

# Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces

COMMUNITY GUIDE • 2020



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**Kate Jenkins**

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*Sex Discrimination Commissioner  
Australian Human Rights Commission*



# A message from the Commissioner

Australia was once at the forefront of tackling sexual harassment globally.

Women's organisations in Australia began to press for the legal and social recognition of sex discrimination in the early 1970s. This movement built on Australia's ratification of two key international conventions:

- the International Labour Organization's Discrimination (Employment and Occupation) Convention in 1973
- the UN Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') in 1983.

States including South Australia, New South Wales and Victoria enacted anti-discrimination laws covering the ground of sex in the late 1970s.

In 1984, the Australian Government introduced the *Sex Discrimination Act 1984*, which specifically prohibited sexual harassment at work and established the role I currently occupy, as Australia's Sex Discrimination Commissioner. Since that time, successive Sex Discrimination Commissioners have identified the elimination of workplace sexual harassment as a key priority.

However, over 35 years on, the rate of change has been disappointingly slow. Australia now lags behind other countries in preventing and responding to sexual harassment.

Since 2003, the Australian Human Rights Commission has conducted four periodic surveys on the national experience of sexual harassment. Our most recent survey conducted in 2018 showed that sexual harassment in Australian workplaces is widespread and pervasive. One in three people experienced sexual harassment at work in the past five years.

Underpinning this aggregate figure is an equally shocking reflection of the gendered and intersectional nature of workplace sexual harassment. As the 2018 National Survey revealed, almost two in five women (39%) and just over one in four men (26%) have experienced sexual harassment in the workplace in the past five years. Aboriginal and Torres Strait Islander people were more likely to have experienced workplace sexual harassment than people who are non-Indigenous (53% and 32% respectively).

Sexual harassment is not a women's issue: it is a societal issue, which every Australian, and every Australian workplace, can contribute to addressing.

Workplace sexual harassment is not inevitable. It is not acceptable. It is preventable.

As Australia's Sex Discrimination Commissioner, I deliver the Inquiry report with a sense of urgency and hope.

I have been devastated by the experiences of sexual harassment within workplaces I have heard about through this Inquiry, the harms suffered by victims and the cost to the economy. However, I have also been heartened by the whole-of-community response to the National Inquiry. Australia wants change.

The current legal and regulatory system is simply no longer fit for purpose. In the Inquiry report, I have recommended a new model that improves the coordination, consistency and clarity between the anti-discrimination, employment and work health and safety legislative schemes.

The new model is evidence-based, victim-focused and framed through a gender and intersectional lens. It is also based on existing legal frameworks to avoid duplication, ambiguity and undue burden on employers. Importantly, it recognises the complementary and mutually reinforcing nature of the three schemes, while also recognising their distinctive features.

I call on all employers to join me in creating safe, gender-equal and inclusive workplaces, no matter their industry or size. This will require transparency, accountability and leadership. It will also require a shift from the current reactive model, that requires complaints from individuals, to a proactive model, which will require positive actions from employers.

Ultimately, a safe and harassment-free workplace is also a productive workplace.

I want to thank the Australian Government for supporting this ground-breaking and world-first inquiry. I also want to acknowledge the legacy and leadership of the people, especially women's advocates and women's organisations, who have fought against sexual harassment from the beginning. The Inquiry report builds upon and advances your work. Finally, I want to thank the team of dedicated and passionate individuals at the Commission who worked on the Inquiry.

#MeToo, #LetHerSpeak, #TimesUp, #BalanceTonPorc, #NotYourHabibti, #Teknisktfel, #QuellaVoltaChe, #YoTambien and similar movements have ignited a global discussion about sexual harassment and gender inequality.

Victims who have for too long been silenced have found their individual and collective voice.

There is an urgency for change. There is the momentum for reform.

By adopting the multifaceted and whole-of-community response outlined in the report, Australia can reclaim its position as leaders in tackling sexual harassment and provide employers with the guidance they need, and victims the support and redress they deserve.



**Kate Jenkins**  
**Sex Discrimination Commissioner**

February 2020

# Terms of Reference

The National Inquiry into Sexual Harassment in Australian Workplaces (Inquiry) is being conducted pursuant to sections 11(1)(a), 11(1)(e), 11(1)(f), 11(1)(g), 11(1)(j), 11(1)(k) and 11(1)(p) of the *Australian Human Rights Commission Act 1986* (Cth).

The Inquiry will review and report on:

- a national survey of the prevalence, nature and reporting of sexual harassment in Australian workplaces, by sector
- 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
- the use of technology and social media to identify both alleged victims and perpetrators of workplace-related sexual harassment
- 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
- the current legal framework with respect to sexual harassment
- existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally
- the impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers' compensation claims, employee turnover and absenteeism, and
- recommendations to address sexual harassment in Australian workplaces.

In conducting the Inquiry, the Commission will have regard to the economic impact of sexual harassment in the workplace, drawing on economic modelling.

Additionally, three years after the release of the Inquiry report, the Australian Human Rights Commission will:

- conduct an assessment of any changes in the prevalence, nature and reporting of sexual harassment in Australian workplaces since the Inquiry, and
- make any further recommendations necessary to address sexual harassment in the workplace.



# Methodology

The Inquiry was jointly announced by the Sex Discrimination Commissioner, Kate Jenkins, and the then Minister for Women, the Hon Kelly O'Dwyer MP, on 20 June 2018.

The Inquiry was conducted pursuant to the Commission's functions under the *Australian Human Rights Commission Act 1986* (Cth). The focus of the Inquiry was on the systemic issues set out in the Terms of Reference. For this reason, the Commission did not investigate or make findings about individual allegations of sexual harassment as part of the Inquiry.

The Commission gathered evidence for the Inquiry through the following key activities to inform the findings and recommendations in this report:

- a national workplace sexual harassment survey to understand the prevalence, nature and reporting of sexual harassment in Australian workplaces
- an online submissions process
- public consultations in all capital cities and some regional cities
- targeted roundtables and meetings with key stakeholders
- independent economic modelling on the costs of workplace sexual harassment
- extensive domestic and international research.

## Principles underpinning the Inquiry

The Commission's methodology for the Inquiry was based on the following principles:

- **Comprehensive and consultative**—the Commission aimed to consult as widely as possible and took measures to ensure that members of the public and a broad range of individuals and organisations from key stakeholder groups were invited to contribute to the Inquiry to hear their views, experiences and suggestions for change. Multiple avenues were available for people to engage with the Inquiry (these are discussed further below).
- **Voluntary**—the involvement of participants in the national workplace sexual survey, consultations and submissions process was voluntary.
- **Inclusive**—the Commission encouraged people from a diverse range of age groups, genders, backgrounds, industries, sectors and occupations across Australia to make a contribution to the Inquiry. This included through community consultations open to members of the public, as well as targeted consultations with people with disability, people of culturally and linguistically diverse (CALD) backgrounds, Aboriginal and Torres Strait Islander peoples, and people who are lesbian, gay, bisexual, transgender, queer/questioning and/or intersex (LGBTQI).

- **Evidence-based**—the Commission’s findings and recommendations for action and change are based on the extensive quantitative data and qualitative information gathered through the Commission’s national workplace sexual harassment surveys, submissions and consultations, as well as on existing academic and social policy research.
- **Confidential**—information gathered through the Commission’s national workplace sexual harassment survey, confidential submissions and consultations were de-identified and confidentiality strictly maintained.
  - » Submissions received by the Commission were treated as confidential, unless the person making the submission requested that it be made public.
  - » The Commission recorded consultations wherever possible. Information from transcripts of consultations included in this report has also been de-identified.
  - » No personal or associated demographic information has been used in the report in a way that directly or indirectly identifies individuals. To protect the identity of victims and other people involved in incidents of workplace sexual harassment, the report uses pseudonyms in case studies from consultations and submissions. In some instances, organisations shared case studies in their submissions. Where these case studies have been used in the report, the pseudonyms used are those provided by the organisation.

- **Sensitive and supportive**—the Commission recognises that the process of sharing experiences in relation to sexual harassment can be very distressing. The Commission ensured that individuals who shared their experiences of sexual harassment were informed about support services available nationally and in their state or territory.

The Commission established a Reference Group to provide advice and guidance for the Inquiry. It included members from across government, business groups, unions, academia and the legal and community sector. The Commission acknowledges and thanks Reference Group members for their valuable assistance with engaging stakeholders and providing frank and robust advice and guidance on the Inquiry.

The Commission received 460 submissions from government agencies, business groups, community bodies and, above all, victims. From September 2018 to February 2019, the Commission conducted 60 consultations as part of the Inquiry, with more than 600 individuals participating in all capital cities and some regional locations across Australia. It also held three roundtables and numerous meetings with key stakeholders.

Note: This Community Guide does not include references. Full referencing details can be found in the complete version of the Inquiry report, available on the Commission’s website at: <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/sexual-harassment-national-inquiry-report-2020>





# Terminology

The language the Commission has used in the report in connection with workplace sexual harassment and affected individuals and communities is set out below.

