened vulnerability of certain groups

Research is needed to better understand the experiences of diverse and marginalised groups who face a heightened vulnerability to sexual harassment and barriers to reporting. As noted above, an intersectional approach is required when addressing harassment.

Advocacy and support services are essential

Advocacy and support services for victims/survivors of sexual harassment are essential. Consistent and clear information and referrals should be provided to support victims/survivors to access appropriate support. These services must be appropriately resourced, specialised and coordinated.

Recommendations

RECOMMENDATION 1

The Commonwealth, state and territory governments should invest in dedicated primary prevention of sexual harassment and sex discrimination. Primary prevention of sexual harassment should also be integrated into a holistic national prevention strategy promoting gender equality and addressing the underlying gendered drivers of violence against women, as part of the implementation of *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia*.

RECOMMENDATION 2

The Victorian Government should amend the *Equal Opportunity Act 2010* to reinstate and strengthen the Victorian Equal Opportunity and Human Rights Commission's functions and powers to enforce the Act and address systemic issues of sexual harassment (as well as discrimination and victimisation), including the functions and powers to:

1. undertake own-motion public inquiries
2. investigate any serious matter that indicates a possible contravention of the Act:
 - a. without the need for a reasonable expectation that the matter cannot be resolved by dispute resolution or the Victorian Civil and Administrative Tribunal
 - b. with the introduction of a 'reasonable expectation' that the matter relates to a class or group of persons
3. compel attendance, information and documents for the purposes of an investigation or public inquiry without the need for an order from the Victorian Civil and Administrative Tribunal
4. seek enforceable undertakings
5. issue compliance notices as potential outcomes of an investigation or a public inquiry.

RECOMMENDATION 3

The Victorian Government should ensure that the Victorian Equal Opportunity and Human Rights Commission is adequately funded to exercise any new and existing functions to facilitate and enforce compliance with the Act.

RECOMMENDATION 4

The Commonwealth, state and territory governments should:

1. amend anti-discrimination laws to include a positive duty to prevent sexual harassment (and discrimination and victimisation), like the duty in section 15 of the *Victorian Equal Opportunity Act 2010*
2. ensure the positive duty is accompanied by a full suite of regulatory powers, including investigations and inquiries with compulsion and compliance tools to enable anti-discrimination commissions to act to enforce the duty effectively
3. adequately fund anti-discrimination commissions to facilitate and enforce compliance with the positive duty.

RECOMMENDATION 5

The Commonwealth, state and territory governments should extend the timeframes for lodging sexual harassment complaints to six years.

RECOMMENDATION 6

Regulators with oversight of sexual harassment should continue to work cooperatively to share information and build capacity in relation to sexual harassment, including at work, and provide support and referrals to victims/survivors.

RECOMMENDATION 7

Commonwealth, state and territory governments should provide additional funding to anti-discrimination commissions

to enhance their dispute resolution services, including in relation to sexual harassment complaints.

RECOMMENDATION 8

Anti-discrimination commissions should offer restorative engagement pathways for sexual harassment complainants, where appropriate.

RECOMMENDATION 9

1. The Australian Human Rights Commission should oversee the harmonisation of complaints data collected by anti-discrimination commissions and facilitate the sharing of de-identified complaints data between anti-discrimination commissions and the publication of cross-jurisdiction complaints data.
2. In line with Recommendation 9(1), the Commonwealth, state and territory governments should provide additional funding to anti-discrimination commissions to enable them to improve their data collection, analysis and reporting.

RECOMMENDATION 10

The Commonwealth, state and territory governments should provide funding to research, design and pilot online reporting platforms in Australia for victims/survivors of sexual harassment, with a particular focus on addressing a service gap for vulnerable people who may not wish to engage in a complaint process, capturing data and streamlining information, referrals and support.

RECOMMENDATION 11

The Australian Human Rights Commission should publish guidance to help victims/survivors to understand and navigate the various avenues available to seek redress for sexual harassment.

RECOMMENDATION 12

The Commonwealth, state and territory governments should take action to ensure appropriate advocacy and support for people who experience sexual harassment, including

access to information, counselling and legal services that are appropriately resourced, specialised and coordinated.

RECOMMENDATION 13

The Australian Human Rights Commission, in partnership with state and territory anti-discrimination commissions, should provide guidance to the sector to support the development of formal referral protocols and memorandums of understanding between regulators, courts and sufficiently specialised support services to ensure wrap-around supports are accessible prior to, during and following all complaint and court processes.

RECOMMENDATION 14

The Commonwealth, state and territory governments should resource and equip anti-discrimination commissions to:

1. deliver education and consultancy services to help organisations to develop equal opportunity actions plans and implement policies, procedures and projects directed towards addressing sexual harassment and creating positive workplace cultures
2. independently monitor changes to policy and practice promised by organisations in settlement agreements with complainants.

RECOMMENDATION 15

The Australian Human Rights Commission should make recommendations for further tailored research to better understand sexual harassment against marginalised and diverse groups, and their experience of intersectional discrimination.

1. Introduction

1.1 About the Commission

1.1.1 OUR ROLE AND FUNCTIONS

The Commission is an independent statutory body with responsibilities under the following Victorian laws:

- *Equal Opportunity Act 2010*
- *Charter of Human Rights and Responsibilities Act 2006* (the Charter)
- *Racial and Religious Tolerance Act 2001*.

Our role is to protect and promote human rights and eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible. We do this through a range of functions.

Resolve complaints	We resolve complaints of discrimination, sexual harassment, racial and religious vilification and victimisation by providing a free confidential dispute resolution service.
Research	We undertake research to understand and find solutions to systemic causes of discrimination and human rights breaches.
Educate	We provide information to help people understand and assert their rights, conduct voluntary reviews of programs and practices to help organisations comply with their human rights obligations and provide education and consultancy services to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.
Advocate	We raise awareness across the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views/behaviours.
Monitor	We monitor the operation of the Charter to track Victoria's progress in protecting fundamental rights.
Enforce	We intervene in court proceedings to bring an expert independent perspective to cases raising equal opportunity, discrimination and human rights issues. We also conduct investigations to identify and eliminate systemic discrimination.

1.1.2 OUR WORK ON SEXUAL HARASSMENT

The Commission has considerable expertise and experience related to sexual harassment owing to our functions under Victoria's Equal Opportunity Act. Some of our recent work in this area is highlighted below:

- We are currently developing resources – including step-by-step guidance in the form of digital conversation starter toolkits – to help facilitate conversations in the workplace about sexual harassment (and gender equality). Further information about this innovative pilot project, known as 'Raise It! Conversations about workplace equality and sexual harassment', is set out in Section 3.
- We are updating our practice guideline on sexual harassment,¹ which will be released later this year.
- In the 2017–18 financial year, we answered 374 people's enquiries about sexual harassment through our information service and responded to 90 people's complaints of sexual harassment through our dispute resolution service.
- In the 2017–18 financial year, we delivered 77 education sessions covering sexual harassment, including specialised sexual harassment education packages, reaching 2023 people across the public and private sectors.
- Since 2015, we have been conducting an Independent Review into the nature, extent, drivers and impact of sexual harassment (and sex discrimination) in Victoria Police.² Our final report, due to be published in mid-2019, will assess the current state of gender equality, including in relation to sexual harassment, in Victoria Police and audit the extent of its implementation of our recommendations from Phase 1 of the review.
- In 2015, we intervened in *Collins v Smith*³ to provide guidance to the Victorian Civil and Administrative Tribunal (VCAT) on the principles to consider when awarding compensation for sexual harassment under the Equal Opportunity Act.

1.2 This submission

Section 2 of this submission addresses the nature, extent, impacts and drivers of sexual harassment, as well as barriers to reporting. Section 3 outlines Victoria's regulatory environment in relation to sexual harassment.

Section 4 makes recommendations to strengthen existing approaches to sexual harassment. (A full list of recommendations is included at page 4.)

A NOTE ON THE CASE STUDIES IN THIS SUBMISSION

The case studies in this submission have been included with the consent of the victims/survivors. Pseudonyms are sometimes used to protect their anonymity. Some details of individual matters have been omitted or changed to protect the identity of victims/survivors, where necessary.

Several case studies relate to Victoria Police and have been included with its permission. This is due to the significant work that the Commission has undertaken with Victoria Police as part of our Independent Review into sex discrimination and sexual harassment, including predatory behaviour, in its workplace.

When Victoria Police engaged the Commission to undertake the review it was understood that sex discrimination and sexual harassment were serious and systemic issues in its workforce, which had caused, and continued to cause, considerable harm, especially to its female employees. In a demonstration of its leadership and commitment to creating a safe, equal and respectful workplace, Victoria Police directed the Commission to conduct the review publicly.

Victoria Police has worked closely with the Commission since the review began, committed to implementing the recommendations we have made so far and adopted a range of measures to this end. Our submission contains further information about this work.

2. Understanding sexual harassment

Section 2 addresses the nature and extent of sexual harassment, where it occurs, as well as the characteristics of victims/survivors and alleged harassers. Section 2 also examines

the impacts and drivers of sexual harassment at work, and the barriers victims/survivors often face when seeking to report the harassment.

2.1 The nature of sexual harassment

In Victoria, sexual harassment is against the law in a range of contexts, including in employment. Section 92 of the Equal Opportunity Act defines sexual harassment as unwelcome conduct of a sexual nature,

unwelcome sexual advances or unwelcome requests for sexual favours, which could be expected to make a reasonable person feel offended, humiliated or intimidated.

2.2 Extent of sexual harassment reported to the Commission

Sexual harassment is one of the most common issues reported to the Commission. In 2017–18, we received 432 enquiries and 156 complaints about sexual harassment. In the case of complaints, this represented a 19.1 per cent increase between 2016–17 and 2017–18.⁴

Table 1: Number of enquiries and complaints about sexual harassment from 2015–16 to 2017–18

Year	Number of enquiries	Number of complaints
2017–18	432	156
2016–17	371	131
2015–16	437	170

Considered differently, in 2017–18, 374 people enquired about sexual harassment and 90 people made complaints about this issue. This was an increase from 2016–17, up from 319 people who made enquiries and 76 people who made complaints. In 2015–16, 361 people made enquiries and 103 people lodged complaints.

The number of sexual harassment enquiries and complaints (and the number of people making them) typically spikes following high profile initiatives and cases. It is therefore reasonable to assume that the 19.1 per cent increase in sexual harassment complaints between 2016–17 and 2017–18 is due at least in part to the #MeToo movement and the wave of allegations of harassment that followed in its wake.

The enquiries and complaints we receive account for only some of the sexual harassment reported to us each year. Sexual harassment is also regularly reported through our other work, including education and engagement activities, independent reviews and other research projects. The data reported here therefore needs to be considered within this broader context.

2.2.1 SEXUAL HARASSMENT IN EMPLOYMENT

Most of the sexual harassment reported to the Commission occurs in employment, as evidenced by the following information.

Enquiries and complaints data

In 2017–18, 326 people enquired about sexual harassment in employment, representing 87.2 per cent of people who enquired about sexual harassment. During that same period, 86 people made a complaint about sexual harassment in the workplace, equating to 95.6 per cent of all sexual harassment complaints.

Figure 1: Number of people making complaints about sexual harassment in 2017–18

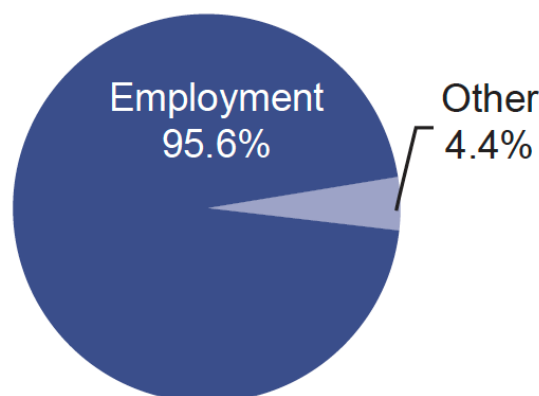


Table 2: Number of people enquiring and complaining about sexual harassment in employment, from 2015–16 to 2017–18

Year	Number of people enquiring (% of all sexual harassment enquirers)	Number of people who made complaints (% of all sexual harassment complainants)
2017–18	326 (87.2%)	86 (95.6%)
2016–17	254 (79.6%)	66 (86.8%)
2015–16	295 (81.7%)	87 (84.5%)

Independent review into Victoria Police data

The forthcoming report of Phase 3 of our Independent Review will include findings about the extent of sexual harassment within Victoria Police, as well as the steps taken by Victoria Police to strengthen its responses to this problem. The data – and the report, more broadly – will set a baseline for Victoria Police which, among other things, will help it to understand the extent of sexual harassment within its organisation today and to continue to show leadership in strengthening its response to this problem.

Data from our restorative engagement scheme for Victoria Police employees

Following our first Independent Review report in 2015, the Commission entered into an arrangement with Victoria Police to establish a restorative engagement scheme to resolve complaints from its employees about sexual harassment (and sex discrimination). This scheme operated as a modified version

of our existing dispute resolution service and leveraged our expertise in facilitating the resolution of sexual harassment (and sex discrimination) complaints. Victoria Police’s engagement in the scheme shows its commitment to recognise and address workplace harm experienced by its employees.

As at February 2019, the Commission had conciliated 30 complaints under the scheme, of which 24 (80 per cent) raised allegations of sexual harassment. Further information about the scheme is detailed in Section 4.2.1.

Initially established as an interim scheme, the Victorian Government has since announced its intention to establish a redress and restorative engagement scheme for certain victims/survivors of sex discrimination and sexual harassment in Victoria Police.⁵

2.2.2 SEXUAL HARASSMENT IN OTHER AREAS OF PUBLIC LIFE

The sexual harassment that is reported to the Commission extends beyond employment, although the harassment in other areas is reported to us in smaller numbers. These other contexts include educational institutions, the provision of goods and services, the provision of accommodation, clubs and local government. For example, with respect to education and training, research conducted by the Australian Human Rights Commission in 2016 found that one in five (21 per cent) students were sexually harassed in a university setting.⁶ As outlined below, the Commission is aware of significant issues of sexual harassment within medicine, including against students.⁷

In 2017–18, 48 of the 374 people (12.8 per cent) who enquired about sexual harassment under the Equal Opportunity Act did so in relation to areas other than employment. During that same period, four of the 90 people who made a sexual harassment complaint did

so in relation to areas other than employment, equating to 4.45 per cent of all sexual harassment complainants.

Of the 44 people who made complaints of sexual harassment between 1 July 2018 and 31 January 2019, six (13.6 per cent) raised harassment in an area other than employment.

As the impacts of sexual harassment can be profound and lasting (see Section 2.6), even one case of harassment is too many. So, while the total number of people who have approached the Commission with enquiries or complaints about sexual harassment in areas other than employment is smaller than those related to employment, efforts to strengthen the regulation of sexual harassment need to consider the needs of all victims/survivors of sexual harassment. Further, awareness raising of sexual harassment occurring outside of employment is needed to ensure victims/survivors understand their rights and options to seek redress.

2.3 Where workplace sexual harassment occurred

The sexual harassment in employment reported to the Commission typically occurs in wide-ranging contexts. These include places of work, work-related events, such as functions, and outside of work between colleagues, including through social media.

The industries represented in the reports we receive about workplace sexual harassment vary. However, the number of people who made complaints about sexual harassment was noticeably higher in some industries than in others.

Retail was the industry most workplace sexual harassment complainants raised over the past three financial years. In 2017–18, more than twice the number of complainants (27) raised sexual harassment in retail than in the next most common industry, public administration and safety (13).

Table 3: Top five industries named by complainants of workplace sexual harassment, 2015–16 – 2017–18 (% of all workplace sexual harassment complainants)

2017–18		2016–17		2015–16	
Retail	27 (31.4%)	Retail	19 (28.8%)	Retail	23 (26.4%)
Public administration and safety	13 (15.1%)	Professional, scientific and technical services	14 (21.2%)	Public administration and safety	18 (20.7%)
Manufacturing	10 (11.6%)	Financial and insurance services	6 (9.1%)	Arts and recreation services	9 (10.3%)
Professional, scientific and technical services	8 (9.3%)	Public administration and safety	5 (7.6%)	Health care and social assistance	7 (8.0%)
Health care and social assistance	6 (7%)	Manufacturing	5 (7.6%)	Construction	7 (8.0%)

These industries represent only the top five industries reported to us in the context of a complaint under the Equal Opportunity Act. The Commission is aware of further cases of sexual harassment in these industries, as well as in other industries that were not reported to us through our dispute resolution service.

Understanding the characteristics of workplaces and industries where sexual harassment occurs can be helpful in targeting responses to harassment at work.

2.4 Who experienced workplace sexual harassment

The Commission's functions and powers under the Equal Opportunity Act in relation to sexual harassment afford us unique insights into the people directly and indirectly affected by this problem in Victoria. Most often we hear from people who have themselves been sexually harassed. However, we also hear from people who have been indirectly affected and/or witnessed others being sexually harassed.

Consistent with research, the sexual harassment reported to us disproportionately

affects certain groups of people, notably women, but also young people, people who identify as LGBTI, people with disability, Aboriginal and/or Torres Strait Islander people and people from multicultural or multifaith backgrounds.⁸

Often the sexual harassment that is reported to us is experienced together with discrimination – sometimes as intersectional discrimination – and/or together with victimisation.

