

EVERY WORKER'S RIGHT.  
EVERY EMPLOYER'S DUTY.

Submission of Gordon Legal  
to the  
National Inquiry into Sexual  
Harassment in Australian Workplaces

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28 February 2019

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Gordon  
Legal

IT'S PERSONAL

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**SUBMISSION OF GORDON LEGAL TO THE**  
**NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES**

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## **EVERY WORKER'S RIGHT. EVERY EMPLOYER'S DUTY.**

### **SUBMISSION OF GORDON LEGAL TO THE NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES**

#### **PRELIMINARY**

1. Gordon Legal welcomes the opportunity to make a submission to the National Inquiry into Sexual Harassment in Australian Workplaces.

#### ***About Gordon Legal***

2. Gordon Legal was founded in Melbourne in 2010 by Peter Gordon and relaunched as a new full-service labour law firm in March 2018. The firm is deeply committed to the rights and interests of vulnerable workers. Our practitioners have decades of experience at the forefront of plaintiff law and workers' rights litigation. Our work in the field of anti-discrimination law, including sexual harassment, complements our experience of representing the vulnerable in numerous other fields, including litigation relating to asbestos, sexual abuse in religious institutions and thalidomide.
3. We are keen to share our experiences and observations. In this submission, we have tried to adopt a practical, rather than an academic, approach to the terms of reference. Where we have suggested law reform, we consider that the initiatives are not only desirable but also achievable. All our Recommendations support the central principle that a sexual harassment-free workplace is every worker's<sup>1</sup> right and every employer's<sup>2</sup> duty.

#### **RECOMMENDATIONS**

4. We have made 24 Recommendations, which we list below.
  - (i) Workplace training should make it clear that sexual harassment may be manifested in a number of ways, with clear explanation that a hostile work environment is unacceptable.
  - (ii) Information points, including websites, should not classify sexual harassment in such a way as to generate the impression that it is always a sub-species of sex discrimination.

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<sup>1</sup> In this submission, this term includes volunteers.

<sup>2</sup> In this submission, we have used the term 'employer' to include all providers of work, whether via a conventional contract of service or otherwise.

- (iii) Judicial officers and tribunal members, including in industrial tribunals, should receive training in the parameters of the definition of sexual harassment and in the importance of rejecting the tendency to normalise or excuse sexual banter or sexually charged language in the workplace.
- (iv) Medical practitioners and related professions should receive training in the parameters of the definition of sexual harassment and in the importance of rejecting the tendency to normalise or excuse sexual banter or sexually charged language in the workplace.
- (v) To avoid doubt, the definition of “*conduct of a sexual nature*” should be amended to include material posted, communicated or otherwise published on social media.
- (vi) More funding should be provided for targeted, accessible sources of information and for dissemination of information in community languages.
- (vii) More funding should be provided to community legal centres and via legal aid to facilitate not only advice, but also litigation.
- (viii) The complaint Form should be streamlined to separate complaints of ‘*unlawful discrimination*’ and complaints of ‘*human rights breaches and discrimination in employment under the ILO convention*’ so as to minimise the danger of confusion.
- (ix) The time frame within which the President of the Commission may decide not to investigate a complaint alleging unlawful discrimination should be extended to 6 years.
- (x) The complaint Form should either dispense with the need for a proposal for resolution or make it clear that the articulation of a proposal for resolution may be deferred until a complainant has seen the material proffered by a respondent. In any case, it should be made clear that the articulation in the complaint does not limit the complainant’s ability to modify the proposal in future.
- (xi) The provisions concerning bringing a complaint and making an application should be harmonised.
- (xii) It should be made clear that interest groups and unions are entitled to make both complaints and applications.
- (xiii) Volunteers should be protected from sexual harassment.
- (xiv) Workers should be protected from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment.

- (xv) The SDA (and all Commonwealth anti-discrimination laws) should be amended to ensure that the anti-victimisation provisions may be used without fear of jurisdictional challenge.
- (xvi) Costs should be governed by provisions similar to those in s 570 of the FWA, which limits circumstances in which a party may be ordered to pay costs to (essentially, for present purposes) initiation of proceedings vexatiously or without reasonable cause, or where there has been an unreasonable act or omission resulting in the incurring of costs by the other party.
- (xvii) The scope of s 106(2) SDA should be expanded to ensure that the taking of reasonable steps includes providing potential targets of sexual harassment with education and information about inappropriate workplace behaviour.
- (xviii) There should be a focus on capacity building among employers. Legislative guidance should be provided, by way of action plans and compliance codes for the taking of reasonable steps. Legislative provision should be made for adherence to an action plan to be taken into account in deciding whether reasonable steps were taken and for adherence to a compliance code to constitute the taking of reasonable steps.
- (xix) Employers should be obliged to provide a prescribed Information Statement to workers, summarising key principles concerning unlawful discrimination (including sexual harassment), similar to the model established under the *Fair Work Act 2009* (Cth) (FWA) for dissemination of a Fair Work Information statement.
- (xx) Guidelines should be established by the AHRC to ensure that investigations by legal practitioners into sexual harassment do not operate as cloaking devices. In particular, there should be no reliance on an exculpatory report or conclusions unless all information upon which reliance is placed is available to the complainant.
- (xxi) Guidelines should be established by the AHRC to provide that, if an employer relies upon privacy concerns to deny a complainant access to information, a clear explanation should be given identifying which privacy principles or criteria were considered relevant, so that a complainant may obtain advice about the matter.
- (xxii) If an employer provides EAP services, workers should be given a choice between an EAP contracted to the employer or reimbursement of fees paid to similar support services selected by the worker.
- (xxiii) An independent enforcement agency, similar to the Fair Work Ombudsman, should be established, for the purpose of conducting litigation on behalf of workers in sexual harassment cases.