## **Victims**

The report captures people's experiences of workplace sexual harassment that the Commission heard about in the course of the Inquiry. Some people when describing their experiences prefer to use the term 'victim' and others prefer the term 'survivor.' The Commission recognises that some people consider 'victim' problematic because it may suggest that people who have experienced workplace sexual harassment are helpless or lack agency. This is not the position of the Commission. Similarly, other people prefer the resilience and empowerment associated with the term 'survivor'. In the report, the Commission generally uses the term 'victim', since this is most commonly used in the community, and intends this to be inclusive of victims and survivors.

The report also sometimes uses terms such as 'complainant', 'applicant' and 'alleged victim', in the context of formal reporting, complaints and other legal or administrative processes or proceedings.

## **Harassers**

When describing what the Commission heard about people's experiences of sexual harassment, the report uses the term 'harasser' to describe a person who has had an allegation made against them, as well as a person who has been found or proven to have engaged in workplace sexual harassment through a formal process. The use of the term 'harasser' is not intended to suggest that there has been a finding of unlawful sexual harassment under anti-discrimination legislation, or of guilt in relation to a criminal offence (or breach of any other relevant law).

The report also sometimes uses terms such as 'respondent', 'alleged harasser' and 'perpetrator', in the context of formal reporting, complaints and other legal or administrative processes or proceedings.

## **Women and men**

People of diverse genders are affected by workplace sexual harassment. In the report, the terms 'women' and 'men' are used inclusively. In some instances, the use of these terms reflects the specific language used in submissions, consultations or other source material referenced.

## **Worker**

This report uses the broad term 'worker' to describe a person who undertakes work in any capacity, including work that is paid or unpaid, full-time, part-time, casual, permanent or temporary, or where they are self-employed.

It is intended to include people engaged in a wide variety of work arrangements, including as employees or under other arrangements defined by relevant laws, people working in 'non-standard' arrangements, including temporary or agency work, on-call work, labour hire, independent contracting, or forms of other non-permanent or non-regular work in the so-called 'gig' or 'sharing economy'.

It includes people working with temporary migration status in Australia, with full or partial work rights attached to their visa, or who may be unauthorised to work but do so. It also includes people who may be in training, apprentices, interns, students and volunteers.

The report considers people's experiences of sexual harassment while working in a wide range of work arrangements in Section 3.5, 'People who experience sexual harassment in the workplace', and discusses legal definitions, coverage and protections for workers in Section 5, 'The legal and regulatory framework'.





# Overview

## **(a) The National Inquiry into Sexual Harassment in Australian Workplaces**

Workplace sexual harassment is prevalent and pervasive: it occurs in every industry, in every location and at every level, in Australian workplaces. Australians, across the country, are suffering the financial, social, emotional, physical and psychological harm associated with sexual harassment. This is particularly so for women.

This behaviour also represents a very real financial impost to the economy through lost productivity, staff turnover and other associated impacts.

In June 2018, against the backdrop of the momentum of the #MeToo movement and recognition of the prevalence of, and immense harm caused by sexual harassment in Australian, and global, workplaces, the Sex Discrimination Commissioner, Kate Jenkins, and the then Minister for Women, the Hon Kelly O'Dwyer, announced the National Inquiry into Sexual Harassment in Australian Workplaces (Inquiry).

As Australia's national human rights institution, the Australian Human Rights Commission (the Commission) was tasked with undertaking this Inquiry. The Commission has an established record of undertaking initiatives aimed at addressing sexual harassment and promoting gender equality.

In the Terms of Reference, the Commission's task was to review and report on workplace sexual harassment and make recommendations in relation to:

- its prevalence, nature and reporting in Australian workplaces
- the role of technology
- its drivers, including risk factors for particular population groups or in different workplace settings
- the current legal framework
- existing measures to address it and examples of good practice
- its impacts on individuals and businesses, including its economic impact.

The Inquiry report outlines the Commission's findings and recommendations. The full list of recommendations is set out at the end of this Community Guide.

The purpose of this Inquiry is to improve how Australian workplaces prevent and respond to sexual harassment, including through an examination of the systemic issues set out in its Terms of Reference.

The Inquiry report is a reflection of the contributions of many individuals and organisations and the Commission is grateful to those who took the time to attend a consultation, write a submission or assist the Inquiry.

There is an urgency and demand for change across all corners of society.

Australia is also being closely watched internationally. This is Australia's moment to be a global leader on this important and topical issue.

### **(b) A new approach to addressing sexual harassment in Australian workplaces**

Overwhelmingly, the Commission heard that the current system for addressing workplace sexual harassment in Australia is complex and confusing for victims and employers to understand and navigate. It also places a heavy burden on individuals to make a complaint.

Yet most people who experience sexual harassment never report it. They fear the impact that complaining will have on their reputation, career prospects and relationships within their community or industry. Throughout the Inquiry, the Commission heard of the need to shift from the current reactive, complaints-based approach, to one which requires positive actions from employers and a focus on prevention.

Through the package of recommendations in the report, the Commission proposes a new approach for government, employers and the community to better prevent and respond to sexual harassment in the workplace and provide leadership and innovation in addressing this complex and difficult issue.

The new approach is:

- evidence-based
- victim-focused to enhance outcomes for people experiencing harassment
- framed through a gender and intersectional lens
- based upon existing legal frameworks to avoid duplication, ambiguity or undue burden on employers. It is consistent with the Australian Government's Deregulation Agenda of delivering more effective and efficient regulatory frameworks.

The new approach also draws upon, and furthers, existing policies and initiatives in this space. There are five key areas of focus which underpin the new approach:

1. Data and research
2. Primary prevention
3. The legal and regulatory framework
4. Workplace prevention and response
5. Support, advice and advocacy.

These areas are expanded upon below.

### **(c) Outline of the report**

Through the recommendations in the report, the Commission seeks to make a significant contribution to reducing workplace sexual harassment and creating safer, more respectful and productive Australian workplaces.

The report outlines:

- the current context in which workplace sexual harassment occurs (Section 2)
- what is currently understood about workplace sexual harassment, in terms of:
  - » how prevalent it is
  - » the behaviours that constitute sexual harassment and how it occurs
  - » why it occurs
  - » who experiences it
  - » who carries it out
  - » the workplace settings where it occurs
  - » what impact it has on individuals, businesses and the broader economy (Section 3)
- how primary prevention initiatives outside the workplace can be used to address workplace sexual harassment (Section 4)
- the current legal and regulatory systems for responding to workplace sexual harassment and how these can be improved (Section 5)
- a proposed new framework for workplaces to address sexual harassment (Section 6)
- the support, advice and advocacy services that are available, and how access to these services can be improved (Section 7).



### *(i) The current context*

Under the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act), sexual harassment is:

- any unwelcome sexual advance
- unwelcome request for sexual favours, or
- other unwelcome conduct of a sexual nature in relation to the person harassed

in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. The Sex Discrimination Act makes sexual harassment unlawful in certain areas of public life, including employment.

Since the Sex Discrimination Act was introduced in 1984, there have been substantial changes to the nature of work.

Temporary or agency work, part-time or on-call work, labour hire, independent contracting and other forms of 'non-standard' work are now common, particularly in the so-called 'gig' or 'sharing economy'.

Higher rates of self-employment and lower rates of union membership can create challenges when it comes to making a complaint of sexual harassment and holding workplaces accountable. Technological change has also blurred the distinction between the personal and the professional world, creating ambiguity about the boundaries of the workplace.

Australia's domestic legal framework with respect to workplace sexual harassment gives effect to broader international obligations to prevent sexual harassment and other forms of gender-based violence and discrimination.

The media and social media also play a role. It is important that they work to promote public awareness, accountability and transparency, while avoiding the risks and harms of reporting that occurs without the consent of the victim or that undermines procedural fairness for the harasser.

Workplace sexual harassment was estimated to cost the Australian economy approximately \$3.8 billion in 2018. This is Australia's opportunity to instead invest this money in better health and economic outcomes for its workers and workplaces.

*(ii) Understanding sexual harassment in the workplace*

**Prevalence**

The Commission conducts a world leading national survey on experiences of workplace sexual harassment in Australia every four years. These surveys are an important source of data on the prevalence, nature, reporting of, impacts and responses to workplace sexual harassment in Australia.

The results of the fourth national survey conducted by the Commission in 2018, *Everyone's Business: Fourth survey on sexual harassment in Australian workplaces* (the 2018 National Survey) have informed the Commission's findings as part of this Inquiry.

The 2018 National Survey provides a clear picture of the pervasiveness of sexual harassment in Australia workplaces.

The results indicate that 33% of people who had been in the workforce in the previous five years said they had experienced workplace sexual harassment. Women (39%) were more likely than men (26%) to have experienced workplace sexual harassment in this period.

The Commission recommends that the national survey continue to be conducted every four years to allow trend analysis to inform policy decisions, and to inform employer initiatives.

There is currently little consistency in the collection, monitoring and reporting of data on workplace sexual harassment by anti-discrimination and other regulatory agencies.

Effective systems for collection and reporting of consistent, de-identified data on workplace sexual harassment by the Commission, state and territory anti-discrimination agencies, Fair Work, work health and safety (WHS) and workers' compensation agencies, are key to the success of the new regulatory model proposed by the Commission (see Section 5).