SEXUAL HARASSMENT VICTIMS/SURVIVORS ALSO EXPERIENCE DISCRIMINATION AND VICTIMISATION

In 2017–18, of the 86 people who made workplace sexual harassment complaints, most also made complaints of various types of discrimination (such as sex, disability, race) and victimisation. The complaints of sexual harassment also included the following:

- eight people raised one ground of discrimination
- 20 raised two grounds of discrimination
- nine raised three or more grounds of discrimination
- 37 raised victimisation.

Sex discrimination was the most common ground of discrimination raised in connection with sexual harassment. Of the 86 people who made a workplace sexual harassment complaint, 55 made a claim of sex discrimination.

Of significance is the high rate of victimisation complaints that were alleged in addition to sexual harassment (43 per cent).

2.4.1 WOMEN ARE AFFECTED DISPROPORTIONATELY BY SEXUAL HARASSMENT

Women and men can both experience sexual harassment, including at work. Yet, research shows that women are sexually harassed far more often than men.⁹ This is why sexual harassment is recognised both as a form of discrimination against women and gender-based violence.

SEXUAL HARASSMENT IS A CAUSE AND CONSEQUENCE OF GENDER INEQUALITY

The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) has classified sexual harassment and other forms of gender-based violence as discrimination against women,¹⁰ which are prohibited under the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*.¹¹ In the employment context, the CEDAW Committee has noted that sexual harassment ‘is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment’.¹² It has further noted that ‘[e]quality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace’.¹³

In addition to CEDAW, many other international and national legal instruments prohibit gender-based violence against women. The extent of recognition of the need to prevent and address such violence is such that it has evolved into a principle of customary international law.¹⁴

The gendered nature of sexual harassment is evident in the Commission’s own complaints data. For instance, in 2017–18 women comprised 70 of the 86 people (81.4 per cent) who made workplace sexual harassment

complaints. This is higher than in the two previous financial years, when women comprised 47 (71.2 per cent) and 67 (77.0 per cent) of complainants, respectively.

Table 4: Gender of complainants of workplace sexual harassment (proportion of all workplace sexual harassment complainants %)

Gender	2017–18	2016–17	2015–16
Female	70 (81.4%)	47 (71.2%)	67 (77.0%)
Male	16 (16.6%)	19 (28.8%)	20 (23.0%)
Other	0 (0%)	0 (0%)	0 (0%)
Total	86	66	87

2.4.2 SEXUAL ORIENTATION AS A RISK FACTOR FOR SEXUAL HARASSMENT

Research shows that LGBTI employees experience sexual harassment at far higher rates than their non-LGBTI colleagues.¹⁵

The Commission’s 2015 Independent Review report found that an employee’s sexual orientation is a risk factor for sexual harassment in Victoria Police. It found that:

- gay employees are six times more likely than male employees overall in Victoria Police to have been sexually harassed by a colleague in the previous five years¹⁶
- for lesbian employees, rates of sexual harassment are a third higher than for women employees overall in Victoria Police.¹⁷

Our forthcoming Phase 3 review report will include findings about the extent of sexual harassment in Victoria Police, including against its LGBTI employees.

2.5 Respondents to sexual harassment

Respondents of sexual harassment complaints have diverse characteristics and backgrounds. In the workplace, they work across a range of industries and hold positions at different levels of organisations.

While there is no typical profile of someone who sexually harasses another, research indicates that most harassers are male.¹⁸

In line with this research, men comprise most of the harassers reported to the Commission. Men have, for instance, comprised more than nine in ten of the alleged harassers of workplace sexual harassment in complaints made over the previous three financial years.¹⁹

Table 5: Gender of alleged perpetrators of workplace sexual harassment complaints, 2015–16 – 2017–18 (proportion of all workplace sexual harassment perpetrators %)

Gender	2017–18	2016–17	2015–16
Male	83 (96.5%)	61 (92.4%)	80 (92.0%)
Female	3 (3.5%)	5 (7.6%)	7 (8.0%)
Other	0 (0%)	0 (0%)	0 (0%)
Total	86	66	87

Similarly, men comprised most harassers of sexual harassment in Victoria Police reported during Phase 1 of the Commission's Independent Review. Survey participants who had experienced recent sexual harassment were asked about the gender of the individual harasser or the main gender of the group where they were harassed by more than one

person. Seventy-seven per cent of individual harassers were men. For female victims/survivors, who made up most of the victims/survivors, 93 per cent of harassers were male and five per cent were female.²⁰

2.6 Impacts

The impacts of sexual harassment reported to the Commission vary for each person and may change over time. Some who have been harassed tell us that the impacts on them have been profound.

Victims/survivors tell us that some impacts

are immediate and temporary. Some, like those 'Maddie' told us about, are longer lasting. People who have been sexually harassed over prolonged periods or by multiple perpetrators often speak to us about the cumulative effects of the harassment.

THE IMPACTS OF SEXUAL HARASSMENT AT WORK MAY BE LONG LASTING

'Maddie' always wanted to join Victoria Police. When she was little she wanted to be a police woman on a horse. After she joined Victoria Police she heard from detectives about their work and decided that was the career path for her.

Maddie is 'out' at work and comfortable with who she is. But an incident that happened to her early in her career is still with her today. She finds she can go for long periods of time where she doesn't think about what happened, but when she remembers, it makes her upset.

Maddie was with her friends from work at the pub one night after work. She and her girlfriend were talking and dancing and having fun.

A group of detectives from Maddie's station were at the pub, too. Maddie's friends heard them say, 'all the fucking lesbians are here now', when they saw her. One of the detectives approached Maddie and her girlfriend. He walked up to Maddie and said, 'just because you're a lesbian, doesn't mean you can have all the women'. He turned to Maddie's girlfriend and said, 'I can't believe you're dating Maddie and I can't believe you're a lesbian. What a fucking waste'. Then the detective went back over to his friends.

Maddie thought that maybe it was the end of the abuse. But then the detective started throwing food at her from across the bar. One of his mates approached her and said, 'Just remember when you want to report this, I'm the tall one and I've done nothing'. The manager of the pub asked the detective and his friends to leave. Another one of the detective's mates came up to Maddie and said, 'I can't believe we are getting kicked out, you're the fucking problem'.

The next day, the detective called Maddie, begging her not to report him to the newspaper. He told her that he wasn't homophobic and was married with kids.

Maddie made a complaint to her manager. The detective who abused her apologised, but Maddie didn't believe the apology was genuine. The detective's sanction for abusing Maddie was being banned from certain pubs close to the station. Maddie still had to work with the detective immediately after the incident.

As an aspiring detective, just out of the Police Academy, Maddie didn't feel able to pursue the matter against the detective because she was worried it might impact her career. She thinks she would have taken the complaint further if she had been reassured and supported by a senior colleague when it happened.

Some years after the incident, Maddie is still affected by what happened. She wonders if the detective has ever thought about the impact of his actions. Every time she thinks about what happened, she hopes that the detective hasn't done this to anyone else.

Many of the individual impacts of workplace sexual harassment that we hear about at the Commission are like those experienced when the harassment occurs in other areas of public life. Consistently, complainants raise the effect of sexual harassment on their mental and physical health (which sometimes results in Workcover claims). We also hear how sexual harassment causes hurt, humiliation and denigration.

However, some reported impacts are specific to the workplace. We have been told, for instance, about the negative impact harassment can have on job satisfaction, engagement and performance, as well as career progression and job security.

We hear that the victims'/survivors' relationship to the harasser in the workplace is a factor that may influence the way that the person is affected by the harassment. This includes when the harasser is the direct manager or supervisor or the victim/survivor and can influence their ability to progress within an organisation. The impact on people's career progression is often noted when the harassment occurs in hierarchical professions, such as medicine²¹ or law,²² where employees are expected to abide strictly by people with organisational power and authority.

How employers respond to reports of sexual harassment may have a significant impact on victims/survivors. Most people we hear from at the Commission tell us that their employer responded poorly to the harassment. Such responses include at best ignoring or dismissing the harassment and at worst taking retaliatory action against the victim/survivor for reporting the harassment.

It is common for the Commission to be told that senior leaders fail to acknowledge and condemn sexual harassment in their workplaces, downplay reports of inappropriate behaviour and do not put in place appropriate supports to help victims/survivors and bystanders navigate internal complaints processes.

In some cases, we hear about inappropriate behaviours modelled by people in senior positions. When this occurs, it signals to employees that such behaviour is not only tolerated but is also considered to be appropriate and consistent with organisational values and norms. This, in turn, influences how

employees behave and discourages victims/survivors and bystanders from reporting harm.

In such circumstances, the response of the employer can compound the impacts of the sexual harassment. It can also contribute to the under-reporting of sexual harassment, reinforcing the need for a well-resourced, external complaints system.

Importantly, the Commission does hear about employers who respond appropriately to reports of sexual harassment, including by providing support to the person harassed. We are often approached by employers who are themselves seeking to better understand and respond to sexual harassment in the workplace.

Research suggests that organisations that are unable to maintain safe and respectful workplaces are more likely to experience negative effects on their productivity, professional engagement and workforce capacity.²³ Research has shown, for example, that sexual harassment in workplaces can lead to decreased job satisfaction and organisational commitment.²⁴ This is supported by further research that finds that women's personal encounters with sexual harassment were associated with lower psychological and physical wellbeing, triggering more health problems and organisational withdrawal.²⁵

Consistent with this research, the Commission regularly hears about the damaging effects of sexual harassment on workplaces. Some people, including in the fire and emergency services sector,²⁶ have expressed concerns to us that the failure of their organisations to respond appropriately to sexual harassment has put themselves and their colleagues at risk of further harassment. Others have told us how sexual harassment has undermined performance in their workplaces, including through disengagement from the workforce, low morale, fractured and dysfunctional teams, lost productivity from presenteeism, absenteeism and resignation.

2.7 Drivers

Devising effective strategies for change is dependent on understanding the specific drivers that:

- enable sexual harassment in different contexts
- influence whether victims/survivors report the harassment
- influence if and how people, including in workplaces, respond to the harassment.

Consistent with research,²⁷ our work shows that gender inequality is the primary driver of sexual harassment, as well as low rates of reporting and poor responses by many organisations. From our work we also know that sexual harassment commonly occurs in the context of 'the structures of discrimination against women', meaning 'the forms of subordination of women that are deeply rooted in our thinking, our myths, and in our individual, institutional, and social ways of functioning'.²⁸

CEDAW COMMITTEE RECOGNISES THE GENDERED DRIVERS OF SEXUAL HARASSMENT

According to the CEDAW Committee, sexual harassment and other forms of gender-based violence are:

rooted in gender-related factors such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour.²⁹

The Committee has further explained that, '[t]hese factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered as a private matter, and to the widespread impunity for it'.³⁰

Attitudes about gender, including rigid stereotypes, can enable sexual harassment, influence people's understanding of whether sexual harassment has occurred and affect

people's views about the credibility of the victim/survivor. They can also lead to victim-blaming and stop harassers from being held accountable.

2017 NATIONAL COMMUNITY ATTITUDES TOWARDS VIOLENCE AGAINST WOMEN SURVEY

The 2017 National Community Attitudes toward Violence against Women Survey concludes that '[a]ttitudes towards gender inequality and violence are among the many factors that contribute to this violence'.³¹ The survey's key findings include that:

- one in five people (23 per cent) believe that many women exaggerate the problem of male violence, with men more likely than women to believe this (28 compared to 18 per cent)³²
- half of Australians believe many women mistakenly interpret innocent remarks or acts as being sexist³³
- one in five Australians (20 per cent) say they would not be bothered if a male friend told a sexist joke about women³⁴
- one in five Australians (23 per cent) think women find it flattering to be pursued persistently even if they are not interested.³⁵

The characteristics of individual workplaces and industries – which historically have been structured around male paradigms of power and patterns of life – as well as the circumstances of an individual’s employment

(for example, casual, recently employed) may also create opportunities for sexual harassment to occur and influence how victims/survivors and organisations respond.

SEXUAL HARASSMENT IN THE LEGAL PROFESSION

In 2012, the Commission surveyed 427 women lawyers in Victoria about their experiences in the profession, including in relation to sexual harassment.

- Of the 427 women surveyed, 100 (23.9 per cent) said they had experienced sexual harassment while working as a lawyer or legal trainee in Victoria.³⁶
- The harassment was most likely to occur in the early stages of employment, with 63 per cent of incidents occurring in the first year of employment.³⁷ More than 30 per cent reported that they had been working for more than a year but less than five years when the harassment took place.³⁸
- Seventy-eight per cent (88) reported that the harasser(s) held more senior positions within the workplace as either their immediate supervisor (23 per cent), employer/partner (30 per cent) or a more senior co-worker (24.7 per cent).³⁹
- The Commission concluded that where power is concentrated in a select few, (often males), there is potential for that power to be misused, with many victims/survivors and bystanders feeling too intimidated to complain or powerless to stop it.⁴⁰

I was an articled clerk and he was pretty senior. I didn’t mention it as, at the time, it was the sort of thing that people joked about and you were supposed to take it in your stride.⁴¹

The behaviour was pretty openly displayed and accepted by all. I felt uncomfortable about it but as a graduate there was not much I could do and the behaviour seemed to be tolerated at the top.⁴²

Women and non-binary people are often at greater risk of sexual harassment than men in male-dominated workplaces or where women are concentrated in lower-paid or insecure jobs. As US legal and social science academic Vicki Schultz has explained:

[s]ex segregation also makes it more difficult for those in the minority to resist harassment. Without the power and safety that comes with more equal numbers, women and others who are harassed

cannot effectively censor or counter stereotypes and cannot effectively deter, resist or report harassment. Nor can they participate effectively in shaping the organization’s cultures and norms, or in changing the organization’s structures and practices in ways that foster greater inclusion and equality. Research shows that skewed numbers leave women outnumbered and vulnerable at work, left to curry favor or compete with men on an unequal basis.⁴³

From the Commission's work in the fire and emergency services sector, we know that dominant masculine cultures in workplaces – which often value attributes, characteristics and roles traditionally associated with men while simultaneously devaluing those typically associated with women – can underpin a broad range of behaviours, ranging from everyday sexism to serious cases of sex discrimination and sexual harassment.

Sexual harassment can also be enabled where there is unchecked, subjective discretion to hire and fire people or to promote staff without the use of objective criteria or transparent, external oversight of decision making – in

essence, where leaders have unrestrained authority to make or break careers.⁴⁴ In our landmark review into sexual discrimination in Victoria Police, the Commission observed that the protection of 'high value' employees at the expense of other staff can allow sexual harassment to go on unchecked.⁴⁵ 'High value' individuals could include a leading partner in a firm, a well-regarded surgeon, a political leader, professor or high profile actor.⁴⁶ Workplaces with 'high value' employees can shelter harassers, increasing the risk that people complaining about sexual harassment will be victimised and making it very difficult to challenge the behaviour.

SEXUAL HARASSMENT IN THE MEDICAL PROFESSION

In September 2015, the Royal Australasian College of Surgeons' Expert Advisory Group on Discrimination, Bullying and Sexual Harassment published research into discrimination, bullying and sexual harassment in the practice of surgery.⁴⁷

- Of the 3516 people who responded to a sector-wide survey, 49 per cent said they had experienced discrimination, bullying or sexual harassment.⁴⁸
- Seventy-one per cent of hospitals reported discrimination, bullying or sexual harassment in their hospital in the previous five years.⁴⁹
- The research found that the problems exist across all surgical specialties,⁵⁰ with senior surgeons and surgical consultants the primary source of these problems.⁵¹
- The research also found that gender inequality was a key cause of discrimination, bullying and sexual harassment that had to be addressed.⁵²

The Royal Australasian College of Surgeons accepted the report's recommendations in full, issued a formal apology and developed an action plan to respond to the issues in the report.

Despite this response, the Commission is aware of ongoing concerns about sexual harassment in the medical profession in Victoria⁵³ and is working with stakeholders to consider effective responses to address the underlying systemic issues. We have been told of the need for a system-wide response to address the drivers of sexual harassment that may present as barriers to reporting, including a reverence for 'high value' workers, strong hierarchies with male-dominated leadership and apprentice-style working arrangements, where the reputations and career prospects of junior staff are beholden to their supervisors and mentors.

What is clear from these drivers is that effective prevention and redress of sexual harassment demands a focus on systemic change, and not just holding individual perpetrators and workplaces accountable. For example, there is a vital need for governments at all levels to invest in primary prevention that addresses gender inequality as the primary driver of sexual harassment and other forms of violence against women. *Change the story: A shared framework for the primary prevention of violence against women and their children in Australia*⁵⁴ provides an established, national framework to guide this work.

RECOMMENDATION 1

The Commonwealth, state and territory governments should invest in dedicated primary prevention of sexual harassment and sex discrimination. Primary prevention of sexual harassment should also be integrated into a holistic national prevention strategy promoting gender equality and addressing the underlying gendered drivers of violence against women, as part of the implementation of *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia*.