- (xxiv) The AHRC should have power to investigate suspected cases of sexual harassment without the need for an individual complaint and to refer such cases to the enforcement agency, where it considers there to be a reasonably arguable basis for action.

## THE TERMS OF REFERENCE (TOR)

5. For ease of reference, we have allotted numbers to the TOR as follows:

- (i) a national survey of the prevalence, nature and reporting of sexual harassment in Australian workplaces, by sector
- (ii) online workplace-related sexual and sex-based harassment and the use of technology and social media to perpetrate workplace-related sexual and sex-based harassment
- (iii) the use of technology and social media to identify both alleged victims and perpetrators of workplace-related sexual harassment
- (iv) the drivers of workplace sexual harassment, including whether:
  - some individuals are more likely to experience sexual harassment due to particular characteristics including gender, age, sexual orientation, culturally or linguistically diverse background, Aboriginal and/or Torres Strait Islander status or disability
  - some workplace characteristics and practices are more likely to increase the risk of sexual harassment
- (v) the current legal framework with respect to sexual harassment
- (vi) existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally the impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers compensation claims, employee turnover and absenteeism, and
- (vii) recommendations to address sexual harassment in Australian workplaces.

## TOR (i) A NATIONAL SURVEY OF THE PREVALENCE, NATURE AND REPORTING OF SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES, BY SECTOR

### *The tip of the iceberg*

6. As to prevalence and reporting of sexual harassment, we are confident that what we see as lawyers is the tip of a very large iceberg, and that sexual harassment is severely under-reported, for reasons including those set out below.

### *Self-silencing - the disempowered non-complainer*

7. Of those workers who do contact us, it is relatively common for them to self-silence. Many have not told their employer about their experiences, for fear of being labelled as overly sensitive or as troublemakers. There is a tendency to appease<sup>3</sup> or to go along with the inappropriate behaviour rather than jeopardise employment<sup>4</sup>. The dilemma for such workers is that, when they ultimately make a complaint, alleging a pattern of conduct stretching back for an extended period, their credibility and sincerity may be attacked on the basis that they have consented to the conduct or that they cannot have been offended, humiliated or intimidated because if they had been, they would have spoken up earlier<sup>5</sup>.
8. In our experience, some targets of sexual harassment have not told their partners or other loved ones about their plight. Partners are sometimes not told for fear that they may misinterpret past self-silencing as a form of acquiescence, flirting or other form of consent. Other loved ones are not told for fear of causing them anxiety. In yet other cases, targets of sexual harassment blame themselves, believing it is their fault that the conduct occurred.
9. It is common for our clients to modify their dress or behaviour. They start wearing baggy clothes, stop wearing makeup and adopt a low profile, in the belief that this may stop the harassment. There have been instances of targets of sexual harassment having to defend their standards of dress in the course of litigation:

*'She denied ever wearing a low cut skirt. Whilst she had red boots, she would always wear them underneath her skirt. Her skirts were well below the knee, and midway to her calf.'*<sup>6</sup>

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<sup>3</sup> For example *Jay Higgins v Coles Supermarkets Australia Pty Ltd T/A Coles* [2017] FWC 6137 (21 November 2017)

<sup>4</sup> For example *Nunan v Aaction Traffic Services Pty Ltd* [2013] QCAT 565 (14 October 2013)

<sup>5</sup> For example *York v Toll Holdings Ltd* [2016] FWC 4140 (1 July 2016)

<sup>6</sup> *GLS v PLP (Human Rights)* [2013] VCAT 221 [72]

10. It takes courage to talk about sexual harassment, let alone contact a lawyer to discuss it. Against this backdrop, even making an in-house complaint, let alone the taking of legal action, is daunting for most potential complainants. A phenomenon similar to that of the '*discontented non-requestor*', identified in relation to requests for flexible work<sup>7</sup>, is sharpened and magnified, in the context of sexual harassment, into the 'disempowered non-complainer', not least because of the sensitive nature of the subject matter.
11. It follows that, in many cases, a lawyer may be the first person in whom the target of sexual harassment confides. By this time, the problem is usually intractable. Working relationships are impaired, sometimes irretrievably. We consider that, in a high percentage of cases, had early preventative action been taken, the problem would have been defused early with optimal outcomes, including, in some cases, preservation of the working relationship.

### ***Poor Identification of the phenomenon of sexual harassment***

#### *"Hostile environment" sexual harassment*

12. As to the nature of sexual harassment, we consider that while certain forms of sexual harassment, such as requests for sexual favours and unwelcome physical contact, are routinely recognised as sexual harassment by individuals and organisations, sexual harassment constituted by the existence of a sexually permeated hostile environment is not.
13. It comes as a surprise to many to learn that the displaying of sexually explicit material, telling jokes or sexually inappropriate banter could be actionable. Again, even where such conduct causes stress and discomfort, workers do not make in-house complaints for fear of being perceived as overly sensitive.