The development of formal information sharing and data exchange mechanisms regarding sexual harassment complaints between regulatory agencies, under guidance from the Workplace Sexual Harassment Council (see Recommendation 14), will also support the Commission's proposed new regulatory model.

**Nature**

Each victim's experience of workplace sexual harassment is unique and influenced by a range of factors. The 2018 National Survey identified a number of different types of sexually harassing behaviour including:

- verbal forms of sexual harassment, such as sexually suggestive comments or jokes, intrusive questions about private life or physical appearance, repeated invitations to go on dates, or requests or pressure for sex
- sexually explicit pictures, posters or gifts
- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, indecent exposure, or being followed, watched or someone loitering nearby
- inappropriate physical contact, such as unwelcome touching, hugging, cornering or kissing, or actual or attempted rape or sexual assault
- sexual harassment involving the use of technology, including sexually explicit emails, SMS or social media, indecent phone calls, repeated or inappropriate advances online, or sharing or threatening to share intimate images or film without consent.

The two most commonly reported types of behaviour were sexually suggestive comments or jokes and intrusive questions about private life or physical appearance.

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Many workers told the Commission about being subject to sexually harassing ‘jokes’, where the harasser later claimed to be surprised when their attempts at humour were met with offence or insult. Several victims told the Commission about experiencing workplace sexual harassment which began in verbal exchanges and ended in rape or sexual assault.

The Commission also heard that technology was often used to perpetrate sexual harassment.

The frequency, duration and location of workplace sexual harassment also tells a story. In the 2018 National Survey, when people who said they had been sexually harassed in the workplace in the last five years were asked about the most recent incident they experienced:

- 49% said the same type of harassment had happened to them previously at the same workplace
- 45% of those who said they experienced the same type of sexual harassment previously, said it had been ongoing for 12 months or longer
- 52% said they were sexually harassed at their workstation or where they worked.

### **Cultural and systemic drivers**

Through the Inquiry, the Commission heard about the way in which power disparities in society, as well as in the workplace, enabled sexual harassment. Overwhelmingly, the Commission heard that gender inequality was the key power disparity that drives sexual harassment. Gender inequality relates to the unequal distribution of power, resources and opportunity between men and women in society, due to prevailing societal norms and structures.

The Commission also heard that while gender inequality is an underlying condition for sexual harassment to occur, it is not the only factor that drives it. Other forms of discrimination and disadvantage that create power imbalances in the workplace and in society, can also drive sexual harassment.

When people experience multiple forms of intersecting discrimination and harassment, for example on the basis of gender, race, disability or sexuality, this is referred to as ‘intersectional’ discrimination. The Commission was told that ‘intersectionality’ is an important factor in understanding workplace sexual harassment and how to address it.

Other cultural and systemic factors that contribute to the prevalence of workplace sexual harassment that were raised in consultations and submissions included:

- the culture or ‘climate’ of a workplace, including the critical role of leadership in setting workplace culture
- a lack of understanding about what constitutes sexual harassment
- use of alcohol in a work context.

### **People who experience workplace sexual harassment**

The Commission heard, and research also indicates, that women experience higher rates of workplace sexual harassment than men. Beyond this, research on the experiences of different groups of people is limited. However, there is increasing evidence that sexual harassment affects some groups of people in disproportionate ways.

In addition to gender, other factors may increase the likelihood that a person may experience workplace sexual harassment. Workers who may be more likely to experience sexual harassment in the workplace include:

- young workers aged less than 30 years
- lesbian, gay, bisexual, transgender, queer or intersex (LGBTQI) workers
- Aboriginal or Torres Strait Islander workers
- workers with disability
- workers from culturally and linguistically diverse (CALD) backgrounds
- migrant workers or workers holding temporary visas
- people in working arrangements described as ‘precarious’ or ‘insecure’.



The Commission also heard that the existing research on the factors that make an individual or groups vulnerable to sexual harassment is very limited, and that further research is required to better understand this.

### **Harassers**

Existing research has shown that in most incidents of workplace sexual harassment the harasser was male. However, given the limited research on harassers beyond this, it is difficult to identify any typical characteristics of a person who engages in sexual harassment. Harassers have diverse behaviours and motivations, and exist across all age groups, industries and social strata.

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The 2018 National Survey does provide some insights into harassers in the Australian workforce. When people who said they had experienced workplace sexual harassment in the last five years were asked about the most recent incident:

- the majority (64%) said they were sexually harassed by a single harasser
- most (79%) said that one or more of their harassers was male
- where the most recent incident involved a single harasser, more than half (54%) indicated that the harasser was aged 40 or older
- victims said that the harasser was most commonly a co-worker employed at the same level (27% for single harassers, and 35% for multiple harassers).

Through the Inquiry process, the Commission also heard from individuals whose experiences reflected the National Survey data on harassers. However, better research is required to understand the behaviours and characteristics of harassers, as a means to develop targeted prevention initiatives and improved responses.

### **Workplace settings**

Sexual harassment is more prevalent in some workplace settings than in others. The 2018 National Survey data, information from submissions and consultations, academic research and government reviews (both Australian and international) show that a range of characteristics and practices specific to particular industries, professions or workplaces may increase the risk of sexual harassment.

Workplace settings where there is a higher risk of experiencing sexual harassment include those that:

- have been found by the 2018 National Survey to have a higher prevalence rate of sexual harassment than the rate across all industries of 31% (for example, the information, media and telecommunication industry and the arts and recreation industry)
- are male-dominated (for example, the construction and mining industries), because of:

- » the gender ratio
- » the over-representation of men in senior leadership roles
- » the nature of the work being considered 'non-traditional' for women
- » the masculine workplace culture

- involve a high level of contact with third parties, including customers, clients or patients (for example, the retail and hospitality sectors, and the health care and social assistance industry)
- are organised according to a hierarchical structure (for example, in police organisations, the Australian Defence Force, and the medical and legal professions).

While there is limited data available on workplaces located in rural, regional and remote areas, particular factors such as geographic isolation, lower population density and cultural and social dimensions can increase the risk of sexual harassment in these settings and create barriers to reporting or challenging these behaviours.

Small businesses face particular challenges in addressing workplace sexual harassment. The small size of the workplace and high degree of informal and personal interactions can increase the risk of sexual harassment and create barriers to reporting. Small businesses often lack the resources and skills to handle complaints. However, the size and make-up of small businesses also mean that business owners and managers are uniquely positioned to set and influence workplace culture and behaviour in a positive way.

The Commission recognises that further research is required to assist in identifying risk factors for different workplace settings, as well as developing tailored solutions.

### **Impacts of sexual harassment in the workplace**

The Inquiry found that as well as having a devastating and profound impact on individuals, workplace sexual harassment also undermines workplace productivity and imposes a significant economic cost to Australian society.

Consultations and submissions described the complex and interconnected ways in which experiencing and reporting workplace sexual harassment can affect individuals, including through:

- negative impacts on health and wellbeing
- negative impacts on employment (both day-to-day and in relation to career progression)
- significant financial consequences.

The impact of workplace sexual harassment is not only limited to individual victims but extends to their families, friends, bystanders and other co-workers.

Sexual harassment also represents a cost to Australian employers through:

- lost productivity
- staff turnover
- negative impact on workplace culture
- resources associated with responding to complaints, litigation and workers' compensation
- reputational damage.

Under the Terms of Reference for the Inquiry the Commission was asked to consider the economic impact of workplace sexual harassment. The Australian Government Department of the Treasury engaged Deloitte Access Economics (Deloitte) to undertake the modelling (a full copy of this report is available at Appendix 7 of the Inquiry report). Deloitte estimated the total financial cost of workplace sexual harassment to the Australian economy as \$3.8 billion, noting that this was likely to be a 'conservative estimate'. Lost productivity (\$2.6 billion) represented the largest component of the estimated economic cost of workplace sexual harassment, with the largest share of this borne by employers.

Together with the non-financial impacts on victims, the very significant economic costs provide a compelling case for investment by governments and employers in preventing and addressing workplace sexual harassment.

## National Sexual Harassment Research Agenda

To address the evidence gaps identified through this Inquiry, a National Sexual Harassment Research Agenda should be developed.

The National Sexual Harassment Research Agenda should be guided by, amongst other things, findings of the Commission's 2018 National Survey, as well as the issues and evidence gaps emerging from this Inquiry, including:

- the prevalence and nature of sexual harassment, particularly technology-facilitated sexual harassment
- risk factors that lead to greater exposure to sexual harassment for particular population groups, including women, young workers, LGBTQI workers, Aboriginal and Torres Strait Islander workers, workers with disability, workers from CALD backgrounds, migrant workers or workers on temporary visas, and other vulnerable workers
- the prevalence, nature, reporting and impacts of sexual harassment for workers in these population groups
- behaviours, characteristics and trends in relation to sexual harassers
- risk factors that create an environment in which sexual harassment is more likely to occur in particular workplace settings, arrangements, industries and sectors
- the impacts (particularly long-term) of workplace sexual harassment on individuals, businesses and society more broadly and the economic costs of workplace sexual harassment
- the effectiveness of strategies for the primary prevention of sexual harassment.

### *(iii) Prevention outside the workplace*

To prevent workplace sexual harassment, primary prevention initiatives must not only address the drivers of sexual harassment in a workplace context but also in society more broadly.