2.8 Barriers to reporting

The Australian Human Rights Commission's 2018 national survey shows that fewer than one in five people (17%) who were sexually harassed at work in the previous five years made a formal report or complaint.⁵⁵

Some of the reasons we commonly hear for victims/survivors not reporting or making a complaint in relation to sexual harassment in the workplace include:

- uncertainty about what constitutes sexual harassment and where to go for help
- community attitudes that condone, excuse, minimise or deny sexual harassment
- inadequate capability among management to deal with sexual harassment
- lack of accountability in workplaces in relation to sexual harassment
- fear of reprisal and victimisation, such as termination or being denied opportunities
- lack of job security, including for migrant, casual or contract workers
- inadequate support from management and co-workers to make a complaint
- lack of faith that a complaint will be effective
- trauma and shame.

These barriers are compounded by a complex and fractured regulatory system that individualises the harm of sexual harassment and places the burden on individual victims/survivors to identify and report sexual harassment, often at great risk to their personal and professional lives, health, wellbeing and financial security.

People facing intersectional discrimination are also understood to experience additional, compounding barriers to reporting workplace sexual harassment, accessing their legal rights and being believed.⁵⁶ Tailored research is needed to understand and overcome the specific barriers that different victims/survivors face in reporting sexual harassment, including those who are most vulnerable (see Sections 2.4 and 4.5, and Recommendation 15).

3. Victoria's regulation of sexual harassment

Section 3 outlines Victoria's regulatory framework for addressing sexual harassment.

3.1 Legal protections

Anti-discrimination legislation requires employers to eliminate sexual harassment (and discrimination) from their workplaces. It also sets out the rights of employees to enjoy workplaces free from sexual harassment (and discrimination) and provides them with a mechanism to make a complaint to an independent statutory body.

Sexual harassment in employment is unlawful under the *Sex Discrimination Act 1984* (Cth),⁵⁷ which enshrines Australia's obligations under CEDAW to eliminate all forms of discrimination against women, including sexual harassment. Sexual harassment is also prohibited under state and territory anti-discrimination laws, which offer differing definitions of sexual harassment and levels of protection.

Our submission focuses on Victoria's anti-discrimination law, the Equal Opportunity Act, and the other legislative protections available in this state.

3.1.1 THE EQUAL OPPORTUNITY ACT

The Equal Opportunity Act aims to eliminate discrimination, sexual harassment and victimisation.⁵⁸ It also aims to facilitate the progressive realisation of substantive equality.⁵⁹ It covers employment and other areas of public life, such as the provision of goods and services.⁶⁰

The definition of sexual harassment

Section 92(1) of the Equal Opportunity Act defines 'sexual harassment' as unwelcome sexual behaviour that could reasonably be expected to make a person feel offended, humiliated or intimidated.⁶¹

DEFINITION OF 'SEXUAL HARASSMENT'

For the purposes of this Act, a person sexually harasses another person if he or she—

- a. makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
- b. engages in any other unwelcome conduct of a sexual nature in relation to the other person—

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

Section 92(2) defines the phrase 'conduct of a sexual nature'.

DEFINITION OF 'CONDUCT OF A SEXUAL NATURE'

In subsection (1) conduct of a sexual nature includes—

- a. subjecting a person to any act of physical intimacy;
- b. making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence;
- c. making any gesture, action or comment of a sexual nature in a person's presence.

Under the Act, sexual harassment can be physical, spoken or written. It can also be a gesture or an action.

A range of behaviours may constitute sexual harassment. These include:

- comments about a person's private life or the way they look
- sexually suggestive behaviour, such as leering or staring
- brushing up against someone, touching, fondling or hugging
- sexually suggestive comments or jokes
- displaying offensive screen savers, photos, calendars or objects
- repeated requests to go out on dates
- requests for sex
- sexually explicit emails, text messages or posts on social media sites.⁶²

A single incident is enough to constitute sexual harassment.⁶³

The motivation or understanding of the harasser is irrelevant.⁶⁴ Sexual harassment can still occur when the harasser believes their behaviour is welcome.

Some types of sexual harassment can constitute a criminal offence. These include indecent exposure, stalking and sexual assault, as well as obscene or threatening phone calls, letters, emails, text messages and posts on social networking sites.

Areas covered by the Equal Opportunity Act

In Victoria, sexual harassment is against the law in a range of contexts, namely employment,⁶⁵ educational institutions,⁶⁶ the provision of goods and services,⁶⁷ the provision of accommodation,⁶⁸ clubs⁶⁹ and local government.⁷⁰

In employment, the Act covers sexual harassment by employers,⁷¹ employees,⁷² partners⁷³ and members of qualifying bodies.⁷⁴ It also covers sexual harassment in industrial organisations⁷⁵ and common workplaces.⁷⁶

For example, the Act covers the following employment contexts:

- an employer harassing an employee, job applicant or an employee of someone else who shares their workplace, such as a consultant or contractor
- an employee harassing a fellow employee, job applicant or their employer
- a person harassing another person who shares a common workplace with them.⁷⁷

The duties of an employer in relation to sexual harassment extend to all full-time, part-time and casual workers, agents and contractors, trainees and apprentices, job applicants, volunteers and unpaid workers.⁷⁸

Sexual harassment in the workplace occurs when it happens at work, at work-related events, between people sharing the same workplace and between colleagues outside of work such as through social media.⁷⁹

Protection from victimisation

Employers are responsible for eliminating victimisation in their workplace⁸⁰ and employers and employees must not victimise others.⁸¹ Victimisation occurs when a person punishes or threatens to punish someone, or someone associated with that person, because they have:

- made a complaint or brought proceedings under the Act
- given evidence or information or produced a document in connection with proceedings or an investigation under the Act
- attended a compulsory conference or mediation at VCAT in any proceedings under the Act
- refused to do something because it would be discrimination, sexual harassment or victimisation.⁸²

Examples of victimisation include bullying and intimidating an employee who has made a complaint of sexual harassment.⁸³

Positive duty to eliminate sexual harassment

In Victoria, employers must take 'reasonable and proportionate measures' to eliminate discrimination, sexual harassment and victimisation in their workplaces.⁸⁴ This 'positive duty' requires employers to be proactive about prevention, rather than simply reacting to complaints. It also encourages compliance with the Act, even in the absence of an individual complaint.⁸⁵ Victoria is currently the only state or territory with this positive duty in its anti-discrimination legislation.

The steps to comply with the positive duty vary for every organisation, taking into account factors such as the size, nature, resources and priorities of the business or operations, as well as the practicality and cost of the measures.⁸⁶ The measures required to meet the positive duty are similar to those that must be undertaken to avoid being found vicariously liable for discrimination and sexual harassment. However, unlike the vicarious liability provisions, the duty requires measures taken to 'eliminate' discrimination, and it operates regardless of whether a discrimination or sexual harassment dispute is brought or proceeding commenced.

At a minimum, the duty requires organisations to identify potential areas of non-compliance with the Act and to develop strategies for meeting and maintaining compliance, and for eliminating any discrimination. In the case of sexual harassment, this will generally involve:

- maintaining up-to-date policies and processes that are promoted across the workplace,
- making it clear that sexual harassment and victimisation are unlawful
- demonstrating the organisation's commitment to preventing sexual harassment.

Depending on the context, the duty may also require clear processes for individuals to make an internal complaint, along with training that includes a focus on identifying and appropriately responding to sexual harassment and victimisation in the workplace.

The examples provided in the Equal Opportunity Act are instructive of the spectrum that may be required:

A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.

A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

In Section 4.4, we outline what we consider best practice to look like in workplaces to effectively eliminate sexual harassment. This includes, for example, developing and publishing action plans that outline the specific steps the organisation will take to comply with its positive duty to eliminate sexual harassment.

THE EVOLUTION OF THE POSITIVE DUTY IN THE EQUAL OPPORTUNITY ACT

In 2008, the former public advocate for Victoria, Julian Gardner, made recommendations to reform the *Equal Opportunity Act 1995* (the predecessor to the current Act) in *An Equality Act for a Fairer Victoria*.⁸⁷ The Gardner report recommended a shift from the traditional approach to anti-discrimination law of prohibiting discriminatory conduct and relying upon victims/survivors to take action to enforce the law to one that addresses entrenched, systemic issues. His vision was for the Commission to be able to shift its focus from resolving disputes to pursuing compliance with the Act more actively.⁸⁸

In 2010, the Victorian Government passed the *Equal Opportunity Act 2010* and implemented many of the reforms recommended by Mr Gardner, including introducing a positive duty requiring duty holders to proactively eliminate discrimination, sexual harassment and victimisation.⁸⁹

Alongside the positive duty were additional functions and powers that would enable the Commission to enforce the Act and address systemic discrimination by:

- allowing the Commission to conduct investigations and public inquiries in certain circumstances
- introducing enforcement mechanisms, such as the power for the Commission to issue compliance notices and enforceable undertakings
- strengthening the Commission's powers to compel information, documents and attendance in the context of an investigation or public inquiry.

However, the Act was amended again in 2011, before it commenced.⁹⁰ Among other things, the amendments removed the public inquiry function and compliance powers and limited the compulsion powers. Today, the Commission has more limited tools to enforce the Act.

Our recommendations on how to strengthen the enforcement of the Act can be found in Section 4.1.

The Commission can encourage and facilitate compliance with the positive duty through our education, research and investigative functions. However, individuals cannot complain about contraventions of the positive duty to the Commission⁹¹ or bring a direct action to VCAT.

For example, we can investigate a suspected contravention of the duty that is serious in nature, relates to a class or group of persons and cannot reasonably be expected to be resolved by dispute resolution or at VCAT, in circumstances where the investigation would advance the objectives of the Equal Opportunity Act.⁹² An example of this is our current investigation into unlawful discrimination against persons with a mental health condition in the travel insurance industry. The investigation was prompted by a 2015 case in which VCAT found that the insurer, QBE, had unlawfully discriminated against Ms Ingram, a teenager, based on her mental health condition.⁹³ Following the failure of the travel insurance industry to

change discriminatory policies, we decided to investigate insurers' obligations including compliance with the positive duty.

Similarly, the investigation function could be used to investigate workplaces that the Commission reasonably suspects have contravened the Equal Opportunity Act, including a suspected breach of the positive duty to eliminate sexual harassment in a workplace. However, as discussed in Section 4.1, there are some procedural barriers in section 127 of the Act that may inhibit us from using this function as efficiently or effectively as it was originally intended.

ADDITIONAL OBLIGATIONS ON PUBLIC AUTHORITIES

In addition to the positive duty to eliminate sexual harassment, discrimination and victimisation, under the Victorian Charter public authorities (whom are also employers) are required to act consistently with certain enumerated human rights,⁹⁴ including the right to equality. This right requires public authorities to provide every individual with protection from discrimination and to promote respectful workplaces that do not tolerate sexual harassment.⁹⁵

Discrimination

In addition to sexual harassment being prohibited, such behaviour may also meet the Equal Opportunity Act's definition of discrimination when it is based on a protected attribute, such as sex. When a person experiences sexual harassment and discrimination because of the intersection of different attributes, such as disability, race or sex, this may constitute intersectional discrimination.⁹⁶

As set out in Section 2.4, the Commission regularly receives complaints alleging discrimination and victimisation, in the context of sexual harassment. A strength of the Act is that it enables us to help resolve these claims together.

Liability of employers and employees

An employer who sexually harasses or victimises an employee can be held directly liable under the Equal Opportunity Act.⁹⁷ Employees are also liable for sexual harassment against another employee.⁹⁸

In addition, an employer can be held vicariously liable under the Act when an employee or agent engages in these same behaviours during their employment or when acting on the organisation's behalf.⁹⁹ An employer will not be held liable if they can prove that they took 'reasonable precautions' to prevent the behaviour,¹⁰⁰ such as systematically investigating complaints¹⁰¹ and regularly training staff about their obligations under the Act.¹⁰²

3.1.2 OTHER RELEVANT LEGAL PROTECTIONS

Sexual harassment is also unlawful in certain circumstances under state and federal work, health and safety and industrial relations law.

The federal *Fair Work Act 2009* prohibits discrimination against employees by employers,¹⁰³ which may be relevant where:

- a sexual harassment claim also constitutes sex discrimination
- where 'adverse action' has been taken against employees because the employee has exercised their workplace rights¹⁰⁴
- the employee has a particular attribute.¹⁰⁵

The Fair Work Act does not, however, explicitly protect workers from sexual harassment.

The Victorian *Occupational Health and Safety Act 2004* also indirectly provides protection from sexual harassment in the workplace. It places a general duty on employers to provide and maintain a working environment that is safe and without risks to health, as far as is reasonably practical.¹⁰⁶ Employers must also ensure that other persons are not exposed to risks to their health and safety as a result of the employer's actions.¹⁰⁷ Employees must take reasonable care to ensure that they work in a manner that is not harmful to the health and safety of others.¹⁰⁸ However, this general duty has not yet resulted in regulations or codes of practice focused on addressing sexual harassment in any jurisdictions.¹⁰⁹

Calls have been made to strengthen protections for workers from sexual harassment in both state and federal occupational, health and safety and industrial relations laws, and at an international level.¹¹⁰ As explained in Section 4.1.4, complementary regulation of sexual harassment, including by workplace and anti-discrimination regulators, is needed to address systemic issues related to sexual harassment. This requires strengthening the legal protections available, as well as ensuring relevant regulators have the full range of tools needed to address sexual harassment at work and in areas outside of work.

3.2 The Commission's victim-centric enquiry and dispute resolution services

3.2.1 OUR ENQUIRY SERVICE

The Commission's enquiry service provides free, timely and sensitive information and referrals. This includes information about making a complaint, including the process and potential outcomes. It also includes information about, and referrals to, support services, such as counselling, healthcare and legal aid.

Following an enquiry, individuals may choose to make a complaint to the Commission. They may seek help to complete a complaint form if they have a disability or English is their second language. A high percentage of complaints are made via the online form on our website.

Some individuals do not wish to make a formal complaint and simply wish to report what has happened to them. Some wish to report anonymously for fear of reprisal, for confidentiality, or because they are distressed by having to re-tell their story. In these cases, the Commission can listen to the person's experiences, receive a written or oral report, provide clear pathways for support and make a de-identified, confidential report of the incident.

The Commission collects de-identified data and information from the enquiries we receive, which helps us identify any systemic issues or trends.

The Commission is currently seeking to streamline our enquiry service by developing a user-designed online platform with information and options for complaining or reporting sexual harassment (or discrimination) to us. We are also considering options for piloting an online reporting platform in recognition of the need to facilitate safe, confidential and anonymous reports of sexual harassment (and discrimination), with options for reporters to be contacted and provided with further information or support, and for their report to inform systemic responses (see Recommendation 10 in Section 4.2.4).

3.2.2 OUR DISPUTE RESOLUTION SERVICE

The Commission's dispute resolution service offers free, flexible, confidential and timely resolution of complaints. It enables:

- complainants to bring a complaint of discrimination, sexual harassment or victimisation, as well as complaints of racial or religious vilification
- complainants to raise multiple claims of sexual harassment and discrimination based on any of the 18 protected attributes (for example, age, race, sex or disability) and victimisation,¹¹¹ which can be resolved together
- parties to the complaint to participate in a restorative, non-adversarial process to resolve the complaint
- representative complaints to be brought on behalf of individuals or groups
- parties to reach a conciliated agreement with outcomes commonly including an acknowledgement and apology, individual restoration, financial compensation and systemic outcomes, such as a change in a workplace policy or practice
- settlement outcomes to be enforceable, when registered with VCAT.¹¹²

In 2017–18, the service received a 98 per cent customer satisfaction rating.

Who can bring a complaint?

The Commission has the capacity to accept complaints from a range of individuals who may be acting in their own individual capacity, or on behalf of others. For example, complaints can be lodged by:

- a parent or any other person can make a complaint on behalf of a child, with the consent of the child or parent
- any person, including a child, claiming a contravention of the Equal Opportunity Act
- a person making a complaint on behalf of someone else, or a group of people
- a representative body making a 'representative' complaint on behalf of a person or group of other people, where they have sufficient interest in a dispute.¹¹³

Our ability to receive representative complaints recognises that individuals, particularly victims/survivors of sexual harassment, can face substantial barriers in making complaints and participating in conciliations, and that additional support and advocacy is sometimes needed.

For example, a union can support a member by bringing a complaint on their behalf. Where a union is aware of several complaints of sexual harassment related to a workplace, it can also be instructed by a group of complainants to bring a representative complaint.¹¹⁴ The union would clearly have standing where it is concerned that the conduct adversely affects the interests or welfare of its members.

Complaints are triaged according to the urgency of the matter and the vulnerability of the complainant and are assessed for conciliation.