#### *Gender-specific links*

14. While the intersection between sexual harassment and sex discrimination is undeniable, a person's sex is not invariably the determinant in establishing the phenomenon of sexual harassment. We are concerned that there may be under-reporting of sexual harassment experienced by men and by GLBTI people, especially in cases of same-sex sexual harassment. This could, in part, be because the stereotype of sexual harassment is that of male to female sexual harassment. For example, in *Malinov v South Pacific Tyres*<sup>8</sup>, the male respondent "*..did not realise, when he `had the riot act read to him' ... that sexual harassment could be perpetrated between males. He had never been talked to about*

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<sup>7</sup> Skinner N, Cathcart A & Pocock B (2016), 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters', Labour and Industry, Vol. 26, No. 2  
<sup>8</sup> [1997] HREOCA 53 (29 August 1997)



*sexual harassment before.*” Those who do not fit within the perceived ‘target’ template may be embarrassed about reporting sexual harassment, reluctant to reveal their sexuality or gender identity or may believe that they are not entitled to complain about sexual harassment, due to their imperfect understanding of the law.

15. The perception of sexual harassment as male to female conduct may also inadvertently be supported by the construction of information websites which routinely classify sexual harassment under the title of ‘Sex Discrimination’, rather than as a separate species of unlawful conduct applying to all workers, irrespective of gender<sup>9</sup>.

### ***Normalising the Conduct – Unconscious bias and sexual harassment***

16. It is perhaps unsurprising that the community is under-informed about the reach of the definition of sexual harassment, given that some decided cases tend towards a benevolent interpretation of perpetrators’ behaviour. These tendencies were evident in the past when, for example, a judge opined about how a woman of “*average or normal life experience*” was over reacting when confronted by sexual harassment, or suggested that another could have enlisted the help of a boyfriend or parent or friend<sup>10</sup>. That attitude was criticised on appeal<sup>11</sup> but even today, there seems to be a disposition, on occasion, to acknowledge tolerable degrees of misbehaviour such as ‘*lighthearted sexual banter*’<sup>12</sup>, ‘*everyday use*’ of gender based or potentially sexually charged language<sup>13</sup> and ‘*robust language*’ in the workplace<sup>14</sup>. At a subterranean level, it may be that some decision-makers’ attitudes have not changed much. The danger is that this unconscious bias normalises untoward conduct and exerts a chilling effect, which militates against recognition and reporting of sexual harassment.

17. In a similar vein, we have also encountered cases in which it is clear that the medical profession and other health professionals have an imperfect understanding of what sexual harassment is. In some cases, our clients are told by such professionals not to take things so seriously or, worse (especially with younger clients), that they should expect to experience such conduct, given their youth and/or looks. Given that a visit to a GP or psychologist is often the first port of call for a target of sexual harassment, such attitudes reinforce self-doubt and reduce the likelihood of the target taking any action to remedy the situation.

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<sup>9</sup> See for example <https://www.humanrights.gov.au/>

<sup>10</sup> See the comments of Einfeld J in *Hall v Sheiban* [1988] HREOCA 5.

<sup>11</sup> *Hall v Sheiban Pty Ltd* [1989] FCA 72; 20 FCR 217 at [88]

<sup>12</sup> *Beamish v Zheng* [2004] FMCA 60

<sup>13</sup> *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 ;

<sup>14</sup> *Colby Somogyi v LED Technologies Pty Ltd* [2017] FWC 1966 (6 April 2017)

## **RECOMMENDATIONS (i) – (iv)**

- (i) *Workplace training should make it clear that sexual harassment may be manifested in a number of ways, with clear explanation that a hostile work environment is unacceptable.*
- (ii) *Information points, including websites, should not classify sexual harassment in such a way as to generate the impression that it is always a sub-species of sex discrimination.*
- (iii) *Judicial officers and tribunal members, including in industrial tribunals, should receive training in the parameters of the definition of sexual harassment and in the importance of rejecting the tendency to normalise or excuse sexual banter or sexually charged language in the workplace.*
- (iv) *Medical practitioners and related professions should receive training in the parameters of the definition of sexual harassment and in the importance of rejecting the tendency to normalise or excuse sexual banter or sexually charged language in the workplace.*

## **TOR (ii) ONLINE WORKPLACE-RELATED SEXUAL AND SEX-BASED HARASSMENT AND THE USE OF TECHNOLOGY AND SOCIAL MEDIA TO PERPETRATE WORKPLACE-RELATED SEXUAL AND SEX-BASED HARASSMENT AND TOR (iii) THE USE OF TECHNOLOGY AND SOCIAL MEDIA TO IDENTIFY BOTH ALLEGED VICTIMS AND PERPETRATORS OF WORKPLACE-RELATED SEXUAL HARASSMENT**

18. With the increasingly common use of social media, the distinction between work and private life is sometimes blurred<sup>15</sup>. This makes the identification of sexual harassment in certain cases problematic. Parallel to this, we have noticed an increase in the use of technology and social media to engage in workplace-related sexual harassment or other sexually explicit conduct, in conjunction with other unacceptable activities, which occur at the physical workplace. For example, in *Renton v Bendigo Health Care Group*<sup>16</sup>, conduct occurred both in cyberspace and in a physical location. There, a worker posted a video to Facebook in which he ‘tagged’ two work colleagues with the statement that one was ‘getting slammed’ by the other, shortly before he left blobs of white Sorbolene cream on the desk of one of the colleagues.