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Sexual harassment is recognised as a form of gendered violence. The social norms, structures, attitudes and practices that drive violence against women are the same drivers that enable sexual harassment. Violence against women encompasses physical violence and other forms of gender-based harm including psychological harm.

Primary prevention refers to initiatives that target the whole population and aim to transform the key drivers of violence against women, including sexual harassment, so that the violence or harassment does not happen in the first place.

Effective primary prevention of sexual harassment requires strategies that recognise and aim to shift the gendered drivers that underpin sexual harassment and that promote gender equality. This is the approach recommended in *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia (Change the Story)*, which provides an evidence-based framework to guide efforts to prevent sexual harassment.

*Change the Story* sets out that:

- violence against women is driven by gender inequality
- violence against women is preventable
- the actions that will prevent violence against women involve challenging gender inequality (for example, challenging gender stereotypes) and promoting and normalising gender equality in public and private life
- actions must be taken by governments, organisations and individuals in the different settings where people live, work, learn and socialise, and must be tailored to the context and needs of different groups.

The Commission heard from a number of parties, including a joint statement signed by more than 100 organisations and academics, that any primary prevention efforts developed to address sexual harassment should be informed by the *Change the Story* framework.

## Effective approaches to primary prevention

There is a growing body of research on effective approaches to primary prevention in relation to violence against women. The evidence base on the prevention of sexual assault and intimate partner violence is better developed than other forms of violence against women. However, given that sexual harassment and other forms of violence are driven by the same underlying societal norms and practices, a range of principles and approaches to primary prevention from this research are relevant to sexual harassment, including:

- addressing intersecting forms of harassment and discrimination (for example, relating to a person's race, sexual orientation or disability)
- using a whole-of-community approach to address different aspects of the problem across multiple settings, including workplaces, media, education, arts, and sports
- considering the effectiveness of strategies that have been implemented previously
- encouraging bystanders to take action
- engaging men and boys in prevention
- monitoring and evaluation
- dealing with backlash or resistance to prevention efforts.

## Government action to prevent sexual harassment

To be effective, primary prevention needs long-term sustained effort and a high level of leadership and political will.

In Australia, a coordinated national policy approach to addressing violence against women is currently provided by the *National Plan to Reduce Violence against Women and their Children 2010–2022* (the National Plan), endorsed by the Council of Australian Governments (COAG). The National Plan is supported by a series of four three-year Action Plans.

Neither the National Plan nor the first three Action Plans directly identify sexual harassment as an area for action. The Fourth Action Plan was endorsed in August 2019 and specifically includes the following actions which address sexual harassment:

- prevent sexual violence and sexual harassment before it happens through national and targeted initiatives that promote informed consent, bodily autonomy and respectful relationships
- deliver client-centred, trauma-informed, specialised and consistent support to victims and survivors of sexual violence
- strengthen the capacity of all sectors to address sexual harassment to ensure women are safe at work, while studying, in public and online.

Recognising that the National Plan and the Fourth Action Plan expire in 2022, the Commission recommends that COAG incorporate sexual harassment as a key area for action and investment under any future national framework to address violence against women.

The Commission also recommends that all Australian governments have gender equality strategies that address sexual harassment and recognise that sexual harassment is driven by gender inequality and is a form of gender-based violence.

Many states and territories have plans for the prevention of violence against women. However, most of these plans do not include any specific actions to address sexual harassment, or only do so indirectly. The states and territories have an important role to play in the prevention of sexual harassment. The Commission recommends that all state and territory governments have strategies for the prevention of violence against women, modelled on *Change the Story*, that include the prevention of sexual harassment as a key area for action.

### Key areas for primary prevention

Through this Inquiry, the Commission has identified a number of areas that should be immediately prioritised for the primary prevention of sexual harassment.

The Commission recommends that initial primary prevention efforts should be focused on:

- social change strategies on sexual harassment, including a national campaign to increase knowledge and change behaviours that drive sexual harassment
- interventions that address sexual harassment of populations at higher risk of sexual harassment, including those who experience intersectional discrimination
- prevention initiatives that reach young people, which focus on sexual harassment as a form of gender-based violence
- resources on workplace rights for young people
- respectful relationships education in schools that includes content on sexual harassment as a form of gender-based violence and recognises that sexual harassment is driven by gender inequality
- information and training for staff and students in tertiary education institutions that recognises sexual harassment as a form of gender-based violence and provides information on workplace rights
- guidelines and practical measures to ensure responsible reporting of sexual harassment by the media.

#### *(iv) The legal and regulatory framework*

### Towards a new regulatory model

Currently, the key areas of legislation relating to sexual harassment in the workplace are the Sex Discrimination Act, state and territory anti-discrimination laws, the *Fair Work Act 2009* (Cth) (Fair Work Act), state workplace relations laws, and work, health and safety (WHS) laws. WHS laws are based on the Model Work Health and Safety Act in all states and territories, except in Victoria and Western Australia which have their own WHS schemes.



A consistent theme that emerged from submissions and consultations was that the interaction between the schemes is complex and confusing for workers and employers to navigate. As each of the schemes offers specific and differing benefits to victims, the Commission has identified the benefits of each scheme and how to:

- maximise and improve existing legislative frameworks
- leverage, rather than duplicate, the expertise of existing regulators, in line with the Australian Government's Deregulation Agenda.

The new regulatory model that the Commission recommends recognises that the right of workers to be free from sexual harassment is a human right, a workplace right and a safety right.

As the Sex Discrimination Act will continue to be the primary framework for addressing sexual harassment within a human rights context, stronger obligations under the Sex Discrimination Act are an important part of the new model.

Another key feature of the proposed new regulatory model is the establishment of a Workplace Sexual Harassment Council (Council). The Council would be chaired by the Sex Discrimination Commissioner and funded by the Australian Government. The Commission would provide a key leadership, advisory and educative role in the Council to ensure that sexual harassment continues to be understood within a human rights framework.

In addition to the Sex Discrimination Commissioner, the Council's core membership would comprise representatives from the Fair Work Ombudsman, the Fair Work Commission, Safe Work Australia, the Heads of Workplace Safety Authorities, the Heads of Workers' Compensation Authorities and the Australian Council of Human Rights Authorities.

The Council would also include associate members to provide expertise and advice on specific issues or areas of work relating to sexual harassment. Associate members would include representatives across government, non-government, and independent organisations, including employer and union representatives.

The associate members would provide the Council with subject matter expertise and advice on specific issues or areas of work.

The Council would provide a coordinated mechanism for the existing policy and regulatory bodies with responsibility for sexual harassment to work together collaboratively. Importantly, by enabling cross-sector collaboration it would drive the effectiveness and efficiency of government operations. This would ultimately improve prevention of sexual harassment by employers and support an effective tailored response for workers and employers.

Consistent with the multi-faceted and whole-of-community response outlined in the Inquiry report, the Council would also draw upon the expertise of key stakeholders.

### **International human rights obligations**

Australia's domestic legal framework with respect to workplace sexual harassment must be understood in the context of Australia's broader international obligations to prevent sexual harassment and other forms of gender-based violence and discrimination.

Australia has ratified, and has therefore agreed to be bound by, a number of international treaties that recognise fundamental human rights relevant to workplace sexual harassment, including the right to:

- live and work free from violence and harassment
- freedom from discrimination
- security of person
- work
- just and favourable conditions of work.

Australia continues to strengthen its international commitments, with Australia voting in favour of the International Labour Organization (ILO) adopting a new Convention and accompanying Recommendation Concerning the Elimination of Violence and Harassment in the World of Work (ILO Convention 190) in June 2019. ILO Convention 190 broadly defines 'worker' and 'workplace' to capture the full range of traditional and non-traditional work arrangements and relationships, as well as the different workplace settings in which violence and harassment can be experienced.

### **Sex Discrimination Act and state and territory anti-discrimination laws**

At the federal level, sexual harassment in the workplace and in other areas of public life is prohibited in the Sex Discrimination Act. The Sex Discrimination Act confers additional powers and functions on the Commission, including the power to conciliate sexual harassment complaints. It also establishes the office of the Sex Discrimination Commissioner.

Throughout the Inquiry, the Commission heard that the Sex Discrimination Act could be amended to better achieve its objects and clarify its underlying purposes and foundational principles, in order to provide guidance to workers, workplaces, the community and courts.

Accordingly, the Commission recommends changes to the Sex Discrimination Act that ensure:

- the objects include achieving substantive equality
- the definitions of 'workplace participant' and 'workplace' cover all people in the world of work, including those who are paid, unpaid and self-employed
- that public servants are covered
- sex-based harassment is expressly prohibited
- creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

The Commission frequently heard that the lack of a positive duty in the Sex Discrimination Act to prevent workplace sexual harassment means that employers place a higher priority on compliance with employment law and work health and safety laws than discrimination law. This also places a heavy onus on individuals to complain.

For this reason, the Commission recommends that the Sex Discrimination Act is amended to include a positive duty requiring employers, with the possible exception of micro-businesses, to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.

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To support the implementation of this recommendation, the Commission also recommends that the Sex Discrimination Act is amended to provide it with accompanying enforcement powers to assess compliance with the positive duty.