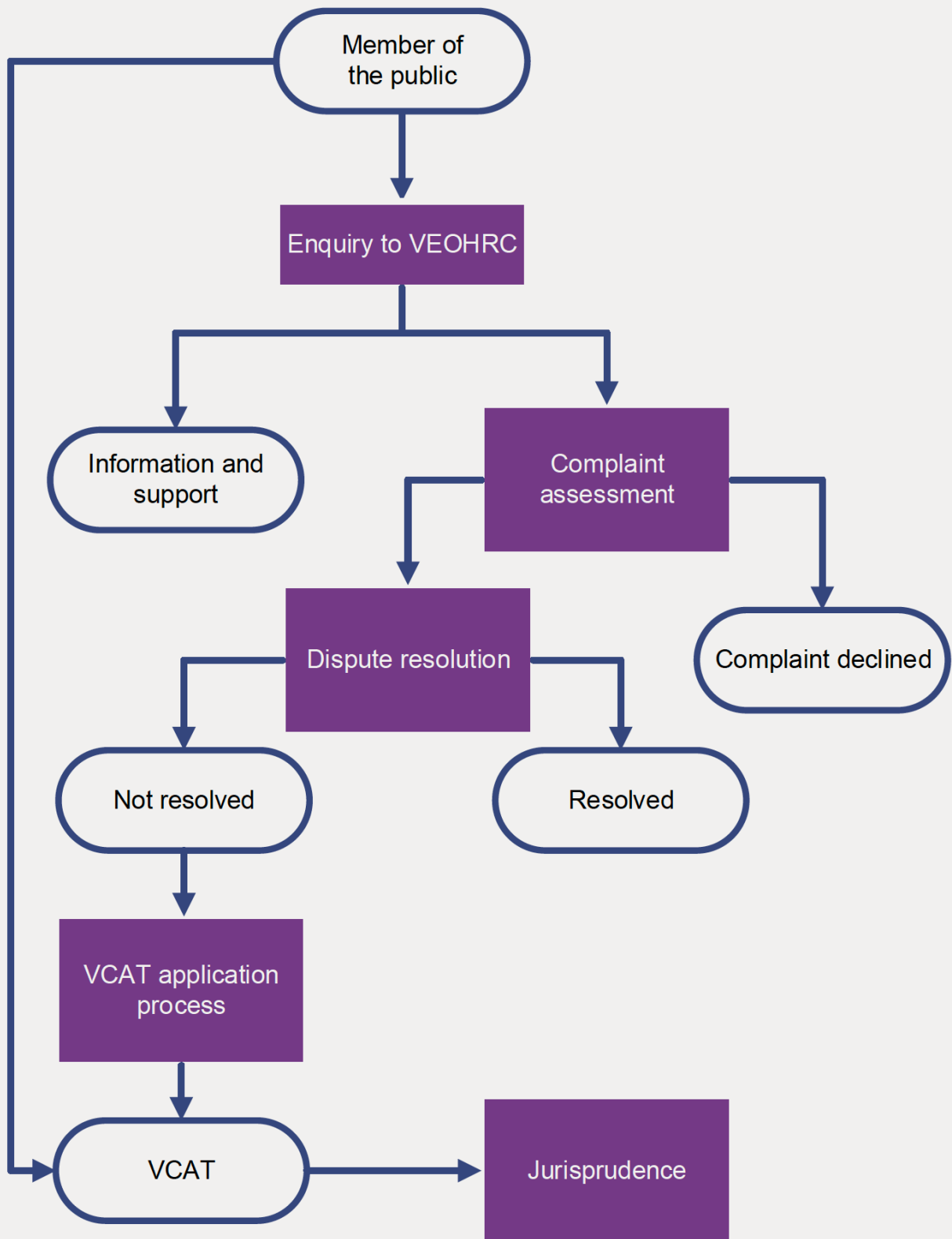
Voluntary conciliations and access to VCAT

Unlike some other jurisdictions in Australia, parties must voluntarily agree to participate in a conciliation at the Commission; there is no requirement to attempt to resolve a complaint before bringing a matter before VCAT.¹¹⁵ This enables complainants to bypass the Commission when they believe there is no real benefit to, or prospect of, successfully conciliating the matter, such as where the respondent denies the conduct or is resistant to engaging with the complainant.

From our experience, most parties approach conciliation with a willingness to try to resolve the complaint, and most complaints can generally be resolved within reasonable timeframes. For example, during the last financial year, 71 of the 86 complainants of workplace sexual harassment (82.6 per cent) had their matters finalised within six months, and 34 (39.5 per cent) within one to three months.

In circumstances where the complaint has not been resolved, a complainant may make a direct application to VCAT (see Figure 2 below).¹¹⁶

Figure 2: Our enquiry and dispute resolution service



A restorative and non-adversarial process

A key strength of the Commission's dispute resolution service is the capacity to offer a restorative and non-adversarial dispute resolution process. This is reflected in our broad discretion to accept complaints, low evidentiary threshold, practice of accepting complaints that may have occurred more than 12 months before the dispute was brought¹¹⁷ and victim-centric process.

A restorative process aims to ensure no further harm to the victim. For example, where an individual who brings an employment related complaint is still employed, we will work with the parties to help them to maintain an ongoing employment relationship. We also prioritise the resolution of complaints involving individuals who continue to be employed in the workplace in which they were sexually harassed or are particularly vulnerable. Sexual harassment complaints are also prioritised in recognition of the potential for significant and ongoing harm.

The Commission's overall objective is to support an individual through the complaint process, including by having access to an impartial conciliator who can address any power imbalance and create an environment that is supportive and educative, reduces further harm and provides the optimum opportunity for resolution. In the context of sexual harassment complaints, the process takes into account the gendered nature of the issues and impacts on the complainant, providing them with a safe environment, support and understanding at every stage.

For example, while the conciliation process aims to resolve complaints promptly, there is also in-built flexibility to meet the needs of the complainant. The process can be paused on the request of the complainant who may require additional time, counselling and support, before they feel ready to continue with the process. Conciliations can also be held over the phone.

FAST-TRACKED CONCILIATION WHERE COMPLAINANT WAS EMPLOYED

A woman made a complaint to the Commission in relation to sexual harassment and discrimination on various grounds against her then employer. She alleged that a senior colleague had asked her to perform oral sex on him outside of the workplace, and that her employer had denied that the conduct constituted sexual harassment because it occurred outside of work and there was not enough evidence of the conduct. She also said that her employer was using her depression to explain away the sexual harassment.

The Commission fast-tracked the complaint as it involved a person in a current place of employment and resolved it within two weeks. Both parties agreed that the employment relationship had broken down and the complainant decided to resign. The complainant received the equivalent of 14 weeks' wages in general damages, her outstanding entitlements and a statement of service.

Common settlement outcomes

The Commission's impartial conciliators help parties come to an agreement and suggest options that the parties may wish to consider in resolving the complaint. Importantly, conciliators encourage the parties to consider including in their settlement agreement actions that the employer could take to address any systemic issues in the workplace.

Outcomes of recent sexual harassment conciliations include both individual redress and agreement to address systemic issues within a workplace. For example, some respondents agreed to provide an apology to the complainant, reinstate them in their original job or workplace, create or review anti-discrimination policies and conduct anti-discrimination training.

Compensation paid to sexual harassment complainants in the past financial year ranged from \$2,000 to \$90,000 and was on average around \$15,000.

A copy of the record of settlement can be lodged and registered by either party at VCAT, with the effect of it becoming an enforceable agreement if it is breached.¹¹⁸

The Commission is considering how it can more actively monitor the implementation of settlement agreements. We are also seeking

more resources to improve our capacity to publish de-identified complaint and settlement data to inform people of the types of complaints that we can resolve and possible outcomes and improve understanding of sexual harassment (and discrimination) (see Recommendations 7 and 9, Section 4.2).

HARASSER AND EMPLOYER PAY COMPENSATION FOR SEXUAL HARASSMENT

The complainant made allegations of sexual harassment against a public authority. The harasser, a senior colleague, was the second respondent. The complainant alleged that the second respondent had put his arms around her and tried to kiss her at a work social function, repeatedly asked her out, referred to her as 'his future wife' and made an overtly sexual gesture towards her.

The complainant said that she spoke to the senior colleague about his behaviour, and he then began to question the need for her role and ask for her resignation. She alleged that he, along with other colleagues, went out of his way to make sure her ability to perform her functions was severely impeded.

At conciliation, the complaint was resolved with the agreement that the respondents pay \$80,000 in compensation and the complainant resign. The second respondent agreed to pay 75 per cent. In addition to agreeing to pay the remaining 25 per cent, the employer agreed to pay for the complainant to take several weeks of special leave, all her unpaid entitlements and counselling services up to \$5,000. The senior colleague also agreed not to contact the complainant again.

3.3 The Commission's education and prevention work

The Commission recognises that regulation alone will not prevent workplace sexual harassment. As the key driver is gender inequality, preventing it requires broad social change – specifically dismantling social norms, practices and systems that support gender inequality and violence against women – through targeted primary and secondary prevention. Education (both for workplaces and the broader community) is one essential component in this and is one of our core legislative functions.¹¹⁹

The Commission plays an important role in designing and delivering preventative education,¹²⁰ strategies, resources and practical guidance for Victorian workplaces. Our work is informed by many years of foundational research and primary and secondary prevention activity in Victoria and other jurisdictions.¹²¹

Through customised and tailored work with individual organisations and workplaces, we aim to drive leading practice in workplace equality. We take a collaborative approach to customising sector and workplace-specific education and training and developing equal opportunity action plans to drive specific and tangible action.

This involves providing consultancy services to employers to identify key areas of risk within organisations and developing tailored action plans to progress best practice across the organisation. This may include policy and practice revision, face-to-face training, digital education tools and managerial action plans.

VICTORIA POLICE IS TAKING A COMPREHENSIVE APPROACH TO REDUCING HARM AND EMBEDDING GENDER EQUALITY

As part of the final phase of our Independent Review, the Commission has worked closely with Victoria Police to develop an outcome monitoring framework to assess the current state of gender equality in the organisation and set a baseline for its ongoing work towards gender equality. The framework identifies areas that are essential to achieving gender equality in Victoria Police, for example safety and victim-centricity in responses to workplace harm. It also identifies the desired outcome and indicators of gender equality in relation to each area. Through working closely with Victoria Police, the Commission has been able to align the framework to the organisation's vision and goals, to increase the likelihood that it will become a foundational document for the organisation moving forward.

Victoria Police's commitment to the framework evidences its comprehensive approach to reducing harm and making its workplace more equitable. It also shows that it is serious about adopting a systematic and thorough approach to achieving these goals, including through effective and ongoing monitoring.

Tailored education and consultancy are key to enable organisations to tailor plans to meet organisational needs and drive concrete actions to achieve gender equality and prevent sexual harassment, for example to:

- set benchmarked targets, goals and indicators
- audit the gender equality impact of existing and proposed programs, policies, services and budgets
- develop communication strategies for staff
- establish governance measures to support implementation
- review and evaluate progress.

At a sector level, the Commission has developed guidelines and resources to help workplaces better understand and meet their obligations. As outlined in Section 1, this includes a sexual harassment guideline that helps employers comply with their obligations under the Equal Opportunity Act and meet their legal and ethical responsibility to create workplace cultures that do not tolerate sexual harassment. In addition, as set out in Sections 1 and 3.3, the Commission is currently piloting Raise It!, with funding from the Office for Women, to help facilitate conversations in the workplace about sexual harassment (and gender equality).

RAISE IT! CONVERSATIONS ABOUT SEXUAL HARASSMENT AND WORKPLACE EQUALITY

After completing an evidence review, the Commission found a gap in training and approaches regarding how to discuss sexual harassment and other gender equality issues in the workplace. As a result, we developed a range of resources, which we are now piloting in seven workplaces across Victoria.

The centrepiece of the project is a set of conversation starter toolkits, including one about sexual harassment. The sexual harassment response and support tool includes a service support directory, helps users to identify what sort of harassment they may have faced and, among other things, helps bystanders understand how they can support people who have been harassed.

As part of the project, we have developed a policy wellness check and in-person coaching on how to start and manage workplace conversations about sexual harassment and other gender equality issues.

Subject to an external evaluation and further funding, the Commission hopes to refine the materials into final products that can be customised for individual workplaces.

Investment in the refinement and tailoring of evidence-based, human-centred design education programs is needed in workplaces (see Recommendation 14, Section 4.4). The Commission is well placed to play a key role in this area since our various functions give us insight and expertise into trends and emerging issues in sexual harassment in Victoria. With further resourcing, we could develop and tailor new projects and innovations (like Raise It!) and deliver more user-designed education and reform packages for employers to create meaningful organisational change.

These projects are key to changing workplace environments and structures, as well as individual attitudes. While evidence indicates that education and training can be effective for some staff,¹²² focusing exclusively on changing individual mindsets does not produce gender equality. Instead, workplaces must also change systems (or workplace environments).¹²³ This is a key aspect of the Commission's approach that could be bolstered with greater investment.

As outlined in Section 4.1, strengthening the Commission's enforcement powers under the Equal Opportunity Act would also enable greater capacity to influence complementary – and essential – system change.

4. Strengthening prevention and response

Victoria's current regulatory framework for sexual harassment is geared too heavily towards individual dispute resolution and individual outcomes. It is also too dependent on individuals making complaints, even though there are significant barriers to doing so.

Effective regulation of sexual harassment must deliver individual and systemic outcomes and not overly burden individual victims/survivors to drive and enforce change. As such, we make recommendations to strengthen the legal framework to improve

protections and empower regulators like the Commission to be able to enforce compliance with the law and drive systemic change. We also recommend strengthening reporting and dispute resolution services, enhancing information and support available to victims/survivors, supporting employers to eliminate sexual harassment (primarily through education and guidance), while addressing the heightened vulnerability of certain groups. In addition, society-wide prevention efforts aimed at addressing the drivers of gender inequality are required.

4.1 Strengthening the legal framework and reducing the burden on individuals

As discussed earlier, Victoria is unique in that its anti-discrimination legislation requires employers to take preventative action to eliminate sexual harassment (as well as discrimination and victimisation). The positive legal duty in our Equal Opportunity Act could – if accompanied by appropriate compulsion and enforcement powers – deliver systemic change and help alleviate the burden on individuals.

While the Commission already uses the positive duty to affect broad cultural reform, the lack of enforceability mechanisms constrains our ability to achieve greater change. It is therefore critical that we have broad and flexible powers to investigate and inquire into breaches of the duty. Effective consequences for non-compliance with the duty are also key when education and encouragement fail to bring change.

4.1.1 STRENGTHENING THE ENFORCEABILITY OF THE EQUAL OPPORTUNITY ACT

The Equal Opportunity Act aims to eliminate discrimination, sexual harassment and victimisation to the greatest possible extent and enable the Commission to facilitate compliance by undertaking, among other things, enforcement functions.¹²⁴

Evolution of reforms affecting the enforceability of the Equal Opportunity Act

As set out in Section 3, the 2008 Gardner report recommended reforms to the 1995 Act to vest the Commission with powers to address systemic issues and pursue compliance.¹²⁵ Gardner considered that the ideal regulatory model is one that is less reliant on victims/survivors making complaints and equips the regulator with broad tools to facilitate and enforce compliance (see Figures 3 and 4 below).

Gardner's recommendations included:

- introducing a positive duty to take reasonable and proportionate measures to eliminate sexual harassment (and discrimination and victimisation) as far as possible¹²⁶
- enabling the Commission to conduct own-motion investigations into serious matters that concern a possible contravention in relation to a class or group of persons (without the need for a dispute)
- enabling the Commission to undertake own-motion public inquiries into serious matters of public interest relating to discrimination, sexual harassment and victimisation that are not appropriate to be dealt with by an individual complaint
- strengthening powers to compel attendance, information and documents for the purposes of an investigation or public inquiry (without an order from VCAT)
- introducing enforcement tools to seek enforceable undertakings and issue compliance notices, as part of a range of investigation and inquiry outcomes.¹²⁷

The Gardner report recommended a shift from relying on complainants to enforce the law to enabling the Commission to proactively address systemic issues and resolve the underlying causes of sexual harassment (and discrimination and victimisation). An investigation was intended to permit 'a graduated, flexible response to issues arising from disputes, which may become the subject of a broader inquiry'.¹²⁸

Gardner's recommendations were partially implemented in 2010. However, the Act was amended again in 2011 (before commencement of the 2010 changes) to:

- remove the new public inquiry power
- prevent the Commission from investigating if the matter could reasonably be expected to be resolved by dispute resolution or VCAT
- require the Commission to apply to VCAT for an order to compel attendance, information and documents
- remove the ability of the Commission to enter into enforceable undertakings and issue compliance notices as potential outcomes of investigations.¹²⁹

Effect of the 2011 amendments on the enforceability of the Act

As noted above, it was intended that the positive duty be enforced through the investigation and inquiry powers, supported by effective compulsion powers and enforcement tools.¹³⁰ However, the amendments to the Equal Opportunity Act in 2011 limited the Commission's ability to pursue enforcement of the positive duty.

For example, the threshold for commencing an investigation is higher as we now need to be satisfied that the matter could not reasonably be expected to resolve through dispute resolution or at VCAT.¹³¹

Once it has begun, we can ask a party to provide information or documents that are 'reasonably necessary' to an investigation. However, we cannot compel production without a VCAT order,¹³² which can be expensive and time-consuming to obtain.

These steps are different to the model intended by Gardner, which seeks to elevate investigations and own motion inquiries. Investigations under this model were intended to allow the Commission to act in relation to breaches of the Act without reliance on individual complaints. Inquiry powers were to be 'broad and flexible' allowing the Commission to pursue systemic outcomes.