19. Obtaining proof of sexual harassment perpetrated via electronic means can be problematic. Section 9(21) of the *Sex Discrimination Act 1984* (Cth) (SDA) which captures acts done using a postal, telegraphic, telephonic or other like services, promises to be helpful, but proof of interaction on social media may be difficult where the offending

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<sup>15</sup> See for example *Colby Somogyi v LED Technologies Pty Ltd* [2017] FWC 1966 (6 April 2017)

<sup>16</sup> [2016] FWC 9089,

material has been deleted. Auto-destruct technology, such as Snapchat, adds an extra level of complication<sup>17</sup>.

20. The definition of sexual harassment may also need review. Under s 28A(1) of the SDA,

*“(1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if:*

*(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*

*(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;” (emphasis added)*

21. Sexual harassment involving social media may not always take the form of an unwelcome sexual advance, or an unwelcome request for sexual favours, “to the person harassed”, in terms of s 28A(1)(a). In examining whether s 28A(1)(b) is engaged, one must turn to the definition of “*conduct of a sexual nature*” which in turn, is defined<sup>18</sup> to include making a statement of a sexual nature “*to a person, or in the presence of a person, whether the statement is made orally or in writing*”. This may be a somewhat archaic definition, given the way in which social media operates. Communication of material on social media may not always be ‘to’ or ‘in the presence of’ a person in the strict sense, because it occurs in cyberspace, without a physical context or framework, and the identity of the author may be unclear. The phenomenon may be compared to situations in which unattributed sexually offensive graffiti had been found to constitute sexual harassment<sup>19</sup>. Although the definition of ‘*conduct of a sexual nature*’ is inclusive, rather than exhaustive, it should be made clear that social media communications may satisfy the definition of sexual harassment.

### **RECOMMENDATION (v)**

(v) *To avoid doubt, the definition of “conduct of a sexual nature” should be amended to include material posted, communicated or otherwise published on social media.*

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<sup>17</sup> See Turnbull and Zowghi ‘Snapchat in the workplace: where’s it app?’ 21 September 2016 <https://www.workplacelawandstrategy.com.au/2016/09/snapchat-in-the-workplace-wheres-it-app/>

<sup>18</sup> s 28A(2)

<sup>19</sup> *Hunt v Rail Corporation of New South Wales* [2007] NSWADT 152 (24 July 2007)

#### TOR (iv) THE DRIVERS OF WORKPLACE SEXUAL HARASSMENT, INCLUDING WHETHER:

- **SOME INDIVIDUALS ARE MORE LIKELY TO EXPERIENCE SEXUAL HARASSMENT DUE TO PARTICULAR CHARACTERISTICS INCLUDING GENDER, AGE, SEXUAL ORIENTATION, CULTURALLY OR LINGUISTICALLY DIVERSE BACKGROUND, ABORIGINAL AND/OR TORRES STRAIT ISLANDER STATUS OR DISABILITY**
- **SOME WORKPLACE CHARACTERISTICS AND PRACTICES ARE MORE LIKELY TO INCREASE THE RISK OF SEXUAL HARASSMENT**

22. While most of our work in this field involves cases where women are sexually harassed by men, there are other drivers of the phenomenon, apart from gender. In our experience, sexual harassment often flourishes in circumstances where there is:

- insecure work;
- a 'captive worker relationship', (such as situations where workers on certain visas depend on the good offices of employers);
- a qualifying or probationary period and/or
- a power imbalance.

#### ***Access to information***

23. We are concerned that vulnerable sectors of the workforce have difficulty obtaining information about rights under anti-discrimination law. While material is readily available on the internet to those who are able to use technology, it is not easily accessible to others who, for example, have no access to such technology, who may be illiterate, whose first language is not English or whose disability prevents them from gaining access to or using technology. The net effect is that workers rely on the organisations for whom they work to supply them with information. This is a notoriously unreliable source.

24. We consider that much could be done to make information available through other channels with which a worker may be expected to have routine contact. Workers from some backgrounds may have lived in countries where the concept of sexual harassment is a novel one. Some workers' daily movements are scrutinised carefully by partners or employers, so any attempt to visit a lawyer or union would be difficult. This is especially so in the case of the 'silent underclass' of migrant workers, whose every move may be controlled in situations of virtual slavery<sup>20</sup>. A focus on disseminating information through 'neutral' venues is therefore important. Multi-lingual flyers or information in public toilets, supermarkets, medical centres, community centres and similar locations would enable information to be obtained more easily and without arousing suspicion.

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<sup>20</sup> See the Global Slavery Index 2018 <https://www.globallslaveryindex.org/2018/findings/country-studies/australia/>

25. Hotlines and information services to enable reporting or discussing concerns in a non-judgmental way play an important role. Apart from providing multi-lingual support, these should be available during, as well as outside, usual business hours, to enable shift workers and others who work non-standard hours to make contact and to enable contact to be made at times convenient to targets who may not be able to speak freely, even in their own homes. Some information services, such as the National Information Service are valuable resources, but seem to be available only from Monday to Friday between 10 am and 4 pm EST.
26. Finally, on this point, although the phenomenon of sexual harassment is more difficult for those in low-paid and insecure work, it should be noted for the record that we have first-hand experience of such conduct occurring in large corporations within highly paid, well-resourced sectors of the workforce, including banking, insurance and the legal industry. This underscores our view that sexual harassment is not about sex but about abuse of power.