As is evident throughout the report, sexual harassment has specific systemic and cultural drivers. Addressing these is key to primary prevention efforts. To facilitate this, the Commission recommends that the Australian Human Rights Act is amended to provide the Commission with an enhanced inquiry function to enable it to inquire into systemic unlawful discrimination, including systemic sexual harassment.

In line with the objective of promoting consistency and clarity within the Sex Discrimination Act, the Commission recommends that liability for sexual harassment be extended to those who aid or permit another person to sexually harass a person. Similarly, there is a need to clarify that the Federal Court and the Federal Circuit Court have jurisdiction to hear an application under the Sex Discrimination Act alleging victimisation as a civil cause of action.

There is no specific timeframe in which a complaint must be lodged with the Commission. However, the President of the Commission has the discretion to terminate a complaint lodged more than six months after the alleged unlawful discrimination took place. The Commission heard that the six-month timeframe associated with this discretion fails to recognise the complex reasons why a victim may delay making a sexual harassment complaint immediately following the alleged incident.

The Commission recommends this timeframe for exercising the discretion to terminate be extended to 24 months.

Similarly, following feedback and analysis, the Commission considers that unions and other representative groups should be able to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

The Commission also heard that the damages awarded by courts in sexual harassment matters were low, especially when compared with other causes of action such as defamation. Given the complexity and importance of this area, the Commission recommends that further research be conducted on the award of damages in sexual harassment matters. This research should focus on whether current damages reflect contemporary understandings of the nature, drivers, harms and impacts of sexual harassment, and be used to inform judicial education and training.

Further, the Commission heard that the risk of a costs order acts as a disincentive to pursuing sexual harassment matters in the federal jurisdiction. Consistent with its objective of promoting consistency between the main legislative schemes, the Commission recommends that a cost protection provision, consistent with the Fair Work Act, be introduced into the Australian Human Rights Commission Act.

To further support consistency, the Commission recommends that the Australian Government work with state and territory governments, through COAG or another appropriate forum, to amend their human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the Sex Discrimination Act. Consistency should be achieved without limiting or reducing protections.



Finally, a recurring theme that arose throughout the Inquiry was that, for many victims, this was the first time they had told anyone about their experiences. Given the profound and often devastating impacts on people affected by workplace sexual harassment, the Commission heard that the Inquiry process allowed people to feel listened to and to have their experiences acknowledged.

As demonstrated by other inquiries and restorative engagement processes, there is a healing power for victims in having their experiences heard, outside of formal complaint-handling processes, in a safe and supportive environment. Building upon these learnings, the Commission recommends that a disclosure process be established that enables victims of historical workplace sexual harassment matters to have their experiences heard and documented with a view to promoting recovery.

### **Fair Work system**

The Fair Work Act and the *Fair Work Regulations 2009* (Cth) establish the Fair Work system, which is the national framework governing the relationship between employers and employees in Australia.

The Fair Work Act does not expressly prohibit sexual harassment. However, it can be raised indirectly in matters brought to the Fair Work Commission through a number of provisions:

- general protections against 'adverse action' on the basis of a workplace right
- general protections against 'adverse action' on the basis of sex
- the anti-bullying jurisdiction
- unfair dismissal
- unlawful termination on the ground of sex.

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Many submissions from legal organisations, unions, community groups and non-government organisations argued strongly in favour of explicitly including sexual harassment in the Fair Work Act to strengthen the Fair Work system's handling of sexual harassment matters. The Commission recommends the Fair Work system be reviewed to consider the most effective mechanism for prohibiting workplace sexual harassment.

The Commission also recommends a range of complementary amendments to ensure the Fair Work Act comprehensively addresses sexual harassment:

- introduction of a 'stop sexual harassment order' equivalent to the 'stop bullying order'
- clarifying that sexual harassment can be conduct amounting to a valid reason for dismissal
- updating the definition of 'serious misconduct' to include sexual harassment.

The Commission recommends that the Fair Work Commission, in consultation with the Workplace Sexual Harassment Council, provide additional guidance material to employers regarding unfair dismissal in relation to sexual harassment.

Given the Fair Work Ombudsman's role in providing information and guidance, the Commission recommends that the Fair Work Ombudsman update its employee information and guidance relating to workplace rights under the Fair Work Act to include sexual harassment.

It is crucial that the regulators within the new regulatory model have appropriate understanding, skills and knowledge in relation to sexual harassment. The Commission therefore recommends that the Fair Work Ombudsman and Fair Work Commission ensure that their staff undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work, and that statutory office holders are also encouraged to undertake this training and education.

This should be undertaken with guidance from the Workplace Sexual Harassment Council. The training and education should include information on the role of gender inequality in sexual harassment, and make clear that it is a form of gender-based violence.

### **Work health and safety**

Established in 2011, the Model WHS laws comprise the Model WHS Act, the Model WHS Regulations and 24 Model Codes of Practice. The Model WHS laws, implemented in all jurisdictions other than Victoria and Western Australia, do not expressly prohibit sexual harassment.

However, they impose a positive duty on employers to prevent sexual harassment in the context of the broad duty to eliminate or manage hazards and risks to a worker's health, which includes psychological health and therefore sexual harassment.

In consultations and submissions, the Commission heard that the lack of an express WHS Regulation, Code of Practice or guideline means that workplace sexual harassment is not being addressed by WHS regulators or employers in a consistent, robust or systemic way. There is an urgent need to raise awareness that sexual harassment is a work health and safety issue.

Relevantly, an independent review into the Model WHS laws, released in February 2019 (the Boland review), also recommended the development of additional regulations on how to identify psychosocial risks in the workplace and the appropriate control measures to manage those risks.

Accordingly, the Commission recommends that WHS ministers agree to amend the model WHS Regulation to deal with psychological health, as recommended by the Boland Review, and develop guidelines on sexual harassment, with a view to informing the development of a Code of Practice. Sexual harassment should be defined consistently with the definition of sexual harassment in the Sex Discrimination Act.

The Commission acknowledges that this will require a cultural and institutional shift in a field that has historically focused on physical harm and risks. The Commission therefore also recommends that the staff of Safe Work Australia and other WHS regulators, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work. This should include information on the role of gender inequality in sexual harassment, and make it clear that it is a form of gender-based violence.

### **Workers' compensation**

Workers can claim compensation for an injury that has arisen out of, or in the course of, employment, including injury caused by workplace sexual harassment.

However, the Commission heard that despite one of the benefits of the workers' compensation framework being its 'no fault principle', victims are discouraged from making a workers' compensation claim, due to the onerous, lengthy and often re-traumatising process.

As outlined above, the Commission recommends that workers' compensation bodies, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work in relation to assessing and determining claims. This should include information on the role of gender inequality in sexual harassment, and make it clear that it is a form of gender-based violence.

### **Non-disclosure agreements**

The use of non-disclosure agreements (NDAs) in sexual harassment matters was a particularly topical and challenging issue that arose during the Inquiry. The Sex Discrimination Commissioner wrote to large employers asking them to issue a limited waiver of confidentiality obligations in NDAs to allow people to make a confidential submission to the Inquiry. Ultimately, only 39 organisations agreed to issue a limited waiver.

The Commission heard about the benefits of NDAs in sexual harassment matters in protecting the confidentiality and privacy of victims and helping to provide closure. However, there were also concerns that NDAs could be used to protect the reputation of the business or the harasser and contribute to a culture of silence.

Given the complexity and importance of this issue, the Commission recommends that, in conjunction with the Workplace Sexual Harassment Council, it develop a practice note or guideline that identifies best practice principles to inform the development of regulation on the use of NDAs in workplace sexual harassment matters.

### **Defamation laws and protections for witnesses in civil proceedings**

Each state and territory in Australia has substantially uniform defamation law. The Model Defamation Provisions (Model Laws) were endorsed by the former Standing Committee of Attorneys-General in November 2004 and each state and territory enacted legislation to implement them.

In consultations and submissions, the Commission heard that Australia's defamation laws discourage sexual harassment victims from making a complaint. Further, the Commission heard about cases where the privacy and confidentiality of alleged victims of sexual harassment was breached, with no legal recourse. This included cases where private complaints had been made public by the media or others, sometimes even prior to the victim making any formal complaint.

In November 2019, the Council of Attorneys-General Review of the Model Defamation Laws (CAG Review) released the draft *Model Defamation Amendment Provisions 2020* (Draft Defamation Amendments). The Commission encourages the CAG Review to consider the operation of the Model Laws, as proposed to be amended by the Draft Defamation Amendments, as they relate to workplace sexual harassment matters.

The Commission also heard concerns about the lack of protection for alleged victims of sexual harassment where they are witnesses in defamation or other civil proceedings, and their sexual harassment allegations are raised in circumstances where they have not made a formal complaint or given permission for this to be made public.

The Commission recommends that consideration be given to introducing protections for witnesses in this situation. Such measures could include a standard direction or presumption in favour of suppression of witness details in defamation proceedings, where the defamatory material includes allegations of sexual harassment.

Drawing upon developments in criminal law matters aimed at minimising the re-traumatisation of victims, consideration should also be given to providing witnesses with a broader range of additional safeguards.