In addition, although the Commission can investigate a breach of the positive duty and take any action we think fit after the investigation, we cannot seek enforceable undertakings or issue compliance notices, as Gardner intended.

We are limited to entering into an agreement, referring a matter to VCAT or making a report to the Attorney-General or the Victorian Parliament.¹³³

Finally, as mentioned earlier, we can no longer conduct a public inquiry where we consider it is in the public interest. It was envisioned that this function would allow us to conduct thematic, sectorial or organisational inquiries.¹³⁴ This could, for instance, include inquiries into the causes of systemic sexual harassment, the victimisation of sexual harassment complainants in a sector or the persistent sexual harassment of staff in an organisation. A public inquiry would carry gravitas, for example by necessitating a government response and carrying more weight in the public eye.

The case for making the positive duty enforceable

Combining the positive duty to eliminate sexual harassment (as well as discrimination and victimisation) with an own-motion public inquiry¹³⁵ and a broadened investigation function,¹³⁶ would provide the Commission with more effective tools to assess compliance with the positive duty, even when there is no complaint.

This change would, in turn, shift the burden of enforcement away from individual victims/survivors and onto the Commission.¹³⁷ This is especially important in areas like sexual harassment where research tells us individuals are less likely to bring complaints and face specific barriers to reporting.

For the Commission to enforce the positive duty effectively, the power to begin and conduct inquiries must sit solely with the Commission. We must also be vested with some powers to impose sanctions (for example, enforceable undertakings and

compliance notices), as recommended by Gardner.¹³⁸ The threshold for an investigation would be if the matter is: (a) serious in nature; (b) indicates a possible contravention of the Act; and (c) we have a reasonable expectation that the matter relates to a class or group of people. The threshold for a public inquiry would be if the matter is: (a) serious in nature; (b) relates to a class or group of persons; and (c) is in the public interest.

Should these amendments be made to the Equal Opportunity Act, Victoria would have an enforceable positive duty that would, among other things, enable the Commission to require organisations who have breached their positive duty to take corrective action, which would ultimately be enforceable at VCAT. It is reasonable to imagine that while enforcement tools would on occasion be necessary to enforce the Act, their mere existence, rather than use, may facilitate cooperation from organisations.¹³⁹

These changes would bring the Equal Opportunity Act in line with international best practice. For example, the UK equality duty enables the UK Equality and Human Rights Commission to enforce compliance through a broad range of regulatory tools, including assessments, investigations,¹⁴⁰ agreements and compliance notices.¹⁴¹ It also has the power to conduct a public inquiry into any matter relating to any of its duties,¹⁴² and has done so in relation to disability-related harassment for example.¹⁴³

RECOMMENDATION 2

The Victorian Government should amend the *Equal Opportunity Act 2010* to reinstate and strengthen the Victorian Equal Opportunity and Human Rights Commission's functions and powers to enforce the Act and address systemic issues of sexual harassment (as well as discrimination and victimisation), including the functions and powers to:

1. undertake own-motion public inquiries
2. investigate any serious matter that indicates a possible contravention of the Act:
 - a. without the need for a reasonable expectation that the matter cannot be resolved by dispute resolution or the Victorian Civil and Administrative Tribunal
 - b. with the introduction of a 'reasonable expectation' that the matter relates to a class or group of persons
3. compel attendance, information and documents for the purposes of an investigation or public inquiry without the need for an order from the Victorian Civil and Administrative Tribunal
4. seek enforceable undertakings
5. issue compliance notices as potential outcomes of an investigation or a public inquiry.

Figure 3: Proposed compliance and enforcement activities under the Equal Opportunity Act



The scenario and accompanying Figures 3 and 4 illustrate how our recommendations to make the positive duty enforceable would strengthen the regulatory framework for addressing sexual harassment, by providing us with a range of ‘responsive regulatory’¹⁴⁴ tools that drive systemic change.

These would range from ‘soft corrective tools’ to facilitate compliance with the Act by working cooperatively with organisations using our existing research and education powers¹⁴⁵ to more ‘punitive sanctions’ that we could use when cooperation is not achieving the desired change.

ENFORCING THE POSITIVE DUTY IN VICTORIA: A HYPOTHETICAL SCENARIO

In 2020, the Commission receives a high volume of enquiries and complaints of sexual harassment and sex discrimination.¹⁴⁶ A disproportionate number of these enquires and complaints relate to organisations within a single male-dominated industry. These include several anonymous reports by women that action was taken against them after they reported the behaviour to their employers, such as verbal threats, being excluded from meetings and opportunities, and baseless criticism of their performance.

A few complaints are conciliated successfully through our dispute resolution service¹⁴⁷ and one dispute lodged with VCAT¹⁴⁸ is settled without an apparent change in the organisation’s policies or culture.

The Commission is aware that the industry has featured heavily in sexual harassment and discrimination complaints brought to us in the past. This prompts us to consider using our functions and powers to address what we suspect is systemic levels of sexual harassment, sex discrimination and victimisation in this industry, and to seek to enforce the positive duty.¹⁴⁹

The Commission uses the following functions and powers, having had its powers and functions reinstated and expanded, as recommended in this submission.

Education, training and review

The Commission offers to provide education and training to organisations subject to a report or complaint.¹⁵⁰ Where organisations are willing to engage us, we review their policies and procedures, help them to develop voluntary action plans, advise them on a victim-centred internal complaint handling process and conduct user-designed training at all levels of their organisations.

Investigations into specific organisations

The Commission undertakes investigations into several organisations where we have received several reports indicating possible serious breaches of the Act¹⁵¹ and the organisations have not requested a review or agreed to participate in education or training. We complete these small, less-intensive investigations quickly.¹⁵²

We conduct the investigation as we see fit,¹⁵³ including by using our newly reinstated compulsion powers to interview staff and request internal policy documents and documents related to any internal complaints processes.¹⁵⁴

During the investigation, we establish that several organisations have breached the positive duty.¹⁵⁵ In addition to publishing a report, we notify the organisations that we are considering conducting a public inquiry and invite them to enter into an agreement with us that they will remedy the breach (for example, by introducing new policies and training).¹⁵⁶

We accept an enforceable undertaking from several organisations and include them in a public register of enforceable undertakings.¹⁵⁷ We also issue a compliance notice to one organisation that has failed to take the required action.¹⁵⁸ The organisations are aware that should they fail to comply with the undertakings or notice, we may apply to VCAT for an enforcement order.¹⁵⁹

This provides an effective incentive for them to comply with the Act, particularly considering the possible public inquiry.

Industry-wide public inquiry

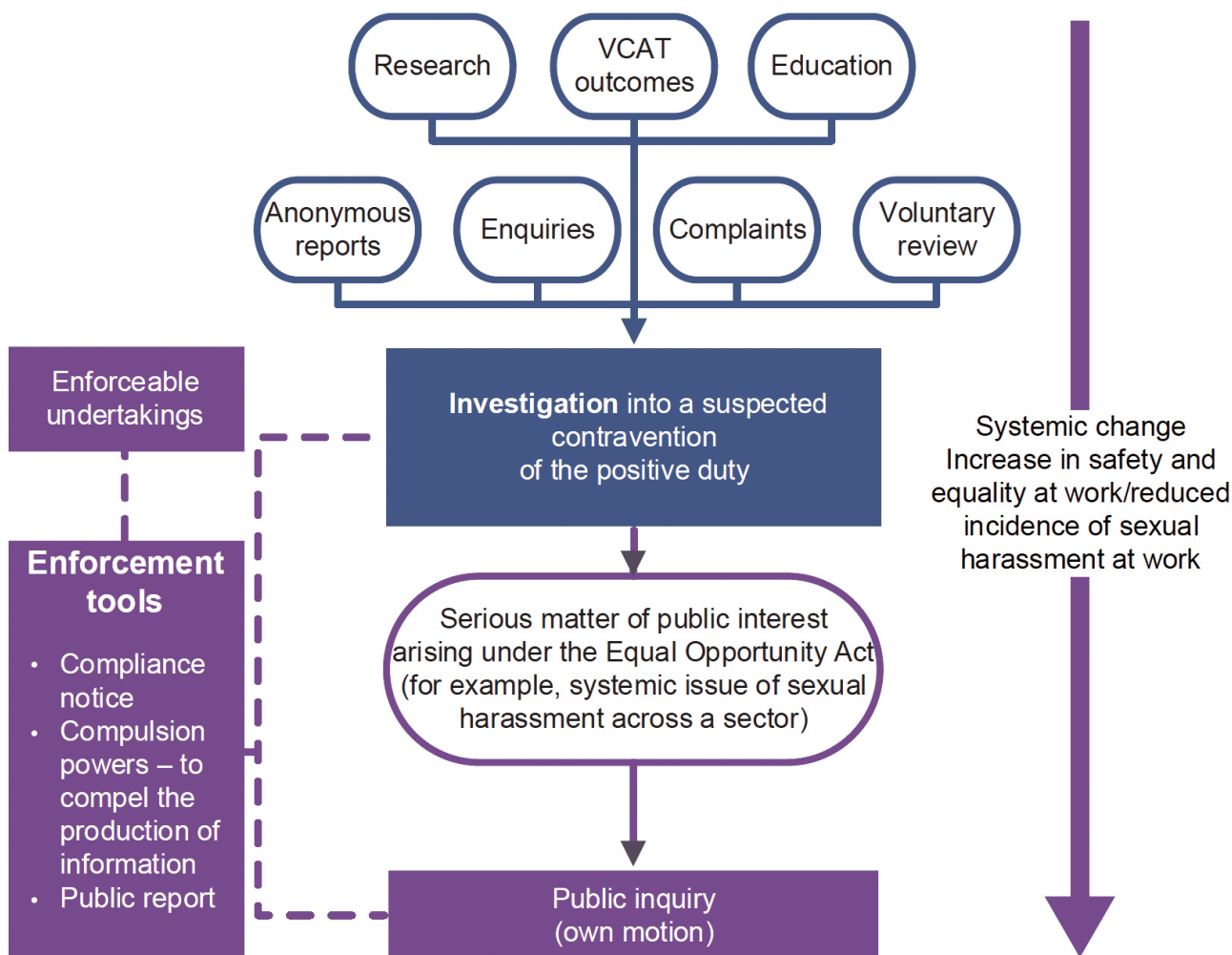
Given the Commission finds several breaches of the Act across the industry, including a failure to eliminate sexual harassment, we are concerned there is a systemic issue of sexual harassment across the industry. We are satisfied that a public inquiry into sexual harassment, sex discrimination and victimisation in the industry is in the public interest.¹⁶⁰

We hold a public hearing¹⁶¹ and publish a report that is tabled in Parliament.¹⁶² We also utilise our compulsion and compliance powers during the inquiry, including seeking enforceable undertakings from organisations and issuing compliance notices where necessary to enforce the positive duty. The inquiry also provides an opportunity for us to work with the industry to understand and address the specific drivers of sexual harassment, the barriers to safe reporting, and what work is needed to change the culture. This data and information are on the public record and contribute to a deeper understanding of the problem of sexual harassment at work.

We note that additional funding is needed to enable the Commission to use any additional powers and functions effectively. The Commission presently has limited funding to

conduct investigations into sexual harassment and any reviews we undertake under the Equal Opportunity Act must be funded by the organisations requesting the review.¹⁶³

Figure 4: Enforcing the positive duty in the Equal Opportunity Act



RECOMMENDATION 3

The Victorian Government should ensure that the Victorian Equal Opportunity and Human Rights Commission is adequately funded to exercise any new and existing functions to facilitate and enforce compliance with the Act.

RECOMMENDATION 4

The Commonwealth, state and territory governments should:

1. amend anti-discrimination laws to include a positive duty to prevent sexual harassment (and discrimination and victimisation), like the duty in section 15 of the *Victorian Equal Opportunity Act 2010*
2. ensure the positive duty is accompanied by a full suite of regulatory powers, including investigations and inquiries with compulsion and compliance tools to enable anti-discrimination commissions to act to enforce the duty effectively
3. adequately fund anti-discrimination commissions to facilitate and enforce compliance with the positive duty.

4.1.2 REMOVING CAPS ON DAMAGES FOR SEXUAL HARASSMENT

The amount of damages available for sexual harassment differs across Australia.

In Victoria, VCAT can make an order for any amount it thinks fit to compensate for loss, damage or injury suffered because of a contravention of the Equal Opportunity Act.¹⁶⁴ By contrast, damages are capped in Western Australia, New South Wales and the Northern Territory.¹⁶⁵

Damages should reflect the seriousness of the harm caused to victims/survivors by sexual harassment. In this connection, it is noteworthy that large awards of damages have been made in some sexual harassment cases over recent years in recognition of the seriousness of the harm.¹⁶⁶ In addition, VCAT has accepted that other legislation awarding damages operates harmoniously with, and does not limit the operation of, the power in the Equal Opportunity Act to award a person for loss, damage or injury suffered in consequence of a contravention of that Act.

The amount of damages available to victims/survivors should not be capped. Nor should they be dependent on the jurisdiction in which the sexual harassment took place. The Australian Human Rights Commission should therefore consider recommending that the cap on damages for sexual harassment in Western Australia, New South Wales and the Northern Territory be removed.

4.1.3 EXTENDING THE DISPUTE RESOLUTION TIME LIMIT FOR SEXUAL HARASSMENT

The Commission can decline to resolve complaints involving sexual harassment more than 12 months old,¹⁶⁷ although in practice we almost never use this discretion. Our approach is to engage with respondents when we receive historical complaints and to guide the parties through the conciliation process, where possible.

VCAT can also dismiss applications made to it when the harassment occurred more than 12 months ago.¹⁶⁸ VCAT facilitates alternative dispute resolution ahead of hearings, which are available in cases 12 months or older. However, as matters progress to hearing, victims/survivors may have to explain any delays in applying and be barred from having their matter heard by VCAT.

At the federal level, the President of the Australian Human Rights Commission may terminate a complaint made more than six months after the sexual harassment.¹⁶⁹

Given the considerable barriers to reporting sexual harassment (see Section 2.8), these six- and twelve-month time limits, however flexibly applied, could deny victims/survivors the ability to access justice. At the very least,

a six-year time limit (with in-built discretion to allow historical matters), consistent with other employment related rights of action,¹⁷⁰ would represent a fairer time limit on complaints.

RECOMMENDATION 5

The Commonwealth, state and territory governments should extend the timeframes for lodging sexual harassment complaints to six years.

4.1.4 STRENGTHENING COMPLEMENTARY REGULATION

Robust cooperation between regulators

Several stakeholders have complementary responsibilities and objectives to address sexual harassment in Victoria. For example, the Australian Human Rights Commission and our own Commission can both receive complaints of sexual harassment in Victorian workplaces. Victoria's WorkSafe, the Fair Work Commission, the Fair Work Ombudsman, unions and others also play key roles in addressing workplace harassment and related issues in this state.

There is clear value in recognising the roles and intersecting goals of regulators with oversight of sexual harassment and working in partnership to harmonise efforts and avoid duplication. Efforts to address sexual harassment at work can, for instance, benefit from complementary regulation by WorkSafe, including it prioritising sexual harassment as a gendered workplace hazard with psychological health impacts.

It is therefore pleasing that the Victorian Government considers that gendered violence at work is a health and safety issue and recognises that WorkSafe needs to be supported to understand, identify and respond to sexual harassment and other forms of gender-based violence at work.¹⁷¹ The Commission is well placed through our education function to support, and work with, WorkSafe in these efforts.

The Commission supports the strengthening of legal protections against sexual harassment and underpinning frameworks to ensure their effective enforcement by co-regulators, including anti-discrimination commissions and workplace regulators such as Worksafe, the Fair Work Commission and the Fair Work Ombudsman. In effect, this would provide a complainant with two complementary avenues to seek redress, and two systems that could support a safer workplace and an end to sexual harassment.

Critical to the success of such reforms is a clear understanding of the different roles of regulators, as well as the resourcing and capacity building of regulators to effectively address sexual harassment. Information sharing and referrals, discussed below, are also key to successful co-regulation of sexual harassment.

Information sharing and referrals

Information sharing, cross-referrals and capacity building depend on strong relationships between regulators with oversight of sexual harassment.

The Commission and other sexual harassment regulators already work together to:

- share 'best practice' measures in encouraging and facilitating compliance with the law related to sexual harassment
- share de-identified data and other information, consistent with our privacy and secrecy obligations, to deepen our collective understanding of sexual harassment
- build capacity to respond to sexual harassment
- provide advice on our respective areas of work (for example, WorkSafe participates in the Commission's Raise It! pilot through the project's Senior Advisory Group).

Through sharing information, we can jointly determine how each regulator can best use their respective expertise and powers to intervene and address sexual harassment. In some cases, a multi-regulator approach may be needed.

Memorandums of Understanding (MoU) between regulatory bodies can facilitate the sharing of data, enforcement actions, joint advocacy, strategy and planning, communications, education and guidance. For example, the Commission currently has a MoU in place with Victoria Police to facilitate an exchange of information between our organisations, to facilitate prosecutions or conciliations involving complaints of 'serious vilification' under the *Racial and Religious Tolerance Act 2001*.

Regulators must ensure that individuals who are considering making a sexual harassment complaint are aware of the various pathways for doing so as well as the benefits, processes and possible outcomes of each service. They should also take steps to provide appropriate counselling, support and referrals. For example, the Commission and WorkSafe routinely refer individuals when the circumstances suggest that the other agency is better placed to help them.