#### **RECOMMENDATIONS (vi) – (vii)**

- (vi) *More funding should be provided for targeted, accessible sources of information and for dissemination of information in community languages.*
- (vii) *More funding should be provided to community legal centres and via legal aid to facilitate not only advice, but also litigation.*

#### **TOR (v) THE CURRENT LEGAL FRAMEWORK WITH RESPECT TO SEXUAL HARASSMENT**

27. Although the 'current legal framework' in Australia extends to State and Territory jurisdictions, we have concentrated on the SDA and the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA), given the jurisdictional context of this Inquiry.

#### ***Confusion between Commonwealth regimes***

28. The AHRC complaint Form states:

*Note: The President of the Commission can decide not to investigate into a complaint alleging unlawful discrimination where the complaint is lodged more than six months after the alleged events(s) happened. If the event(s) being complained about happened more than six months ago, please explain the reasons for the delay in making a complaint to the Commission.*

*For complaints alleging human rights breaches and discrimination in employment under the ILO Convention, the relevant time frame is twelve months. (emphases added)*

29. In our experience, the distinction between a complaint alleging unlawful discrimination (which includes sexual harassment) and a '*human rights breach and discrimination in employment under the ILO Convention*' is imperfectly understood, even by legal practitioners. The distinction is important, not just because the pathways to litigation and remedies are very different, but also because of the significant difference in time frames.
30. Unless one is familiar with the difference between '*unlawful discrimination*' and '*human rights breaches and discrimination in employment under the ILO convention*', it would be easy to fall into error and conclude that all complaints of discrimination in employment, including sexual harassment, come within the second category.
31. There is no need for the laws to be drafted in such a confusing way. They make the law a self-referential mystery, accessible only to the few who are able to decipher them. This is unacceptable in any law, but especially in laws dealing with human rights. As noted in *Innes v Rail Corporation of NSW* :

*"Lawyers work with laws and if those laws are written obscurely or ineffectively the shortcomings should be exposed. If my reasoning in this decision is found to be wrong, as well it might, the lay observer may be startled. It is hoped, that being so, she will take the matter up with those who write such laws and seek a less complex way of determining when actionable discrimination occurs, one that is less expensive, less profligate of legal and judicial time, less stressful for the parties."<sup>21</sup>*

### **RECOMMENDATION (viii)**

- (viii) *The complaint Form should be streamlined to separate complaints of 'unlawful discrimination' and complaints of 'human rights breaches and discrimination in employment under the ILO convention' so as to minimise the danger of confusion.*

### **Time frames**

32. Recent amendments to the AHRCA significantly reduced the applicable time frame within which the President of the Commission may decide not to investigate a complaint alleging unlawful discrimination. The reduction from 12 months, to only 6 months after the alleged event(s) happened<sup>22</sup> is illogical, especially as the time frame for a complaint alleging

<sup>21</sup> [2013] FMCA 36 per Raphael FM at [168]

<sup>22</sup> s 46PH(1)(b) AHRCA

human rights breaches and discrimination in employment under the ILO Convention remains 12 months, under the same Act, for broadly similar conduct<sup>23</sup>.

33. While a Complainant may still pursue a matter before the Federal Court or Federal Circuit Court, and the time limit for that purpose is more generous<sup>24</sup>, the time frame may nevertheless play a crucial role in the granting of leave. Where a complaint is terminated under s 46PH (1)(b) because more than 6 months have passed since the alleged acts, omissions or practices took place, the Complainant must seek leave to proceed<sup>25</sup>. This adds a further layer of complexity to litigation and imposes an extra burden on the resources of a Complainant.
34. In circumstances where it has been recognised that complainants in cases of unlawful discrimination may not be able to commence litigation early, for a variety of compelling reasons<sup>26</sup>, the shortening of a time frame is especially difficult to understand.
35. There is also a broader issue at stake, which is why human rights cases attract such inferior time frames, while 6 years is the norm for most other civil litigation. The existence of a double standard not only makes it more difficult for human rights to be asserted, but sends an unfortunate message to the community that human rights cases are to be treated less generously than, say, a case involving breach of a commercial contract for delivery of spare parts. Proceedings in the latter instance may be brought within 6 years, without leave.

### **RECOMMENDATION (ix)**

- (ix) *The time frame within which the President of the Commission may decide not to investigate a complaint alleging unlawful discrimination should be extended to 6 years.*

### **Premature specification of remedy**

36. The complaint Form also invites complainants to specify how they believe the complaint could be resolved. It states:

*“How do you think this complaint could be resolved? For example, a complaint may be resolved with an agreement that a respondent will change its procedures and/or introduce training or policies on anti-discrimination and/or take other action to prevent possible discrimination.”*

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<sup>23</sup> s 20(2)(c)(i) AHRCA

<sup>24</sup> *Kujundzic v MAS National & Ors* [2013] FMCA 8 (11 January 2013)

<sup>25</sup> s 46PO (3A)

<sup>26</sup> For example, *Hopper v Mt Isa Mines* (1997) EOC 92-879

37. Apart from the fact that the examples omit any mention of compensation, our concern is that this section of the Form may inadvertently constrain future negotiation, especially in circumstances where a complainant:

- has no information about how a Respondent might respond to the complaint,
- may not have received legal advice and/or
- may wish to add or subtract elements of a proposal for resolution.

We have had experience of complainants, who were unrepresented at the time of formulating a complaint, being interrogated about discrepancies between the proposal for resolution on the complaint Form and what was later sought in conciliation. While a Court would not usually consider the proposal in the complaint form to limit the remedy sought, premature articulation of remedy may put the Complainant at an unnecessary tactical disadvantage.