### Other legal and regulatory responses

While the Inquiry has focused on anti-discrimination, employment and WHS law, to provide a broader picture of the complex and intersecting legal and regulatory issues relating to workplace sexual harassment, the Commission has considered other general civil and criminal laws and regulatory responses that may also be relevant.

The Commission was also told about police and judicial responses in workplace sexual harassment matters which lacked sensitivity and understanding. The Commission heard the devastating accounts of victims who had been re-traumatised through their interaction with the legal system. This underscores the importance of those working in the system having sensitive, trauma-informed and gender-responsive approaches to victims of workplace sexual harassment. The Commission recommends that education on the nature, drivers and impacts of sexual harassment be made available to judges, magistrates and tribunal members. This education should include that sexual harassment is driven by gender inequality and is a form of gender-based violence, be trauma-informed and be in line with the principles of *Change the Story*.

### (v) Preventing and responding to sexual harassment in the workplace

As discussed in this section, there was widespread acknowledgement by employers, workers and their representative bodies, that current regulation and approaches by employers—which have remained largely unchanged for decades—have failed to prevent or reduce workplace sexual harassment.

The Commission heard that employers, and particularly small business owners, want greater guidance on what ‘good practice’ for addressing workplace sexual harassment looks like.

### A new framework for workplaces

In response the Commission recommends a new framework for workplaces to better prevent and respond to sexual harassment.

The framework is structured around seven domains and is:

- victim-centred
- practical
- adaptable for businesses of all sizes and in all industries
- designed to minimise harm to workers.

It recognises that improving workplace prevention and responses requires a new and more holistic approach that looks beyond policies, training and complaint handling procedures.

To better **prevent** sexual harassment the Commission recommends action in the following areas or domains:

- **Leadership**—the development and display of strong leadership, that contributes to cultures that prevent workplace sexual harassment.
- **Risk assessment and transparency**—greater focus on identifying and assessing risk, learning from past experience and transparency, both within and outside of workplaces about sexual harassment, to mitigate the risk it can pose to businesses. This can help improve understanding of these issues and encourage continuous improvement in workplaces.

- **Culture**—the building of cultures of trust and respect, that minimise the risk of sexual harassment occurring and, if it does occur, ensure it is dealt with in a way that minimises harm to workers. This includes the role of policies and human resources practices in setting organisational culture.
- **Knowledge**—new and better approaches to workplace education and training, to demonstrate an employer's commitment to addressing harassment and initiate change by developing a collective understanding of expected workplace behaviours and processes.

To better **respond** to sexual harassment the Commission recommends action in the following areas or domains:

- **Support**—prioritising worker wellbeing and provision of support to workers, including before they make a report, as well as after they report and during any formal processes.
- **Reporting**—increasing the options available to workers to make a report of workplace sexual harassment and address barriers to reporting, and creating new ways for business owners and employers to intervene to address sexual harassment, other than launching a formal investigation. Adopting a victim-centred approach to the way investigations are conducted when a report is made can minimise unnecessary harm to workers.
- **Measuring**—the collection of data at a workplace-level and industry-level, to help improve understanding of the scope and nature of the problem posed by sexual harassment. This includes understanding the prevalence, nature and impacts of workplace sexual harassment as well as the effectiveness of workplace initiatives designed to address it.

To support the new framework, the Commission recommends:

- the Australian Institute of Company Directors and the Governance Institute of Australia develop education and training for board members and company officers
- the Workplace Gender Equality Agency work with the Workplace Sexual Harassment Council to consider how good practice indicators for measuring sexual harassment might apply under the *Workplace Gender Equality Act 2012* (Cth) (Workplace Gender Equality Act)
- the Australian Government amend the Workplace Gender Equality Act to require public sector organisations to report on their gender equality indicators
- the ASX Corporate Governance Council introduce sexual harassment indicators for ASX-listed entities to report against
- industry educational bodies, in consultation with the Workplace Sexual Harassment Council, develop accredited education and training for individuals who are responsible for advising employers on addressing workplace sexual harassment
- the Commission, in consultation with the Workplace Sexual Harassment Council, develop a set of good practice indicators for measuring and monitoring sexual harassment.

### Industry-based approaches

While the 2018 National Survey showed that workers across all industries and sectors experience sexual harassment, those industries with the highest reported rates of sexual harassment are placing workers at higher risk and demand urgent attention.

Some industries are alert to these risks and are already actively collecting evidence and information to inform prevention initiatives and responses. Industry, profession and sector-wide initiatives play an important role in addressing the specific drivers and responses to sexual harassment. These may include action plans, campaigns, programs and codes of practice.

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Professional registration, rules and codes, which underpin many licensing and accreditation schemes, are also helpful avenues for holding professionals to account for sexual harassment in the workplace. The benefit of these structures for employers is that they are already in place and are therefore aligned with industry drivers, and are simple and efficient.

### Resources

The Commission heard that employers of all sizes want to take effective steps to address sexual harassment. The size and resources of an employer affects their ability to take these steps. Employers of all sizes have asked the Commission to provide guidance on best practice through this Inquiry, and also for direction to cost-effective and timely tools and resources to assist them.

The Commission recognises the importance of providing clear and practical resources in the seven domains to assist:

- workers to understand their legal rights, responsibilities and options in relation to workplace sexual harassment
- business owners and employers to understand the causes of sexual harassment, how to prevent it, and how to respond to it in a way that minimises harm to workers and also ensures they meet their legal responsibilities.

These resources must be clear, practical, victim-centred, easily accessible from a central location and widely publicised. They also need to be flexible and appropriate for use in businesses of all sizes and in all industries—with particular effort required to ensure that resources support and are appropriate for use in small businesses.

To ensure employers and businesses of all sizes have access to high quality resources and tools to support all seven domains of the framework, the Commission recommends a collaborative approach to the creation and distribution of these resources. This can leverage the vast amount of resources already in existence and the expertise that resides in the collaborating parties.

The Commission recommends the establishment of a collaboration between unions, employers and employer associations to deliver information, education and resources for workers and employers through an online platform, *Respect@Work*.

### *(vi) Support, advice and advocacy*

When sexual harassment occurs, victims need support, advice and advocacy. Throughout the Inquiry, the Commission heard that while there are services that do provide support, navigating the pathways to these services can be difficult, and they are often too expensive or affected by lengthy delays.

Despite the broad-reaching detrimental impacts of sexual harassment, many people affected by it do not seek support. The 2018 National Survey found that fewer than one in five people (18%) who said they experienced workplace sexual harassment in the past five years sought support or advice in relation to the most recent incident. When victims do seek support, it is often from friends and family, and not necessarily specialist professional services.

### **A holistic approach**

The Commission considers that support, advice and advocacy should be delivered through a holistic approach, providing as seamless an experience as possible for victims and other people affected by workplace sexual harassment.

This holistic approach may involve smooth and speedy referrals between services or access to an all-inclusive support, advice and advocacy service. Working women's centres are not-for-profit community organisations that are well placed to provide these services. Australian governments should consider establishing or re-establishing working women's centres in jurisdictions where they do not currently exist to fulfil this role.

## Information and referral

The Commission frequently heard that workers' needs were not being met for clear, up-to-date, relevant, easily accessible information to help them come to terms with their experiences and enforce their rights in relation to workplace sexual harassment.

There are many service providers that provide different forms of information and referral services including the Commission's National Information Service (NIS), unions, working women's centres, community legal centres and legal aid. The Commission recommends further investment in these existing services.

The Workplace Sexual Harassment Council should assist with the development of guidelines and resources, to support the standardisation and enhancement of information and referral services provided to workers affected by sexual harassment. This is consistent with the Commission's recommended new legal and regulatory model.

## Legal advice and advocacy

The Commission heard that victims have difficulty navigating options for taking action on sexual harassment, whether in the workplace, with external agencies or through the courts.

While there are services that provide assistance with navigating these challenges, such as community legal centres and legal aid commissions, the Commission commonly heard that high demand and limited resources make providing quality services increasingly difficult.

Legal advice and representation should be available to all victims of sexual harassment navigating legal and external complaint processes, including those who do not have the means to pay lawyers' fees. Legal aid commissions and community legal centres should be adequately resourced to enable them to provide quality advice and representation in sexual harassment matters.

## Support to promote recovery

The Commission heard repeatedly of the importance of timely access to specialist counselling for victims of sexual harassment. Australia currently has no free and widely available counselling service tailored to the needs of people affected by sexual harassment. Given the prominence and existing expertise of the 1800RESPECT hotline (the national sexual assault, domestic and family violence counselling and information service), the Commission recommends the Australian Government ensure it is sufficiently funded and expanded to support sexual harassment victims. 1800RESPECT should also be resourced to collect de-identified data on the number of people who contact the service in relation to workplace sexual harassment.

Victims who require support beyond what 1800RESPECT can offer should have access to a well-resourced national network of other relevant services including employee assistance programs (EAPs), sexual assault support services, mental health helplines, and healthcare providers with the expertise to respond appropriately to workplace sexual harassment.

## Financial and career support

Victims of workplace sexual harassment experience financial impacts in the form of healthcare costs, career interruptions, reduced earning capacity and legal expenses.

The Commission's recommendations to enhance psychosocial support, information, referral, advice and advocacy services for people affected by workplace sexual harassment will better support victims to access the redress and compensation they may need to address the often significant financial impacts of experiencing harassment.