RECOMMENDATION 6

Regulators with oversight of sexual harassment should continue to work cooperatively to share information and build capacity in relation to sexual harassment, including at work, and provide support and referrals to victims/survivors.

4.2 Improving reporting and dispute resolution services

Anti-discrimination commissions provide a unique, victim-centric service for resolving sexual harassment complaints, with increasing demand for these services (see Sections 2.2 and 3.2). Current services, such as the Commission's own dispute resolution service, operate on modest budgets and with small teams. As a result, we are unable to keep up with demand within existing budgets, which means people are having to wait before dispute resolution can begin.

A modest increase in investment would enable the Commission to better promote our dispute resolution service and improve access to online information and referrals. It would also allow us to resolve more complaints and to do so more quickly.

RECOMMENDATION 7

Commonwealth, state and territory governments should provide additional funding to anti-discrimination commissions to enhance their dispute resolution services, including in relation to sexual harassment complaints.

4.2.1 OFFERING A RESTORATIVE JUSTICE PATHWAY

As discussed in Section 2.2.1, following the Commission's first Independent Review report in 2015, we entered into an arrangement with Victoria Police to establish a restorative engagement scheme to resolve complaints from its employees about sexual harassment (and sex discrimination). A modified version of our existing dispute resolution service, the scheme has shown that where an employer, like Victoria Police, is genuinely willing to engage with complainants, an informal, restorative approach to dispute resolution can be highly effective.

The Commission is considering how we might offer a similar model to parties willing to engage in a restorative process, such as in cases where an employer is aware of a significant number of current and historical incidents of harassment in its workplace.

A restorative pathway offers opportunities for healing, is non-adversarial and is not evidence focused. It does not necessarily require a harasser to participate in the process but facilitates a formal response from the employer which may also result in internal disciplinary action against the harasser. It provides employers with a valuable opportunity to convey their commitment to changing their organisational culture and preventing the recurrence of harassment. As has happened in Victoria Police, it can also lead to improvements in the management of support services and internal complaint mechanisms.

OUR RESTORATIVE ENGAGEMENT SCHEME FOR VICTORIA POLICE EMPLOYEES

The scheme is open to current and former employees of Victoria Police who have experienced sex discrimination and/or sexual harassment. Eligibility is broad and is based on whether a person's account is plausible. A formal complaint under the Equal Opportunity Act is not needed.

Victoria Police and the complainant agree to conciliate the matter at the Commission. As part of the process, a senior representative of Victoria Police attends the conciliation.

Following restorative engagement principles, we facilitate a process of learning and acknowledgement over two sessions.

In the first session, the complainant, Victoria Police representative and conciliator come together in a safe, facilitated environment, in which the complainant shares what has happened to them and seeks verbal acknowledgement of the harm experienced and an apology.

Around one to two weeks later, allowing time for reflection and healing, the parties come together again to reach a mutually acceptable resolution. Common outcomes include a written statement of regret, reinstatement of leave and payment of medical expenses and compensation.

Moving forward, the Commission could offer two pathways of alternative dispute resolution, including a voluntary restorative

engagement pathway. Further consideration is required, particularly in relation to the funding implications of offering such a service.

RECOMMENDATIONS

Anti-discrimination commissions should offer restorative engagement pathways for sexual harassment complainants, where appropriate.

4.2.2 PUBLISHING DE-IDENTIFIED COMPLAINTS DATA

Academics and other stakeholders have noted that access to cross-jurisdictional complaints data from anti-discrimination commissions can help to inform an understanding of the nature and extent of sexual harassment and current trends.¹⁷²

The Commission agrees that sharing de-identified data and information about complaints will help to better inform the public about the nature, extent, drivers and impacts of sexual harassment. It will also help victims/survivors to make informed choices about the jurisdiction in which they should initiate action.

The Commission is seeking further resources to improve our ability to collate, analyse and regularly publish complaints data, information and settlement outcomes.¹⁷³ This includes by improving our case management system.

The Australian Human Rights Commission is well placed to play a leadership role in facilitating the harmonisation of complaints data collection across Australia. It is also well placed to facilitate the sharing of de-identified complaints data between anti-discrimination commissions and the publication of cross-jurisdiction complaints data, for example through the Australian Council of Human Rights Authorities. Consideration must be given to confidentiality provisions in anti-discrimination legislation.

RECOMMENDATION 9

1. The Australian Human Rights Commission should oversee the harmonisation of complaints data collected by anti-discrimination commissions and facilitate the sharing of de-identified complaints data between anti-discrimination commissions and the publication of cross-jurisdiction complaints data.
2. In line with Recommendation 9(1), the Commonwealth, state and territory governments should provide additional funding to anti-discrimination commissions to enable them to improve their data collection, analysis and reporting.

4.2.3 CONFIDENTIALITY CLAUSES

Following the #MeToo movement, concerns were raised globally about the operation of confidentiality (that is, non-disclosure) clauses in settlement agreements. Specifically, that they may sometimes unintentionally enable harassers to perpetrate again under the cloak of confidentiality. They also reduce the visibility of the problem of sexual harassment in society. The New Zealand Law Society noted that inappropriate use of non-disclosure agreements keeps unacceptable behaviour 'in-house', perpetuating a culture of impunity and a lack of accountability that can enable perpetrators to remain unchallenged or simply to move-on to another organisation.¹⁷⁴

While the Commission shares these concerns, we have found confidentiality clauses to be an important tool for creating a safe and open environment within which parties can explore and reach creative and meaningful resolution of disputes. They can also be a great bargaining power for complainants and protect their confidentiality when they do not wish for the matter to be known or are concerned the respondent might cast aspersions on their character. As such, we do not support calls to dispense with confidentiality clauses.

Rather, further consideration of how confidentiality clauses could be more closely regulated and guidance about their proper use is needed. In this connection, we note that there are new models emerging overseas that impose conditions on the use of confidentiality agreements,¹⁷⁵ such as requiring the respondent to act to reduce the likelihood that they will harass again (for example, mandating terms requiring duty holders to implement systemic measures). At a minimum, the Commission considers that confidentiality clauses should not be used to prevent disclosures of sexual harassment by

victims/survivors, and that anti-discrimination commissions and tribunals should encourage respondents to agree to make systemic organisational change.

The Commission endorses the recommendation of the UK Equality and Human Rights Commission that confidentiality clauses should only be used at an employee's request (except in exceptional circumstances) and the settlement agreement should explain the reasons for confidentiality and what disclosures are protected.¹⁷⁶ Further, information and transparency about the advantages and disadvantages of confidentiality clauses must be conveyed to the parties to a conciliation and conciliators should encourage parties to come to a fair agreement, without unnecessarily limiting the rights of the complainant.

4.2.4 PILOTING AN ONLINE REPORTING PLATFORM

Online reporting platforms can:

- facilitate reports of sexual harassment by people who may not otherwise make a formal complaint (including bystanders)
- facilitate anonymous reports
- support people who wish to make a report, while preserving their option to make a formal complaint later
- provide a safe pathway for people to share their story and access information and support
- provide a means to capture data about sexual harassment, including linking reports made in relation to the same perpetrator
- contribute to the evidence base for investigations or inquiries into a particular employer or industry.

Reporting platforms could provide vital data about sexual harassment to anti-discrimination commissions that can then inform systemic responses, including investigations and research. Data could also be shared with other agencies and researchers, subject to existing privacy and secrecy legal obligations¹⁷⁷ including, for example, specialist counselling and wrap-around support services to provide confidential assistance.

Several agencies already offer anonymous reporting, such as the Fair Work Ombudsman, the Independent Broad-based Anti-corruption Commission¹⁷⁸ and the Victorian Ombudsman.¹⁷⁹ However, the platforms used by these agencies are focused more on capturing information from whistleblowers, than providing a user-controlled pathway for engaging with different agencies and support services.

FAIR WORK OMBUDSMAN TIP-OFF SERVICE

In 2016, the Fair Work Ombudsman launched an anonymous tip-off service for employee underpayment cases.¹⁸⁰ This service is leading to positive outcomes for vulnerable workers who may be unwilling to reveal their identity and approach the Ombudsman. More than 20,000 tip-offs alleging potential workplace breaches have been made since the establishment of the service. It is available in 16 languages, which enables working visa holders and international students who are vulnerable to exploitation, to report. More than 800 reports have been made in languages other than English.¹⁸¹

An online reporting platform should provide tailored information about an individual's options and clear pathways for referrals to other agencies for advice and support.

Options for a reporting platform include:

- offering a third party or in-house service
- embedding a version of the platform within willing workplaces
- providing options for anonymous or non-anonymous reports, including different levels of anonymity
- offering referrals to different regulators, depending on the nature of the report and the individual's interest in turning their report into a formal complaint
- options to report information about the industry, organisation or perpetrator
- options to share confidential data with other agencies and researchers to inform systemic responses and understanding of sexual harassment
- options for referrals to counselling and support services.

SEXUAL ASSAULT REPORT ANONYMOUSLY WEBSITE

The Sexual Assault Report Anonymously (SARA) website, run by Melbourne's South Eastern Centre Against Sexual Assault, enables people to report sexual assault and sexual harassment anonymously from anywhere in Australia, seek information or talk to someone about the incident. Up to 30 reports are received per month.

The SARA form is short, requesting information describing the perpetrator, when and where the incident took place and for a reporter to describe in their own words what happened. A reporter has the choice of being contacted by SARA staff for support. The data provided to SARA about serious incidents can be passed on to police all over Australia with any information that identifies the reporter removed.¹⁸²

International best practice suggests that any reporting platforms include:

- an accessible, short and user-designed online form, including a tool that enables a report to be made in the person's own language
- in-person or telephone support and advice
- automatic time and date-stamping
- data-security and confidentiality
- clear information about the platform, how information will be used and who it will be shared with
- clear and tailored referrals to support services.

INFORMATION ESCROW: PROJECT CALLISTO

Launched at two US colleges in 2015, Project Callisto is an online system of reporting devised by public health epidemiologists to enable individuals to report sexual assault and select how their data will be used. Initially designed to enable people to report campus sexual assault, it has since grown to support 13 campuses and, in 2018, expanded to enable reports to be made about the professional industry to address sexual assault and sexual coercion in workplace environments.

A reporter raising an incident creates a secure, encrypted, and time-stamped record about the incident, immediately preserving evidence on their own terms, at a time, place, and pace that is best for them. No one can see the details of a record without the reporter's consent.¹⁸³ The reporter selects when and to which organisation they will release the data. This means that they can elect for the report to be released to support services or the police when another incident of the same type, involving the same person occurs.¹⁸⁴

Our Report Racism pilot¹⁸⁵ shows that adequate funding is essential for designing and piloting an effective online reporting platform, supported by dedicated and skilled staff with capacity to sensitively handle enquiries and reports. Time and cultural awareness are also important for building trust and promoting the platform among target communities. Clear information should be included on the platform about existing service providers, to ensure there is not an unintentional dilution of, or confusion about, different service pathways.

Given the Commission's existing expertise and role in receiving complaints and regulating sexual harassment, we are well-placed to pilot such a platform in Victoria, working in close collaboration with other regulators and key stakeholders. As noted above, the benefit of basing a pilot within the Commission would include enabling anonymous reports to inform investigations and contribute to systemic change and increasing referrals for individuals to specialised support services. Importantly, basing a pilot platform at the Commission would enable reporting of sexual harassment in all areas of public life, not just within the workplace.

RECOMMENDATION 10

The Commonwealth, state and territory governments should provide funding to research, design and pilot online reporting platforms in Australia for victims/survivors of sexual harassment, with a particular focus on addressing a service gap for vulnerable people who may not wish to engage in a complaint process, capturing data and streamlining information, referrals and support.

4.3 Enhancing information and other services

4.3.1 PROVIDING INFORMATION ABOUT AVAILABLE AVENUES FOR REDRESS

Victims/survivors must presently navigate a fragmented system and understanding where to go for help can be a significant barrier to reporting and obtaining redress.

Better information is needed to help victims/survivors understand their rights and the avenues available to them. The Australian Human Rights Commission is well placed to play a leadership role in making this information available for victims/survivors.

Such information should set out the benefits and limitations of initiating action in different jurisdictions and with different regulators. Other key information relates to the cost of initiating action, time limitations, options for representative complaints, the availability of restorative justice and potential outcomes.

RECOMMENDATION 11

The Australian Human Rights Commission should publish guidance to help victims/survivors to understand and navigate the various avenues available to seek redress for sexual harassment.

4.3.2 STRENGTHENING REFERRAL AND WRAP-AROUND SUPPORT SERVICES

Wrap-around support services provide crucial, holistic support to victims/survivors throughout the process of making a complaint. Counselling, practical, emotional and legal supports are key to reduce re-traumatisation and give victims/survivors the best opportunity to achieve a healing, validating and restorative outcome.

The Commission understands from our direct engagement with victims/survivors and discussions with specialist sexual assault services that sexual harassment and sexual assault are often interlinked. Workplace sexual harassment can escalate to sexual assault and, for many people, experiencing or witnessing workplace sexual harassment will

trigger pre-existing trauma from past sexual harassment, sexual assault or child sexual abuse. Specialist sexual assault services are best placed to support victims/survivors in these instances. Accordingly, strong referral relationships to an appropriately resourced and specialised system of sexual assault services are a critical component of a joined-up sector response to sexual harassment in the workplace.

Formal referral protocols and memorandums of understanding should be adopted between regulators, courts and support services to ensure wrap-around supports are accessible prior to, during and following all complaint and court processes. This information should then be made available in all workplaces to help victims/survivors understand the options available to them.

RECOMMENDATION 12

The Commonwealth, state and territory governments should take action to ensure appropriate advocacy and support for people who experience sexual harassment, including access to information, counselling and legal services that are appropriately resourced, specialised and coordinated.

RECOMMENDATION 13

The Australian Human Rights Commission, in partnership with state and territory anti-discrimination commissions, should provide guidance to the sector to support the development of formal referral protocols and memorandums of understanding between regulators, courts and sufficiently specialised support services to ensure wrap-around supports are accessible prior to, during and following all complaint and court processes.

4.4 Supporting workplaces

Workplaces need support and guidance to address sexual harassment. This includes help to unpack and transform often entrenched cultures that tolerate and perpetuate sexual harassment. Our work with employers has shown that the need for support and guidance is often greatest with respect to:

- building a commitment to change across the workforce, especially at leadership
- designing and implementing robust policies, plans and processes
- addressing backlash
- supporting bystanders to act
- embedding high-quality, tailored education and training.

4.4.1 BUILDING A COMMITMENT TO CHANGE

Workplace leaders must embrace change and make the case for change clear. In our experience, tailoring the case for change to individual workforces/industries is key. A key learning of our work with Victoria Police is the power of stories that resonate in embedding the case for change: hearing the first-hand accounts of colleagues; tying the case for change to the identity of workers in the profession; and hearing leaders stand up and acknowledge their own part in enabling permissive cultures.¹⁸⁶

For many organisations, emphasising the economic costs and the impact on profitability will be compelling. While evidence shows that sexual harassment is costly to employers,¹⁸⁷ further Australian-specific research and economic modelling is needed, like KPMG's report on the economic costs of family violence.¹⁸⁸

Research indicates that a large percentage (79 per cent) of women who experience sexual harassment quit their jobs,¹⁸⁹ indicating a significant drain on talent and corporate knowledge, with flow-on economic losses. Resigning is not, however, a feasible option for all victims/survivors. In these cases, the harassment may lead to work withdrawal behaviours, including taking increased sick leave, absenteeism and task avoidance.¹⁹⁰ Addressing harassment can therefore address a range of hidden costs to businesses.¹⁹¹

The risk and fallout from brand damage can also create a 'burning platform' or incentive for change, such as when cases of harassment or the failure to act on patterns of harassment generate media attention or otherwise become public knowledge. US studies suggest that exposure can affect a workplace's ability to attract talent, attract and retain customers and clients and cause those experiencing harm to discourage others from accessing services.¹⁹²

Importantly, for some workplaces, messages that emphasise capability may be more important than impacts on profitability (for example, a need to have one's own home in order to be able to serve the community properly).

4.4.2 ROBUST POLICIES, PLANS AND PROCESSES

A key factor in whether an individual might experience sexual harassment in the workplace is whether their organisation has a comprehensive policy that is understood across the workplace.¹⁹³ Among other things, sexual harassment policies should clearly define prohibited behaviour, recognise protections against victimisation and map internal and external support processes. Workplaces must provide regular training on these policies to ensure they are understood, utilised and effective, and monitor and evaluate their implementation periodically (see Section 4.4.5).

Action plans are key for outlining the practical steps an organisation will take to comply with its positive duty to eliminate sexual harassment. These plans should outline clear and measurable goals, outputs, activities, expected outcomes and accountabilities. They should align the prevention of sexual harassment with the organisation's existing values and be an essential component of the business plan.