#### **RECOMMENDATION (x)**

- (x) *The complaint Form should either dispense with the need for a proposal for resolution or make it clear that the articulation of a proposal for resolution may be deferred until a complainant has seen the material proffered by a respondent. In any case, it should be made clear that the articulation in the complaint does not limit the complainant's ability to modify the proposal in future.*

#### **Standing to complain or to file an application**

38. Under s 46 P of the AHRCA a complainant must be a '*person aggrieved*', but an application to the Federal Court or Federal Circuit Court may be made only by a '*person affected*'. These terms have caused confusion. In particular, interest groups have been found not to have the standing required to make a complaint or to be able to make an application.<sup>27</sup> Again, there is no need for such complication, especially in a human rights jurisdiction, where complainants bear the burden of litigation and are often poorly resourced.

#### **RECOMMENDATIONS (xi) – (xii)**

- (xi) *The provisions concerning bringing a complaint and making an application should be harmonised.*
- (xii) *Provision should be made to enable interest groups and unions to make complaints to the AHRC and then make applications to a court, once a complaint has been terminated.*

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<sup>27</sup> For example, *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 (2 May 2007); *Stokes & Ors v Royal Flying Doctor Service & Anor (No.1)* [2003] FMCA 164



### **Volunteers, customers, clients**

39. The *Sex Discrimination Act 1984* (Cth) (SDA) does not currently protect volunteers from sexual harassment at work. Other jurisdictions have extended protection from sexual harassment to volunteers<sup>28</sup>. Uneven protection of workplace participants is not only logically questionable, but from a practical perspective, it opens the way for incremental normalisation of sexual harassment for all workers, whether volunteers or not. The exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* would have addressed this issue by defining 'employment' to include voluntary and unpaid work<sup>29</sup>.
40. Nor does the SDA protect workers against sexual harassment by customers, clients and the like. Conversely, customers or clients may complain of sexual harassment in the provision of services. This is a double standard, which needs to be addressed.

### **RECOMMENDATIONS (xiii) – (xiv)**

- (xiii) *Volunteers should be protected from sexual harassment.*
- (xiv) *Workers should be protected from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment<sup>30</sup>.*

### **Victimisation**

41. One of the fears most commonly expressed by complainants is that they will suffer stigmatisation, retaliation or victimisation if they complain about sexual harassment. It is therefore crucial for the SDA to contain robust anti-victimisation provisions. Unfortunately, the operation of the anti-victimisation provisions of the SDA is in doubt following decisions such as *Walker v Cormack*<sup>31</sup> and *Chen v Monash University*<sup>32</sup>, which noted the problems associated with simultaneous civil and criminal liability. Given the state of the authorities, there is a live issue as to jurisdiction to hear and determine claims based on allegations of victimisation in contravention of s 94 of the SDA<sup>33</sup>. The exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* would have remedied this problem by removing

<sup>28</sup> For example, the Equal Opportunity Act 2010 (Vic).

<sup>29</sup> cl 6 Exposure Draft – definition of 'employment'.

<sup>30</sup> Both these Recommendations are in line with the report of the Senate Standing Committee on Legal and Constitutional Affairs report: 'Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality' – December 2008; Recommendations 11.26 and 11.46

<sup>31</sup> [2011] FCA 861 (3 August 2011)

<sup>32</sup> [2015] FCA 130 (27 February 2015)

<sup>33</sup> *Hazledine v Arthur J Gallagher Australia & Co (Aus) Limited* [2017] FCA 575

criminal liability for victimisation from the relevant provision and replacing it with civil liability<sup>34</sup>.

### RECOMMENDATION (xv)

- (xv) *The SDA (and all Commonwealth anti-discrimination laws) should be amended to ensure that the anti-victimisation provisions may be used without fear of jurisdictional challenge.*

### Costs

42. In our experience, the current costs regime, where costs follow the event, operates as a deterrent to the bringing of claims under the SDA and other Commonwealth anti-discrimination laws.

43. It used to be a well-established principle in human rights cases that costs did not follow the event. For example, in *Tadawan v State of South Australia*<sup>35</sup>, it was noted:

*The Court has accepted that these matters were normally considered to be "no costs" matters, as evidenced by the practice of state tribunals and the fact that there was no power in HREOC to award costs. The Court has recognised that where proceedings are brought a successful party should not have the benefit of his or her victory lost in costs. The Court is also anxious not to discourage litigants from bringing claims which may well have merit because of the fear of an adverse costs order in the event that the applicant is unsuccessful. On the other hand, the Court can use its powers in relation to costs to discourage unmeritorious claims."*

44. The current approach appears to be the product of a shift in judicial sentiment<sup>36</sup>. In our view, there are sufficient safeguards to filter out unmeritorious claims and from the point of view of access to justice and the administration of human rights legislation, there should be a reversion to the previous practice.

### RECOMMENDATION (xvi)

- (xvi) *Costs should be governed by provisions similar to those in s 570 of the FWA, which limits circumstances in which a party may be ordered to pay costs to (essentially, for present purposes) initiation of proceedings vexatiously or without reasonable cause, or where there has been an unreasonable act or omission resulting in the incurring of costs by the other party.*

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<sup>34</sup> cl 54 of the Exposure Draft.