# Recommendations

## SECTION 2: THE CURRENT CONTEXT FOR THIS INQUIRY

### Implementation of recommendations

**Recommendation 1:** The Australian Government work with state and territory governments to implement the recommendations in this report and provide a joint funded package to ensure their implementation.

## SECTION 3: UNDERSTANDING SEXUAL HARASSMENT IN THE WORKPLACE

### National Sexual Harassment Survey

**Recommendation 2:** The Commission conduct a nationally representative survey every four years, funded by the Australian Government, that:

- a. provides data on sexual harassment, including the prevalence, nature, reporting, impacts of and responses to sexual harassment in the workplace, and identifies trends over time
- b. provides detailed industry data which allows analysis across and within industries
- c. is accessible and adequately captures experiences of sexual harassment across all population groups, including people of culturally and linguistically diverse backgrounds.

### Agency data

**Recommendation 3:** Agencies that handle workplace sexual harassment matters work with the Workplace Sexual Harassment Council (as recommended in Recommendation 14) to:

- a. collect an agreed de-identified data set relating to workplace sexual harassment enquiries, complaints, claims and settlement outcomes to contribute to a coordinated system of annual reporting on workplace sexual harassment metrics
- b. establish formal arrangements for information sharing and data exchange on enquiries, complaints and claims relating to workplace sexual harassment matters.

### National Sexual Harassment Research Agenda

**Recommendation 4:** The Australian Government supports the development and implementation of a National Sexual Harassment Research Agenda, which will identify priorities for research relating to sexual harassment (in addition to the National Sexual Harassment Survey) and contribute to a national evidence base on sexual harassment that can guide policy and practice. ANROWS should lead this work in consultation with the Workplace Sexual Harassment Council.

## SECTION 4: PREVENTION OUTSIDE THE WORKPLACE

### National coordination of sexual harassment prevention

**Recommendation 5:** The Council of Australian Governments agrees to incorporate sexual harassment as a key area for action and investment under any national framework to address violence against women.

### Government gender equality and violence prevention strategies

**Recommendation 6:** All Australian governments have gender equality strategies that address sexual harassment and that recognise sexual harassment is driven by gender inequality and is a form of gender-based violence.

**Recommendation 7:** All Australian governments have strategies for the prevention of violence against women that are based on *Change the Story*, recognise that sexual harassment is driven by gender inequality and is a form of gender-based violence, and include the prevention of sexual harassment as a key area for action.

### Primary prevention initiatives

**Recommendation 8:** Our Watch lead the development of evidence-based strategies for the prevention of sexual harassment, including implementation, monitoring and evaluation. Immediate priorities for action should include:

- a. social change strategies on sexual harassment, including a national campaign to increase knowledge of, and change behaviours that drive, sexual harassment
- b. targeted, evidence-based prevention strategies to address sexual harassment of populations who are at higher risk
- c. initiatives targeted towards young people that focus on sexual harassment as a form of gender-based violence.

### Workplace rights education for young people

**Recommendation 9:** Educational resources for young people of working age on workplace rights be identified, adapted to ensure relevance to workplace sexual harassment and promoted by the Australian Human Rights Commission and Fair Work Ombudsman for use in schools, tertiary education institutions and other settings that reach young people.

### School-based respectful relationships education

**Recommendation 10:** All Australian governments ensure children and young people receive school-based respectful relationships education that is age appropriate, evidence-based and addresses the drivers of gender-based violence, including sexual harassment.

### Sexual harassment prevention by universities and other tertiary education institutions

**Recommendation 11:** Building on work already underway in response to the recommendations in *Change the course*, all tertiary and higher education providers deliver evidence-based information and training on sexual harassment for staff and students that addresses the drivers of gender-based violence and includes content on workplace rights.

**Recommendation 12:** Recognising that some smaller tertiary and higher education providers lack the necessary resources and expertise to deliver the information and training identified in Recommendation 11, the Australian Government should support those providers to do so, for example through the Tertiary Education Quality Standards Authority and the Australian Skills Quality Authority.

### Media guidelines

**Recommendation 13:** The Workplace Sexual Harassment Council (as recommended in Recommendation 14) work with the Australian Communications and Media Authority, the Australian Press Council and Our Watch to promote and support best practice reporting on sexual harassment by the media, including through:

- a. guidelines that promote the safe, responsible, victim-centred and gender-responsive reporting of sexual harassment
- b. practical measures that build the knowledge, skills and capacity of media professionals to implement best practice reporting on sexual harassment.

## SECTION 5: THE LEGAL AND REGULATORY FRAMEWORK

### Workplace Sexual Harassment Council

**Recommendation 14:** The Workplace Sexual Harassment Council, supported by a permanent secretariat, be established immediately and funded by the Australian Government. Its objective is to improve coordination, consistency and clarity across the key legal and regulatory frameworks, to improve prevention and response to sexual harassment.

The Council is to be chaired by the Sex Discrimination Commissioner and its core membership include representatives from:

- the Fair Work Commission and Fair Work Ombudsman
- Safe Work Australia and the Heads of Workplace Safety Authorities
- the Heads of Workers' Compensation Authorities
- the Australian Council of Human Rights Authorities.

The Council will also include associate members to provide expertise and advice on specific issues or areas of work relating to sexual harassment. Associate members include representatives across government, non-government, and independent organisations, including employer and union representatives.

### ILO Convention concerning the elimination of violence and harassment in the world of work (ILO 190)

**Recommendation 15:** The Australian Government ratify ILO Convention 190.

### Sex Discrimination Act

#### Objects, definitions and coverage

**Recommendation 16:** Amend the Sex Discrimination Act to ensure:

- a. the objects include 'to achieve substantive equality between women and men'
- b. sex-based harassment is expressly prohibited
- c. creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited
- d. the definition of 'workplace participant' and 'workplace' covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed
- e. the current exemption of state public servants is removed.

### Positive duties

**Recommendation 17:** Amend the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:

- a. the size of the person's business or operations
- b. the nature and circumstances of the person's business or operations
- c. the person's resources
- d. the person's business and operational priorities
- e. the practicability and the cost of the measures
- f. all other relevant facts and circumstances.

**Recommendation 18:** The Commission be given the function of assessing compliance with the positive duty, and for enforcement. This may include providing the Commission with the power to:

- a. undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply
- b. enter into agreements/enforceable undertakings with the organisation
- c. apply to the Court for an order requiring compliance with the duty.

### Australian Human Rights Commission powers

**Recommendation 19:** Amend the Australian Human Rights Commission Act to provide the Commission with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment. Unlawful discrimination includes any conduct that is unlawful under the federal discrimination laws. The Commission should be given powers to require:

- a. the giving of information
- b. the production of documents
- c. the examination of witnesses
- d. with penalties applying for non-compliance, when conducting such an inquiry.

### Aiding or permitting an unlawful act

**Recommendation 20:** Amend section 105 of the Sex Discrimination Act to ensure that it applies to sexual harassment.

### Victimisation

**Recommendation 21:** Amend the Australian Human Rights Commission Act to make explicit that any conduct that is an offence under section 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination.

### Timeframe as a ground on which the President can terminate an accepted complaint

**Recommendation 22:** Amend the Australian Human Rights Commission Act so that the President's discretion to terminate a complaint under the Sex Discrimination Act on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination took place.

### Representative and/or collective claims

**Recommendation 23:** Amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

### Damages and costs

**Recommendation 24:** The Australian Government conduct further research on damages in sexual harassment matters and whether this reflects contemporary understandings of the nature, drivers, harms and impacts of sexual harassment. This research should inform judicial education and training.

**Recommendation 25:** Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

### Consistency of sexual harassment laws

**Recommendation 26:** The Australian Government work with state and territory governments, through the Council of Australian Governments or another appropriate forum, to amend state and territory human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the Sex Discrimination Act, without limiting or reducing protections.

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### Addressing historical complaints

**Recommendation 27:** A disclosure process be established that enables victims of historical workplace sexual harassment matters to have their experience heard and documented with a view to promoting recovery. The Australian Government should fund the Commission to facilitate this process.

### Fair Work Act/Fair Work Commission

#### Prohibition against sexual harassment

**Recommendation 28:** The Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited.

#### Stop sexual harassment order

**Recommendation 29:** Introduce a 'stop sexual harassment order' equivalent to the 'stop bullying order' into the Fair Work Act. This should be designed to facilitate the order's restorative aim.

#### Unfair dismissal and serious misconduct

**Recommendation 30:** Amend Section 387 of the Fair Work Act to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.

**Recommendation 31:** Amend the definition of 'serious misconduct' in the Fair Work Regulations to include sexual harassment.

**Recommendation 32:** Additional guidance material for all employers relating to unfair dismissal, which includes dismissal relating to sexual harassment, be developed by the Fair Work Commission in consultation with the Workplace Sexual Harassment Council.

#### Fair Work Information Statement

**Recommendation 33:** The Fair Work Ombudsman update its employee information and guidance relating to workplace rights under the Fair Work Act to include sexual harassment, such as amending the Fair Work Information Statement.

### **Education and training**

**Recommendation 34:** The Fair Work Ombudsman and Fair Work Commission, with guidance from the Workplace Sexual Harassment Council, ensure that their staff undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work. Statutory office holders in these jurisdictions should also be supported and encouraged to undertake this training and education.