Workplaces should build the capacity of managers to ensure policies and procedures are applied consistently and in a timely manner. Managers should also have greater capacity to have conversations with staff about sexual harassment and ensure that the organisation has an accessible and

effective complaints process. A suite of options should be made available to people raising allegations, ranging from supported informal management of an allegation to internal and external complaint and dispute resolution processes, supported by formal referral protocols. Complaint handling must be effectively managed to avoid victimisation of complainants or bystanders.

In addition, effective actions can, and should, be taken at a profession or industry level. Specifically, the Commission recommends that professions or industries:

- develop codes of practice related to sexual harassment and other gender equality issues
- develop communications plans to promote gender equality and awareness of sexual harassment
- identify industry-specific levers for systemic change (for example, tying measurable gender equality goals, including steps to prevent sexual harassment, to accreditation, insurance or continuing professional development requirements).

Anti-discrimination commissions, including ours, should continue to deliver education and consultancy services to support workplaces to review their programs and practices, co-design and undertake high-quality education and consultancy services, develop action plans and undertake projects to create positive workplace cultures and systems.

Greater enforcement powers, as recommended in Section 4.1.1, would enable the Commission to enforce the positive duty in the Equal Opportunity Act, thereby creating greater incentives and accountability for workforces to put effective policies, plans and processes in place.

RECOMMENDATION 14

The Commonwealth, state and territory governments should resource and equip anti-discrimination commissions to:

1. deliver education and consultancy services to help organisations to develop equal opportunity actions plans and implement policies, procedures and projects directed towards addressing sexual harassment and creating positive workplace cultures
2. independently monitor changes to policy and practice promised by organisations in settlement agreements with complainants.

4.4.3 ADDRESSING BACKLASH

Backlash is a common, if not inevitable, feature in social change processes.

Traditional approaches that focus on compliance risk, without considering backlash, can create pockets of entrenched resistance and have limited effectiveness over time.¹⁹⁴ Thus, to achieve the cultural change required to address sexual harassment, workplaces need to put in place appropriate strategies to address backlash.

Workplaces should be supported to develop approaches to address the full spectrum of change-resistant behaviours (for example, subtle and passive behaviours, inaction, aggressive attacks).¹⁹⁵ VicHealth has produced some valuable resources and research to help organisations manage backlash,¹⁹⁶ but there are limited tools and guidance overall. As discussed below, with additional resources the Commission could work with organisations to develop tailored strategies to neutralise backlash.

A better system of accountability is also essential. As outlined at Section 4.1.1 above, this must include giving anti-discrimination commissions strengthened powers and resources to fulfil their regulatory roles and enforce legislative prohibitions against sexual harassment, discrimination and victimisation.

4.4.4 SUPPORTING BYSTANDERS

Mobilising bystanders is an accepted and critical component of preventing and addressing sexual harassment. The 2017 National Community Attitudes Survey found that 76 per cent of people would be bothered by a male friend telling a sexist joke about women, but only 45 per cent of those said they would take action in response.¹⁹⁷ This indicates that there is a critical mass of people who, with support, could call out sexual harassment and help shift the gendered attitudes that drive sexual harassment in workplaces and the community more broadly.

In the workplace, employers can increase bystander knowledge and confidence to address sexual harassment through:

- making a public, organisational commitment to prevent sexual harassment that sends a clear message that bystanders will be supported
- leaders modelling good bystander behaviour
- providing bystander protections within sexual harassment policies
- training for workers so that bystanders understand what constitutes sexual harassment and have practical tools to respond (see Section 4.4.5).

Bystander education and support should be a key feature of sexual harassment prevention and response strategies.

4.4.5 EDUCATION AND TRAINING

Workplaces should provide high-quality, tailored education and training on (in) appropriate workplace behaviour to all workers, embedding this through induction, professional development and performance appraisals. In the Commission's experience, the most effective education programs are developed in partnership with employers and tailored to the characteristics of each workplace.

Workplaces should be supported to develop ongoing change programs that nurture respectful workplace cultures and prevent sexual harassment.

The Commission welcomes the Victorian Government's intent to increase funding to the Commission to provide more education in relation to sexual harassment.¹⁹⁸ This additional funding will help us support employers in educating their workforces about sexual harassment and in supporting them to prevent harassment and identify and respond appropriately when it does occur. It will also enable us to develop tailored, evidence-based education programs, and to refine and tailor evidence-based, human-centred design education programs, like Raise It! to support workplaces to address sexual harassment and build greater workplace equality.

Effective education programmes encourage reflection on strategies at every level of an organisation, address backlash and provide messages supportive of bystanders. The programmes are evaluated regularly to ensure that, among other things, they challenge and track changes in underlying gender attitudes, make clear that sexual harassment

is unacceptable and equip workers to feel supported to discuss sexual harassment and act when they experience or witness it. Building ongoing collaborative, cross-organisation structures to manage change processes and responsibility for addressing harassment in the workplace is also key.

4.5 Addressing the heightened vulnerability of certain groups

Research shows that certain groups of people experience a heightened risk of sexual harassment, although more research is needed to understand the specific experiences and risks of different groups (see Section 2.4).

An intersectional approach to the national inquiry will help to ensure that any recommendations appropriately address the experiences and needs of diverse groups. In adopting this approach, the Commission urges the Australian Human Rights Commission to consider making recommendations for further research to better understand sexual harassment against diverse and marginalised groups, and their experiences of intersectional discrimination.

The Commission also encourages workplaces to take steps to reduce the vulnerability of employees from diverse and marginalised groups. For instance, by implementing strategies to create more diverse workplaces, ensuring training and strategies regarding sexual harassment are inclusive, and ensuring reporting and complaint pathways are accessible to all staff. Given intersectional discrimination can compound barriers to reporting sexual harassment, complementary strategies are also essential, including strengthening external complaint systems, external piloting anonymous reporting and supporting bystanders (see Sections 2.8, 4.2.4 and 4.4.4).

The Commission also supports broader reforms to improve the rights of people from diverse and marginalised backgrounds, which may reduce their risk of sexual harassment and improve the responses they receive. Such reforms include:

- recognition in the Victorian Charter of a standalone right to self-determination for Aboriginal and Torres Strait Islander people¹⁹⁹
- amending the Equal Opportunity Act to better recognise and protect people with non-binary genders and intersex status, specifically amending the definition of ‘gender identity’ to recognise people who identify as a non-binary gender and explicitly recognising intersex status as a protected attribute²⁰⁰
- amending religious exceptions in the Equal Opportunity Act to better protect LGBTI people from discrimination by religious bodies in the context of their employment
- amending the Equal Opportunity Act to recognise that people, especially those who are most marginalised, may suffer intersectional discrimination or inequality by virtue of their sex and other characteristics, such as race, religious belief or activity, age, disability, sexual orientation or gender identity.

RECOMMENDATION 15

The Australian Human Rights Commission should make recommendations for further tailored research to better understand sexual harassment against marginalised and diverse groups, and their experience of intersectional discrimination.

Notes

- 1 Victorian Equal Opportunity and Human Rights Commission, *Guideline: Sexual harassment; Complying with the Equal Opportunity Act 2010* (State of Victoria, 2nd ed, 2014).
- 2 Victorian Equal Opportunity and Human Rights Commission, *Independent review into sex discrimination and sexual harassment, including predatory behaviour in Victoria Police: Phase one report* (State of Victoria, 2005) (Phase one report into Victoria Police); Victorian Equal Opportunity and Human Rights Commission, *Independent review into sex discrimination and sexual harassment, including predatory behaviour, in Victoria Police: Phase 2 audit* (State of Victoria, 2017) (Phase two report into Victoria Police).
- 3 *Collins v Smith* [2015] VCAT 1992.
- 4 In collecting data, the Commission counts both 'complaints' (where a complainant may allege more than one respondent subjected them to sexual harassment. For example, a complainant may claim sexual harassment by their employer (vicarious liability) and two individuals, giving rise to three separate complaints) and 'complainants' (individuals making one or more complaints of sexual harassment). The employer and individual respondent(s) may participate in dispute resolution jointly or separately.
- 5 Minister for Police and Emergency Services, 'Supporting victims as part of Victoria Police reforms' (Media release, 20 October 2018).
- 6 Australian Human Rights Commission, *National report on sexual assault and sexual harassment at Australian universities* (Australian Human Rights Commission, 2017) 11.
- 7 Meredith Horne, 'Medical students call for clearer pathways for reporting sexual assault', Australian Medical Association (10 October 2017) <<https://ama.com.au/ausmed/medical-students-call-clearer-pathways-reporting-sexual-assault>>.
- 8 See for example Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (Australian Human Rights Commission, 2018) (AHRC survey) 8, 21-23, 27-30; Paula McDonald, 'Workplace sexual harassment 30 years on: A review of the literature' (2012) 14(1) *International Journal of Management Reviews* 1, 7; Our Watch, *Changing the picture: A national resource to support the prevention of violence against Aboriginal and Torres Strait Islander women and their children* (Our Watch, 2018); Lauren Krnjacki, Eric Emerson, Gwynnyth Llewellyn et al, 'Prevalence and risk of violence against people with and without disabilities: Findings from an Australian population based study' (2016) 40(1) *Australian and New Zealand Journal of Public Health* 16; Sandra L Fielden et al, 'A model of racialized sexual harassment of women in the UK workplace' (2010) 62(1) *Sex Roles* 20.
- 9 AHRC survey, *ibid*, 21, 27; McDonald, *ibid*.
- 10 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature on 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) (CEDAW).
- 11 Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 on gender-based violence against women, updating General Recommendation No 19*, 67th sess, UN Doc CEDAW/C/GC/35 (14 July 2017) (General Recommendation No 35) paras 1-2; *General Recommendation No 19: Violence against Women*, as contained in *Report of the Committee on the Elimination of Discrimination against Women: Eleventh Session*, UN GAOR, 47th sess, Supp No 38, UN Doc A/47/38 (1993) (General Recommendation No 19) paras 6, 17-18.
- 12 General Recommendation No 19, *ibid*, para 18.
- 13 *Ibid* para 17.
- 14 See General Recommendation No 35 (n 11), para 2.
- 15 See, eg, United States Department of Defence, *Annual report on sexual assault in the military, fiscal year 2016* (May 2017) 15; Christy Mallory, Amira Hasenbush and Brad Sears, 'Discrimination against law enforcement officers on the basis of sexual orientation and gender identity: 2000-2013' (The Williams Institute at the UCLA School of Law, November 2013) 5; AHRC survey (n 8), 21, 28.
- 16 Phase one report into Victoria Police (n 2), 71.
- 17 *Ibid* 90-91.
- 18 See, for example, Australian Human Rights Commission, 2018 (n 8), 32-35; McDonald (n 8), 7.
- 19 A complainant may make a complaint against their employer as having primary responsibility for ensuring the workplace is free from sexual harassment, discrimination and victimisation. They can also make a complaint against one or more persons who are alleged to have subjected them to sexual harassment. In sexual harassment complaints a complainant may refer to individual co-workers as being responsible for the sexual harassment but do not name them as an individual respondent to a complaint and choose to engage in dispute resolution only with their employer. In a high proportion of cases of sexual harassment where the individual person responsible for the sexual harassment is not named as a respondent, they are predominately males.
- 20 Phase one report into Victoria Police (n 2), 86.
- 21 See Esther K Choo et. al., 'From #MeToo to #TimesUp in health care: Can a culture of accountability end inequity and harassment?' (2019) 393 (10171) *The Lancet* 499, 499.
- 22 Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: The experiences of female lawyers in Victoria* (State of Victoria, 2012) (Changing the rules) 37.
- 23 See for example Kathi Miner-Rubino, 'Beyond targets: consequences of vicarious exposure to misogyny at work' (2007) 92 *Journal of Applied Psychology* 1254; Gina Vega and Debra R Comer, 'Sticks and Stones May Break Your Bones But Words Can Break Your Spirit: Bullying in the

- Workplace' (2005) 58 *Journal of Business Ethics* 101; Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australian Workplaces* (3rd edition) (2016); Darius K-S Chan et al, 'Examining the job-related, psychological, and physical outcomes of workplace sexual harassment: a meta-analytic review' (2008) 32 *Psychology of Women Quarterly* 362.
- 24 Victor Sojo, Robert E Wood and Anna E Genat, 'Harmful workplace experiences and women's occupational wellbeing: A meta-analysis' (2016) 40 *Psychology of Women Quarterly* 10, 14. Notably, this research also found that frequent, 'low intensity' sexual harassment (such as jokes or subtle comments) can be equally harmful as infrequent, severe forms of sexual harassment, 23.
- 25 Chan (n 23).
- 26 Commissioner Hilton convenes the Fire and Emergency Male Champions of Change. See generally Male Champions of Change Fire and Emergency, Progress Report 2017-18 (2018).
- 27 Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth, *Change the story: A shared framework for the primary prevention of violence against women and their children in Australia* (Our Watch, 2015) 6, 8.
- 28 Rebecca J. Cook, 'Structures of discrimination' (2012) 28(1) *Macalaster International* 33, 33.
- 29 General Recommendation No 35 (n 11), para 19.
- 30 Ibid.
- 31 Kim Webster et al, *Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS) Research report*, 03/2018 (ANROWS, 2018) 5.
- 32 Ibid 86.
- 33 Ibid 71.
- 34 Ibid 119.
- 35 Ibid 89.
- 36 Changing the rules (n 22), 30.
- 37 Ibid.
- 38 Ibid 31.
- 39 Ibid 32.
- 40 Ibid 19.
- 41 Ibid 35.
- 42 Ibid.
- 43 Vicki Schultz, 'Reconceptualizing Sexual Harassment, Again' (2018-2019) 128 *The Yale Law Journal Forum* 22, 49-50.
- 44 Ibid 48, 50.
- 45 Phase one report into Victoria Police (n 2), 285.
- 46 US Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace, *Report of Co-Chairs Chair R Feldblum and Victoria A Lipnic* (June 2016), 24-25.
- 47 Expert Advisory Group on discrimination, bullying and sexual harassment, *Report to the Royal Australasian College of Surgeons* (2015) 6.
- 48 Ibid 4.
- 49 Ibid.
- 50 Ibid.
- 51 Ibid.
- 52 Ibid, 13. See also 5 and 8.
- 53 See for example Aisha Dow and Anthony Colangelo, 'Exploitation and abuse of female doctors may be getting worse', *The Age* (Melbourne, 12 February 2019); Meredith Horne, 'Medical students call for clearer pathways for reporting sexual assault', Australian Medical Association (10 October 2017) <<https://ama.com.au/ausmed/medical-students-call-clearer-pathways-reporting-sexual-assault>>. See generally Esther K Choo et. al., 'From #MeToo to #TimesUp in health care: Can a culture of accountability end inequity and harassment?' (2019) 393 (10171) *The Lancet* 499, 499.
- 54 Our Watch 2015 (n 27).
- 55 Australian Human Rights Commission, 2018 (n 8), 73.
- 56 US Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the workplace, *Report of Co-Chairs Chair R Feldblum and Victoria A Lipnic* (June 2016), 12-13; Sandra L Fielden et al, 'A model of racialized sexual harassment of women in the UK Workplace' (2009) 62(1) *Sex Roles* 20, 28, 31; *Royal Commission into Family Violence: Report and recommendations* (Report, March 2016), vol v, 183-184.
- 57 *Sex Discrimination Act 1984* (Cth) s 28B.
- 58 *Equal Opportunity Act 2010* (Vic) s 3(a).
- 59 *Equal Opportunity Act 2010* (Vic) sub-s 3(d).
- 60 *Equal Opportunity Act 2010* (Vic) ss 44, 98-102.
- 61 *Equal Opportunity Act 2010* (Vic) sub-s 92(1).
- 62 *Equal Opportunity Act 2010* (Vic) sub-s 92(2).
- 63 *Hall v A. & A Sheiban Pty Ltd* [1989] FCA 74, [40, [43].
- 64 *Frith v The Exchange Hotel* [2005] FMCA 402.
- 65 *Equal Opportunity Act 2010* (Vic) ss 93-97.
- 66 *Equal Opportunity Act 2010* (Vic) s 98.
- 67 *Equal Opportunity Act 2010* (Vic) s 99. Individuals may be protected from sexual harassment by clients, customers or others they interact with in the provision of goods and services.
- 68 *Equal Opportunity Act 2010* (Vic) s 100.
- 69 *Equal Opportunity Act 2010* (Vic) s 101.
- 70 *Equal Opportunity Act 2010* (Vic) s 102.
- 71 *Equal Opportunity Act 2010* (Vic) s 93.
- 72 *Equal Opportunity Act 2010* (Vic) s 93.
- 73 *Equal Opportunity Act 2010* (Vic) s 95.
- 74 *Equal Opportunity Act 2010* (Vic) s 97.
- 75 *Equal Opportunity Act 2010* (Vic) s 96.
- 76 *Equal Opportunity Act 2010* (Vic) s 94.