<sup>35</sup> [2001] FMCA 2 [62]

<sup>36</sup> *Sluggett v Human Rights & Equal Opportunity Commission* [2002] FCA 1060 [13]; *Minns v State of NSW (No.2)* [2002] FMCA 197 (2 September 2002) [13]

**TOR (vi) EXISTING MEASURES AND GOOD PRACTICE BEING UNDERTAKEN BY EMPLOYERS IN PREVENTING AND RESPONDING TO WORKPLACE SEXUAL HARASSMENT, BOTH DOMESTICALLY AND INTERNATIONALLY THE IMPACTS ON INDIVIDUALS AND BUSINESS OF SEXUAL HARASSMENT, SUCH AS MENTAL HEALTH, AND THE ECONOMIC IMPACTS SUCH AS WORKERS COMPENSATION CLAIMS, EMPLOYEE TURNOVER AND ABSENTEEISM**

***Organisational responses – precautions***

45. Under s 106(2) of the SDA, vicarious liability may be avoided if it is established that the person took all reasonable steps to prevent “the employee or agent” from engaging in unlawful discrimination. We consider that this needs clarification. At present, the focus seems to be on the prospective perpetrator, but we would argue that dissemination of information to potential targets is an equally important precaution. We consider that the scope of s 106(2) should be expanded to ensure that the taking of reasonable steps includes providing potential targets of sexual harassment with education and information about inappropriate workplace behaviour, so that they can identify untoward behaviour and raise concerns early in the piece.
46. Although we have noticed an increase in organisations promulgating policies on appropriate behaviour, the efficacy of these remains patchy. The better organisations ensure that there is an education programme and refresher training to complement and fortify a policy. However, some organisations subscribe to mere perfunctory measures, such as systems merely requiring workers to acknowledge and accept that they have understood a policy before they can log in to their computer systems. This is not the optimal standard. For example, in *Bellenger v Mid North Coast Local Health District*<sup>37</sup> (an unfair dismissal case), a worker stored more than 1200 inappropriate and pornographic emails on her work computer. Employees were required to acknowledge and accept that they understood the organisation's code of conduct before logging-in to their computers. The applicant gave evidence that she did not read the policy in full when she logged-in and simply accepted the notice so she could get into her work<sup>38</sup>.
47. We have noticed low levels of confidence in in-house complaints mechanisms, coupled in some cases with the perception that those who deal with complaints within the organisation are not senior enough, or powerful enough, to challenge the actions of a senior perpetrator. We have had human resources personnel come to us for advice on victimisation, because their robust approach to eradicating sexual harassment has been perceived as disloyalty to the organisation.

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<sup>37</sup> [2017] NSWIRComm 1019 (24 April 2017)

<sup>38</sup> *Ibid* [33]

48. In our experience, the organisations with the best records of effective response to sexual harassment and other inappropriate behaviour in the workplace are those in which the senior echelons of management overtly display a commitment to ethical behaviour in the organisation and model appropriate behaviour. It is also important that those who administer the policy, such as Human Resources personnel, be sufficiently senior to be able to counsel senior management and provide robust advice. Further, care should be taken to ensure training sessions for those who 'fall through the cracks', such as shift workers, casual staff and contractors.

49. Employers with limited resources may face particular challenges in understanding their obligations and exposure, though it has been noted that their small size is not in itself an excuse for lax standards.

*"It may be more difficult for a small employer, with few employees, to put into place a satisfactory sexual harassment regime than for a large employer with skilled human resources personnel and formal training procedures. But the Act does not distinguish between large and small employers, and the decided cases show that many sexual harassment claims concern small businesses, often with only a handful of employees. A damages award against such an employer may have devastating financial consequences; so there is every reason for such an employer to be careful to prevent claims arising. ....Perhaps employer organisations could take an initiative in this area and provide their members with appropriate advice, and even a draft of a document to be supplied to new employees."<sup>39</sup> (emphasis added)*

50. Rather than relying on employer organisations, we consider that the legislation could play an important practical role in raising awareness and facilitating the establishment and implementation of appropriate standards.

### **Organisational responses – doing nothing while waiting for a formal complaint**

51. Some employers do not spring into action unless and until a worker makes a formal complaint, presuming that absence of a complaint means that all is well, even if there are other signs of dysfunction in the workplace.

52. In situations where self-silencing is endemic, such an approach is not only counter-productive, but also possibly negligent and in breach of health and safety laws. As observed in *Swan v Monash Law Book Co-operative* <sup>40</sup>:

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<sup>39</sup> *Gilroy v Angelov* [2000] FCA 1775 [100]

<sup>40</sup> [2013] VSC 326 (26 June 2013) at [176]

*“The periods of apparent functionality ... did not eradicate or alleviate the risks that had been foreseen. When considering breach, a reasonable employer looking forward to identify what it should have done to avoid injury, having identified a risk, could not simply assume that a continuing absence of complaint, or renewed complaint, meant that the risk had abated. In this regard, the defendant is purporting to rely on aspects of its breach of duty - a want of risk assessment, follow-up procedures, and monitoring - to infer that the foreseen risk had resolved and its failure to take such actions was not in breach of its duty. I reject this contention. The absence of overt continuing behaviour, or complaint about behaviour, is not evidence that the risk of harm to the plaintiff’s mental health ... had abated, or could reasonably be considered by a prudent employer to have abated.”*

### **RECOMMENDATIONS (xvii) – (xix)**

- (xvii) *The scope of s 106(2) SDA should be expanded to ensure that the taking of reasonable steps includes providing potential targets of sexual harassment with education and information about inappropriate workplace behaviour,*
- (xviii) *There should be a focus on capacity building among employers. Legislative guidance should be provided, by way of action plans and compliance codes for the taking of reasonable steps. Legislative provision should be made for adherence to an action plan to be taken into account in deciding whether reasonable steps were taken and for adherence to a compliance code to constitute the taking of reasonable steps.<sup>41</sup>*
- (xix) *Employers should be obliged to provide a prescribed Information Statement to workers, summarising key principles concerning unlawful discrimination (including sexual harassment), similar to the model established under the Fair Work Act 2009 (Cth) (FWA) for dissemination of a Fair Work Information statement<sup>42</sup>.*

### **Organisational responses – post complaint**

- 53. It is common for organisations who have been lax in promulgating and training staff to attempt to recover ground by swiftly instituting an investigation into allegations. In our view, even if appropriate action is taken after the event, this cannot repair the damage done by the lack of precautions.