### **Work health and safety**

#### **New Regulation, Code or guideline**

**Recommendation 35:** WHS ministers agree to amend the model WHS Regulation to deal with psychological health, as recommended by the Boland Review, and develop guidelines on sexual harassment with a view to informing the development of a Code of Practice on sexual harassment. Sexual harassment should be defined in accordance with the Sex Discrimination Act.

### **Training and education**

**Recommendation 36:** Safe Work Australia and WHS regulators, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work.

### **Workers' compensation**

#### **Training and education**

**Recommendation 37:** Workers' compensation bodies, with guidance from the Workplace Sexual Harassment Council, undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work.

### **Other legal issues**

#### **Non-disclosure agreements (NDAs)**

**Recommendation 38:** The Commission, in conjunction with the Workplace Sexual Harassment Council, develop a practice note or guideline that identifies best practice principles for the use of NDAs in workplace sexual harassment matters to inform the development of regulation on NDAs.

### Defamation laws and protection for sexual harassment victims in defamation proceedings

**Recommendation 39:** The Council of Attorneys-General consider how best to protect alleged victims of sexual harassment who are witnesses in civil proceedings, including but not limited to defamation proceedings. Measures could include amending state and territory legislation governing defamation proceedings to introduce a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in any defamation court proceeding, where the defamatory material includes allegations of sexual harassment. Consideration should also be given to additional witness safeguards and protections including:

- a. having the proceedings conducted in a closed courtroom
- b. giving evidence from a remote room
- c. having their evidence in chief be audio-visually recorded prior to the hearing
- d. having an audio-visual recording of their evidence during the hearing be re-used in any subsequent proceedings
- e. being protected from direct cross-examination by a self-represented party
- f. having a support person present while giving evidence.

### Judicial education and training

**Recommendation 40:** All Australian governments should:

- a. Ensure that relevant bodies responsible for developing training, programs and resources for judges, magistrates and tribunal members make available education on the nature, drivers and impacts of sexual harassment. This should be trauma-informed and in line with the principles of *Change the Story*.
- b. Support and encourage judicial officers and tribunal members across civil and criminal jurisdictions who may come into contact with victims of sexual harassment to undertake this education and training.

## SECTION 6: PREVENTING AND RESPONDING TO SEXUAL HARASSMENT IN THE WORKPLACE

### Board education and training

**Recommendation 41:** The Australian Institute of Company Directors and the Governance Institute of Australia, in consultation with the Workplace Sexual Harassment Council, develop education and training for board members and company officers on good governance in relation to gender equality and sexual harassment.

### External reporting

**Recommendation 42:** The Workplace Gender Equality Agency work with the Workplace Sexual Harassment Council to consider how good practice indicators for measuring and monitoring sexual harassment prevalence, prevention and response may apply to reporting in relation to sexual harassment under the *Workplace Gender Equality Act 2012*.

**Recommendation 43:** The Australian Government:

- a. amend the *Workplace Gender Equality Act 2012* to require public sector organisations to report to the Workplace Gender Equality Agency on its gender equality indicators
- b. fund the Workplace Gender Equality Agency adequately to meet these expanded reporting obligations.

**Recommendation 44:** The ASX Corporate Governance Council introduce sexual harassment indicators for ASX-listed entities to report against, under its Corporate Governance Principles and Recommendations. This could include:

- a. specific mention of sexual harassment in guidance on company codes of conduct (ASX recommendation 3.2)
- b. information about measures taken to address sexual harassment, as part of its requirements that listed entities have and disclose a diversity policy and set measurable objectives to achieve gender diversity (ASX recommendation 1.5).

### Accredited education and training

**Recommendation 45:** Industry educational bodies, in consultation with the Workplace Sexual Harassment Council, develop accredited education and training for individuals in roles that are responsible for advising employers on addressing workplace sexual harassment. The training should aim to:

- a. build skills and capacity on how to prevent and respond to workplace sexual harassment
- b. be trauma-informed
- c. include content on the nature, drivers and impacts of sexual harassment.

### Measuring and monitoring

**Recommendation 46:** The Commission in consultation with the Workplace Sexual Harassment Council develop a set of good practice indicators and methods for measuring and monitoring sexual harassment prevalence, prevention and response.

### Industry-wide initiatives

**Recommendation 47:** Key industry and professional groups (unions, employer associations, employers and other industry bodies) collaborate to establish industry and profession-wide initiatives to address sexual harassment, for Australian workplaces of all sizes. Initiatives may include industry-wide prevalence surveys, awareness-raising campaigns on industry-specific issues, or the development of industry-specific policies or accreditation requirements.

### *Respect@Work*

**Recommendation 48:** To support all workplaces to address sexual harassment, the Workplace Sexual Harassment Council will lead a new collaboration by unions, employers and employer associations called *Respect@Work*, which will deliver information, education and resources for workers and employers through an online platform.

## SECTION 7: SUPPORT, ADVICE AND ADVOCACY

### A holistic approach to support, advice and advocacy

**Recommendation 49:** Australian governments provide increased and recurrent funding to working women's centres to provide information, advice and assistance to vulnerable workers who experience sexual harassment, taking into account particular needs of workers facing intersectional discrimination. Australian governments should consider establishing or re-establishing working women's centres in jurisdictions where they do not currently exist.

### Information and referral

**Recommendation 50:** The Commission be promoted as the central contact point for information on workplace sexual harassment rights and responsibilities, including information about options for action and referral to alternative regulatory schemes, and referral to a range of victim support services.

**Recommendation 51: Hotlines and similar services provided by other agencies and regulatory bodies under the Commission’s proposed new regulatory model (see Section 5) provide information and referral services in relation to workplace sexual harassment in a gender-responsive manner, including:**

- a. detailed information about workplace sexual harassment under their regulatory schemes
- b. information about options for action and referral to alternative regulatory schemes
- c. referral to a range of victim support services.

**Recommendation 52: The Workplace Sexual Harassment Council:**

- a. provide high-level advice on development of guidelines and resources to ensure that all services providing information, advice and support in relation to sexual harassment can provide accurate information, make appropriate cross-referrals, and collect consistent data
- b. after three years, consider the need for a centralised, accessible service to provide information and advice in relation to workplace sexual harassment.

#### Legal advice and assistance

**Recommendation 53: All Australian governments provide increased and recurrent funding to community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid commissions to provide legal advice and assistance to vulnerable workers who experience sexual harassment, taking into account the particular needs of workers facing intersectional discrimination.**

#### Psychosocial support

**Recommendation 54: The Australian Government promote the 1800RESPECT hotline and ensure it is adequately resourced to expand its services to provide appropriate psychological support and referral to people affected by workplace sexual harassment, and collect and maintain de-identified and disaggregated data on contacts regarding workplace sexual harassment.**

**Recommendation 55: Psychosocial support for people affected by workplace sexual harassment be provided through a national network of services, including specialist sexual assault support services, mental health helplines, and healthcare providers with the expertise to respond appropriately to the gendered nature of sexual harassment. All Australian governments should prioritise funding to these services to ensure accessibility and capacity.**



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Inquiry team: Natasha de Silva, Tanaya Roy, Lauren Jones, Gabrielle Flax, Alanna Harper, Afton Fife, Sarah Haid, Anita Knudsen, Trish Low, Susan Newell, Georgia Waters, Camilla Gebicki, Victoria Dart, Anastasia Krivenkova, Annalise Cincotta-Lee, Alexandra Meagher, Diana Lambert, Megan McElhone, Jayne O'Connor.

Other Commission staff: Padma Raman, Darren Dick, Rachel Holt, Julie O'Brien, Maria Twomey, Adrian Flood, Hannah Tonkin, Ella Kucharova, Prabha Nandagopal, Amy Dale, Leon Wild, Danielle Kendall-Hall, Marie-Claire Muir, Georgia Flynn, Nevo Rom, Renee Arian, Maria Katsabanis, Catherine Earl, Christopher Field, Alice McBurney, Tyla Joubert, Elsa Chen, Olivia Aitken, Kate Griffiths, Sarah Hayes, Eleanor Holden, Kelly Britto, Connie Kwan, Amy Lamont, Gabriela Sanchez, Sophie Fletcher Watson.

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For further information about the Australian Human Rights Commission or copyright in this publication, please contact:

Australian Human Rights Commission  
GPO Box 5218, SYDNEY NSW 2001  
Telephone: (02) 9284 9600  
Email: [communications@humanrights.gov.au](mailto:communications@humanrights.gov.au)

**Design and layout** Dancinggirl Designs | **Printing** Growing Positive Solutions  
**Cover image** Getty Images | **Editing** Boldface, Manifesto Editing

## Further Information

### **Australian Human Rights Commission**

Level 3, 175 Pitt Street  
SYDNEY NSW 2000  
GPO Box 5218  
SYDNEY NSW 2001

Telephone: (02) 9284 9600  
Complaints Infoline: 1300 656 419  
General enquiries and publications: 1300 369 711  
TTY: 1800 620 241  
Fax: (02) 9284 9611

Website: **[www.humanrights.gov.au](http://www.humanrights.gov.au)**

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