- 77 *Equal Opportunity Act 2010* (Vic) ss 93-94.
- 78 *Equal Opportunity Act 2010* (Vic) s 4. However, we note that volunteers and unpaid workers are not otherwise considered 'employees' under the Act and are therefore not protected from discrimination.
- 79 *Equal Opportunity Act 2010* (Vic) sub-s 94(3). See also *Collins v Smith* [2015] VCAT 1029; *GLS v PLP* [2013] VCAT 221; *Cooper v Western Area Local Health Network* [2012] NSWADT 39.
- 80 *Equal Opportunity Act 2010* (Vic) s 15.
- 81 *Equal Opportunity Act 2010* (Vic) s 103.
- 82 *Equal Opportunity Act 2010* (Vic) s 104.
- 83 *Lazos v Australian Workers Union & Anor* [1999] VCAT 635.
- 84 *Equal Opportunity Act 2010* (Vic) sub-s 15(2).
- 85 Julian Gardner, *An equality act for a fairer Victoria: Equal opportunity review final report* (State of Victoria, 2008) [1.97].
- 86 *Equal Opportunity Act 2010* (Vic) sub-s 15(6).
- 87 Gardner (n 85), 14-19.
- 88 *Ibid* 110.
- 89 *Equal Opportunity Act 2010* (Vic), s 15.
- 90 *Equal Opportunity Amendment Bill 2011* (Vic).
- 91 *Equal Opportunity Act 2010* (Vic) sub-s 15(3).
- 92 *Equal Opportunity Act 2010* (Vic) sub-s 15(4), pt 9 and s 127.
- 93 *Ingram v QBE Insurance* [2015] VCAT 1936.
- 94 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.
- 95 *Charter of Human Rights and Responsibilities Act 2006* (Vic) sub-s 8(3).
- 96 The CEDAW Committee has explained that: '[i]ntersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2 [of CEDAW]. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures...': Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the core obligations of states parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) para 18.
- 97 *Equal Opportunity Act 2010* (Vic) ss 93(1), 104.
- 98 *Equal Opportunity Act 2010* (Vic) s 93(2).
- 99 *Equal Opportunity Act 2010* (Vic) s 109.
- 100 *Equal Opportunity Act 2010* (Vic) ss 109-110.
- 101 See, eg, *Zareski v Hannanprint Pty Ltd* (No 2) [2012] NSWADT 65 [4] (approving a proposal by the employer that a detailed process for investigating complaints would constitute reasonable precautions for avoiding liability).
- 102 *Cooper v Western Area Local Health Network* [2012] NSWADT 39, [82]-[85].
- 103 *Fair Work Act 2009* (Cth) s 351.
- 104 *Fair Work Act 2009* (Cth) ss 341(1), 342.
- 105 *Fair Work Act 2009* (Cth) s 351(1).
- 106 *Occupational Health and Safety Act 2004* (Vic) sub-s 21(1).
- 107 *Occupational Health and Safety Act 2004* (Vic) sub-s 21(2).
- 108 *Occupational Health and Safety Act 2004* (Vic) sub-ss 25(1), (2).
- 109 See, eg, *Model Work Health and Safety Bill 2016* (Cth) and *Model Work Health and Safety Regulations 2016* (Cth), which do not define sexual harassment or set out the requirements on duty holders to prevent sexual harassment.
- 110 See the proposed Convention, Ending violence and harassment in the world of work in International Labour Organization, *Report V(1)*, International Labour Conference, 108th sess, 2019, 5, 15 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_637108.pdf>.
- 111 *Equal Opportunity Act 2010* (Vic) s 6.
- 112 *Equal Opportunity Act 2010* (Vic) s 120.
- 113 *Equal Opportunity Act 2010* (Vic) ss 113, 114.
- 114 *Ibid*.
- 115 *Equal Opportunity Act 2010* (Vic) s 123.
- 116 *Equal Opportunity Act 2010* (Vic) s 122.
- 117 Under section 116 of the *Equal Opportunity Act 2010* (Vic), the Commission has discretion to decline to provide dispute resolution regarding complaints where an alleged incident of sexual harassment, discrimination or victimisation occurred more than 12 months before the dispute was brought. In practice, this discretion is almost never used and historic complaints are accepted and conciliated.
- 118 *Equal Opportunity Act 2010* (Vic) s 120.
- 119 *Equal Opportunity Act 2010* (Vic) ss 155, 156.
- 120 During the last financial year, the Commission provided 77 education sessions covering sexual harassment, including specialised sexual harassment education packages, reaching 2,023 people across a range of levels in public and private sector organisations.

- 121 See, eg, Our Watch 2015 (n 27); VicHealth, *Preventing violence before it occurs: A framework and background paper to guide the primary prevention of violence against women in Victoria* (2007); UN Women, *A framework to underpin action to prevent violence against women* (2015); Iris Bohnet, *What works: Gender equality by design* (Belknap Press, 2016).
- 122 European Institute for Gender Equality, *Effective gender equality training: Analysing the preconditions and success factors. Synthesis report* (Publications Office of the European Union, 2016).
- 123 See Bohnet (n 121); VicHealth, *Generating equality and respect. A world-first model for the primary prevention of violence against women. Full evaluation report* (Victorian Health Promotion Foundation, 2016).
- 124 *Equal Opportunity Act 2010* (Vic) s 3.
- 125 Gardner (n 85), 110.
- 126 In formulating the Victorian positive duty, the Gardner report drew on positive duties that have been introduced in jurisdictions such as the United Kingdom and Northern Ireland in order to achieve substantive equality: Gardner, *ibid*.
- 127 However, it was envisioned that it would not be necessary for the Commission to have undertaken an investigation or inquiry prior to accepting an enforceable undertaking. See Gardner, *ibid*; *Equal Opportunity Bill 2010* (Vic) 129.
- 128 Gardner, *ibid*; *Equal Opportunity Bill 2010* (Vic) s 133.
- 129 *Equal Opportunity Amendment Bill 2011* (Vic).
- 130 Gardner (n 85).
- 131 *Equal Opportunity Act 2010* (Vic) s 127. As a result of these barriers, including the need for significant evidence to initiate an investigation, the positive duty to eliminate sexual harassment has not yet been subject to an investigation by the Commission.
- 132 *Equal Opportunity Act 2010* (Vic) ss 130-131.
- 133 *Equal Opportunity Act 2010* (Vic) s 139.
- 134 Gardner (n 85), 125.
- 135 The proposed threshold for a public inquiry would be that there is a matter related to the operation of the Act (a) that raises an issue that is serious in nature (b) that relates to a class or group of persons and (c) the Commission considers a public inquiry to be in the public interest.
- 136 The proposed threshold for an investigation would be that there is a matter related to the operation of the Act (a) that raises an issue that is serious in nature (b) that indicates a possible contravention of the Act and (c) the Commission has a reasonable expectation that the matter relates to a class or group of persons.
- 137 *Ibid* 125-126.
- 138 *Ibid* 126.
- 139 *Ibid* 126, 128.
- 140 For example, in 2014, the EHRC commenced an investigation into unlawful discrimination, harassment and victimisation of employees by the Metropolitan Police Service (MPS). The investigation was launched in response to concerns about the MPS's treatment of minority ethnic female and same-sex attracted officers. The EHRC found that, although it was not possible to establish a breach of the equality legislation on the evidence available, there were significant instances of poor practice in relation to, among other things, data collection and retention and internal dispute handling.
- 141 *Equality Act 2006* (UK) ss 20-21, 31, 32, 23. NB: The UK Equality Duty in section 149 of the *Equality Act 2010* (UK) is currently limited to the public sector. However, the UK Equality and Human Rights Commission recently recommended that the UK Government introduce a duty on all employers to protect workers from harassment and victimisation in the workplace. See Equality and Human Rights Commission, *Turning the tables: Ending sexual harassment at work report* (2018) 13.
- 142 *Equality Act 2006* (UK) s 16. See also *Discrimination Act 2008* (Sweden) ch 3, ss 6, and ch 4; and *Employment Equity Act 1995* (Canada) ss 5, 10, 25, 27 and 31. Sweden's anti-discrimination legislation requires employers to 'take measures to prevent and hinder any employee being subjected to harassment or reprisals associated with sex, ethnicity, religion or other belief, or to sexual harassment' and provides the Swedish Equality Ombudsman with a range of compulsion and enforcement powers, including the power to compel an employer to meet with the Ombudsman and provide information, documents and workplace access to the Ombudsman, as well as powers to impose a financial penalty for non-compliance or bring a court action on behalf of an individual. See also sections 1 to 13, which impose enforceable duties on employers to take a range of other specific, active measures to prevent discrimination and harassment, including for example to promote equal rights and opportunities in working life; promote gender balance and diversity in recruitment; ensure working conditions are suitable regardless of sex (and other attributes); help workers to combine paid work and parenthood; and take steps to discover, remedy and prevent unfair gender differences in pay. Pursuant to section 13, all employers (save for those with fewer than 25 employees) are required to draw up a Gender Equality Plan every three years detailing how the employer will implement the various requirements under chapter 3, including the requirement to prevent sexual harassment, and provide an account on what implementation has taken place on these issues in the previous three years. Under Canadian legislation, all employers have a duty to identify and eliminate employment barriers that result from the employer's employment systems, policies and practices and are not authorised by law. To enforce this duty, compliance officers can negotiate written undertakings to remedy non-compliance and, in the event of a breach of

- or failure to give an undertaking, the Canadian Human Rights Commission can issue a compliance direction which is enforceable at the Employment Equity Tribunal. Compliance is also supported by legislative requirements on employers to develop 'Employment Equity Plans' with numerical goals, and routinely monitor, document and review implementation of these plans. Private sector employers must also report annually to the Minister on various equity measures, with a copy of the report being provided to the Canadian Human Rights Commission.
- 143 Equality and Human Rights Commission, *Hidden in plain sight: Inquiry into disability-related harassment*, (Equality and Human Rights Commission, 2011).
- 144 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Belinda Smith, 'It's About Time - For a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 5, 117.
- 145 *Equal Opportunity Act 2010* (Vic) ss 156-157.
- 146 *Equal Opportunity Act 2010* (Vic) Part 6; s 6(o); Part 4, Div 1; s 111.
- 147 *Equal Opportunity Act 2010* (Vic) s 111.
- 148 *Equal Opportunity Act 2010* (Vic) Part 8, Div 2.
- 149 *Equal Opportunity Act 2010* (Vic) Part 3.
- 150 *Equal Opportunity Act 2010* (Vic) ss 156-157.
- 151 The Commission would need to satisfy the criteria for an investigation including that the issue is serious in nature and relates to a class or group of persons as per section 127 of the current Act. Proposed clause 127 of the Equal Opportunity Bill 2010 provided that the Commission could conduct an investigation into any matters relating to the operation of the Act that 'indicates a possible contravention' of the Act, rather than the stricter 'reasonable grounds to suspect' a contravention of the Act in the current legislation. Further, the Act currently requires that the matter 'cannot reasonably be expected to be resolved by dispute resolution or by making an application to the Tribunal', which was not a requirement of clause 127 of the Equal Opportunity Bill 2010. The Commission recommends that the criteria in clause 127 of the Equal Opportunity Bill 2010 replace the current section 127 of the Act.
- 152 Under section 162(1)(d) of the Act, the board is responsible for deciding if the Commission should conduct an investigation. The Commission recommends that this requirement is removed from the Act to enable it to conduct investigations quickly as required in the circumstances.
- 153 *Equal Opportunity Act 2010* (Vic) s 129 and Equal Opportunity Bill 2010 cl 130.
- 154 Equal Opportunity Bill 2010 cl 132. Under the current Act, the Commission may ask for information to assist with an investigation, however, it cannot compel production of information or documents without going to the Tribunal for an order as per sections 130–131.
- 155 Under section 15(4) of the Act, a contravention of the duty may be subject to an investigation by the Commission.
- 156 *Equal Opportunity Act 2010* (Vic) s 139(2)(b).
- 157 Under clause 144 and 145 of the Equal Opportunity Bill 2010 the Commission may accept a written undertaking from a person which can be recorded on a register that is available to the public.
- 158 Equal Opportunity Bill 2010 cl 146.
- 159 Equal Opportunity Bill 2010 cl 147.
- 160 Ibid, cl 128(1). See also cl 15(4), providing that a contravention of the positive duty may be the subject of an investigation or inquiry. Clause 128(2) sets out the proposed criteria for a public inquiry. For example, clause 128(2) required the Commission to obtain consent from the Attorney-General to conduct a public inquiry. However, the Gardner Review (n 89) did not recommend that Attorney-General consent be required. In our recommendations, the Commission proposes that it be required to seek board consent (rather than Attorney-General consent) for reasons consistent with recommendation 91 of the Gardner Report.
- 161 Ibid, cl 131.
- 162 Ibid, cl 140.
- 163 Under section 151 of the Act, the Commission can enter into an agreement with a party who has requested a review, including to recover 'reasonable costs'. The Commission does not, however, have the ability to recover costs from organisations it investigates.
- 164 *Equal Opportunity Act 2010* (Vic) s 125.
- 165 *Equal Opportunity Act 1984* (WA), s 127(b)(i) caps damages at \$40,000, *Anti-discrimination Act 1977* (NSW) s 108 caps damages at \$100,000, *Anti-Discrimination Act 1992* (NT) s 88(b) caps damages in accordance with regulations, currently \$60,000
- 166 See, eg, *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82. In this case, the judge awarded \$30,000 in damages for economic loss and \$100,000 for pain and suffering. In the Victorian matter of *Collins v Smith* (Human Rights) [2015] VCAT 1992, the Tribunal awarded \$332,280, which included general damages of \$180,000 and aggravated damages of \$20,000.
- 167 *Equal Opportunity Act 2010* (Vic) s 116.
- 168 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), sch 1, ss 18, 66K.
- 169 *Australian Human Rights Commission Act 1986* (Cth), sub-s 46PH(1)(b).
- 170 See, eg, *Fair Work Act 2009* (Cth) s 544.
- 171 Victorian Labor Party, Election Platform (2018).
- 172 Paula McDonald and Sara Charlesworth, *Academic evidence on the causes, manifestations and responses to workplace sexual harassment; Initial submission to the Australian Human Rights Commission's National Inquiry in Australian Workplaces* (2019) 21.

- 173 The Commission presently produces an annual report setting out data pertaining to the nature and extent of discrimination, sexual harassment and victimisation complaints conciliated in a given financial year in Victoria. We also maintain a register of de-identified conciliated cases on our website.
- 174 New Zealand Law Society, *Report of the New Zealand Law Society Working Group to enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession* (2018) 28.
- 175 See for example Cal Civ Code §1001 (2019), and Wash Rev Code § 49.44.210 (2018).
- 176 United Kingdom Equality and Human Rights Commission, *Turning the tables: ending sexual harassment at work* (Mar 2018) 16, 17. <<https://www.equalityhumanrights.com/en/publication-download/turning-tables-ending-sexual-harassment-work>>
- 177 *Equal Opportunity Act 2010* (Vic) s 176.
- 178 Independent Broad-based Anti-Corruption Victoria, Reporting tool <<https://www.ibac.vic.gov.au/reporting-corruption/report/provide-information>>.
- 179 Victorian Ombudsman, <<https://www.ombudsman.vic.gov.au/Complaints/Make-a-Complaint/Complaint-Form.aspx#page=1.html>>.
- 180 Fair Work Ombudsman, Anonymous Report Tool, <<https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/anonymous-report>>.
- 181 Fair Work Ombudsman, '20,000 tip-offs shine a light on dodgy workplaces' (Media release, 23 February 2018).
- 182 S.A.R.A *Sexual Assault Report Anonymously* <<https://www.sara.org.au/>>.
- 183 Callisto, *Year 3 of Combatting Sexual Assault, Empowering Survivors and Advancing Justice*, 2017-2018 academic year report, (2018), p 5. <https://www.projectcallisto.org/Callisto_Year_3_final.pdf>
- 184 Callisto, *ibid* 10; Anjana Rajan, Lucy Qin, David Archer et al, *Callisto: A cryptographic approach to detect serial predators of sexual misconduct* (2018) 2, 3.
- 185 Victorian Equal Opportunity and Human Rights Commission, *Report racism trial: Outcomes report*, <<https://www.humanrightscommission.vic.gov.au/images/files/Report%20Racism%20trial%20-%20outcomes%20report.pdf>>.
- 186 Phase two report into Victoria Police (n 2), 36.
- 187 For example, one US study estimates that sexual harassment claims costed an organisation on average \$22,500 person in terms of productivity alone. Chelsea R Willness et al, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60 *Personnel Psychology* 127, 151. See also: Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31(3) *Gender and Society* 333.
- 188 KPMG, *The cost of family violence in Victoria, Summary report* (May 2017).
- 189 McLaughlin, Uggen and Blackstone (n 187).
- 190 Chelsea R Willness, Piers Steel and Kibeom Lee, 'A meta-analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60 *Personnel Psychology* 127, 137.
- 191 Donna Chung et al, *Preventing violence against women in the workplace. An evidence review: Full report* (VicHealth, 2012) 22.
- 192 US Equal Employment Opportunity Commission (n 46), 22-24.
- 193 *Ibid*.
- 194 *Ibid*.
- 195 VicHealth, *(En)countering resistance: Strategies to respond to resistance to gender equality initiatives* (2018) 3, 4.
- 196 *Ibid* 10.
- 197 Webster (n 31) 13.
- 198 Victorian Labor Party (n 171) 17.
- 199 See *United Nations Declaration on the Rights of Indigenous Peoples*, adopted on 13 September 2007, UN Doc A/RES/61/295 art. 3.
- 200 See *Sex Discrimination Act 1984* (Cth) ss 4, 5C.