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<sup>41</sup> See cl 75 of the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth)

<sup>42</sup> See ss124-125 FWA.

### *Use of legal professional privilege; privacy considerations*

54. One troubling phenomenon we have noted is the engagement, by an employer or principal, of a law firm (or use of an in-house lawyer) to conduct investigations into sexual harassment complaints, closely followed by the claiming of legal professional privilege over the report into the allegations. This device reinforces the power imbalance which is a common feature in sexual harassment matters. It is common for a complaint to be found to be unsubstantiated, with no explanation or information about the process used to arrive at this conclusion. A closed investigation confers an advantage on the organisation and, in some cases, the perpetrator, which cements imbalances in bargaining power, to the detriment of a complainant.
55. In a similar vein, complainants are sometimes denied information about the outcome of an investigation because of privacy concerns. The basis for concealing information due to privacy concerns is not usually articulated in a way which explains the connection between privacy principles and the denial of information. This can be frustrating for a complainant, who may then have a perception that the investigation process is not transparent and/or biased in favour of the perpetrator.

### **RECOMMENDATIONS (xx) – (xxi)**

- (xx) *Guidelines should be established by the AHRC to ensure that investigations by legal practitioners into sexual harassment do not operate as cloaking devices. In particular, there should be no reliance on an exculpatory report or conclusions unless all information upon which reliance is placed is available to the complainant.*
- (xxi) *Guidelines should be established by the AHRC to provide that, if an employer relies upon privacy concerns to deny a complainant access to information, a clear explanation should be given identifying which privacy principles or criteria were considered relevant, so that a complainant may obtain advice about the matter.*

### *Biased EAPs*

56. Another concern is the use of Employment Assistance Programmes (EAP), which are skewed to the employer's interests. We have had experience of EAP psychologists who are reluctant to give evidence voluntarily, because their contracts contain provisions prohibiting them acting against the interests of the employer. Even where there are no such provisions, companies providing EAP services are sometimes wary of criticising the organisation to whom they provide such services, for fear of losing the contract for provision of the service.

### **RECOMMENDATION (xxii)**

- (xxii) *If an employer provides EAP services, workers should be given a choice between an EAP contracted to the employer or reimbursement of fees paid to similar support services selected by the worker.*

### **Impacts on individuals and business of sexual harassment**

57. Sexual harassment presents a significant cost to employers through lost productivity, absenteeism, workers compensation, staff turnover, drop in staff morale and reputational damage<sup>43</sup>. It can result in the end of a career, damage to personal relationships and the destruction of social networks. While some targets of sexual harassment seek medical and psychological assistance, many do not or cannot because of the cost. Some are reluctant to make a workers' compensation claim for fear of being further stigmatised, should they apply for jobs in the future and be required to disclose such information. In such circumstances, placing the financial burden on the worker to take legal proceedings operates as a natural disincentive or barrier to litigation.
58. As has been previously noted in relevant literature<sup>44</sup>, the public policy implicit in human rights law must be considered and given due recognition<sup>45</sup>. The SDA includes objectives designed not only to address individual cases of unlawful conduct, but also to exert a broader influence over community attitudes and conduct<sup>46</sup>. It is not enough to leave it to individuals to do the heavy lifting. Robust enforcement agencies must be established and empowered to take on cases for the broader public good.

### **RECOMMENDATION (xxiii) – (xxiv)**

- (xxiii) *An independent enforcement agency, similar to the Fair Work Ombudsman, should be established, for the purpose of conducting litigation on behalf of workers in sexual harassment cases.*
- (xxiv) *The AHRC should have power to investigate suspected cases of sexual harassment without the need for an individual complaint and to refer such cases to the enforcement agency, where it considers there to be a reasonably arguable basis for action.*

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<sup>43</sup> Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of The Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality (1 September 2008) [361]

<sup>44</sup> *Andrades C 'The Struggle to Restore Dignity' Employment Law Bulletin vol 18 85 at 86*

<sup>45</sup> *Wattle v Kirkland (No.2) (2002) FMCA 135 at [71].*

<sup>46</sup> s 3 Sex Discrimination Act 1984 (Cth)

## CONCLUSION

59. One of the more concerning features of beneficial legislation is that it so frequently fails those it is intended to protect<sup>47</sup>. Feeble or cautious regulation sends a clear message to the community that sexual harassment is not to be taken seriously. We appreciate the opportunity to contribute to the national discussion and trust that the Inquiry will be instrumental in effecting positive change.
60. We would be pleased to expand on this submission, should that assist the Commission.

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**CAROL ANDRADES**  
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28 FEBRUARY 2019

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<sup>47</sup> *Graeme Innes v Rail Corporation of NSW* [2013] FMCA 36 per Raphael FM at [6],

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