



Employment Law Centre of WA (Inc)

Working for WA Workers

ABN 36 365 876 841

Submission

National Inquiry into Sexual Harassment in Australian Workplaces

A large, stylized 3D graphic at the bottom of the page consists of several interconnected blue and grey geometric shapes, resembling a modern architectural structure or a series of overlapping planes. The blue faces are prominent, while the grey faces provide depth and shadow.

February 2019

National Inquiry into Sexual Harassment in Australian Workplaces
Kate Jenkins
Sex Discrimination Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Lodged online: [link](#)

28 February 2019

Dear Sex Discrimination Commissioner Ms Jenkins

National Inquiry into Sexual Harassment in Australian Workplaces

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the National Inquiry into Sexual Harassment in Australian Workplaces (the **Inquiry**).

ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia offering free employment law advice, assistance, education and representation. Each year ELC assists thousands of callers each year through our Advice Line service and provides numerous employees with further assistance from a solicitor.

Please see our submission below. We would be happy to provide further information to the Inquiry and participate in further consultation should there be any opportunity to do so.

Yours sincerely

Employment Law Centre of WA

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Summary of ELC Recommendations

ELC recommends as follows.

Term of Reference: The current legal framework with respect to sexual harassment

RECOMMENDATION 1: That the definition of sexual harassment in the *Sex Discrimination Act 1984 (WA)* be amended so that:

- 1.1 sexual harassment occurs in circumstances where:
 - (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
 - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed.
- 1.2 a complainant does not need to prove that conduct occurred in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated; and
- 1.3 a respondent has a defence against a claim of sexual harassment in circumstances where the respondent can establish both that:
 - (a) the respondent had no actual intention to offend, humiliate and intimidate; and
 - (b) a reasonable person, having regard to all the circumstances, would not have anticipated the possibility that the person harassed would be offended, humiliated or intimidated’.

RECOMMENDATION 2: That the sexual harassment protections in the *Sex Discrimination Act 1984 (Cth)* be extended to cover volunteers and other kinds of unpaid workers.

RECOMMENDATION 3: That the sexual harassment protections in the *Sex Discrimination Act 1984 (Cth)* be extended to cover persons performing work in non-traditional working arrangements, such as ‘gig workers’.

RECOMMENDATION 4: That the *Sex Discrimination Act 1984* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth) be amended to provide for a reverse onus of proof for a victimisation offence, similar to the general protections provisions in the *Fair Work Act 2009* (Cth).

RECOMMENDATION 5: That the *Sex Discrimination Act 1984* (Cth) be modified to place a positive duty on employers and other responsible parties to eliminate sexual harassment and victimisation, in line with the duty that section 15(2) of the *Equal Opportunity Act 2010* (Vic) places on Victorian employers.

RECOMMENDATION 6: That there are civil penalties for breaches of the sexual harassment provisions in the *Sex Discrimination Act 1984* (Cth), and the power to allow for such penalties to be paid to the victim of sexual harassment.

RECOMMENDATION 7: That the penalties for a victimisation offence be substantially increased to be aligned to those available for serious contraventions of the *Fair Work Act 2009* (Cth).

RECOMMENDATION 8: That the Australian Human Rights Commission be empowered to

- 8.1 investigate and commence proceedings on behalf of complainants;
- 8.2 investigate and commence proceedings without requiring a particular identified complainant; and
- 8.3 seek compensation and penalties for breaches of the SD Act.

RECOMMENDATION 9: That further consideration be given to how to make settlement agreements reached at or through Australian Human Rights Commission conciliation easier to enforce for complainants.

RECOMMENDATION 10: That the Australian Human Rights Commission establishes an anonymous sexual harassment complaints function to assist with identifying non-compliance and to inform workplace investigations.

RECOMMENDATION 11: That the *Australian Human Rights Commission Act 1986* (Cth) be amended so that the time-frame for lodging a sexual harassment complaint (and other discrimination-based complaints) is extended to 6 years.

RECOMMENDATION 12: That the legal framework for sexual harassment complaints under the *Sex Discrimination Act 1984* (Cth) be modified so that parties to a sexual harassment complaint before the Federal Circuit Court of Australia or Federal Court of Australia bear their own costs, and that the parties are not at risk of adverse cost orders except for in exceptional circumstances (such as a complaint being made or responded to frivolously, vexatiously or without a reasonable prospect of success).

Term of Reference: Recommendations to address sexual harassment in Australian workplaces

RECOMMENDATION 13: That adequate resourcing is provided to the Australian Human Rights Commission to perform the additional proactive and reactive compliance functions recommended above.

RECOMMENDATION 14: That immediate additional funding and resources be provided to the community legal sector for the purpose of enabling legal assistance to be given to vulnerable workers who experience sexual harassment.

1. Introduction

1. It is well recognised that sexual harassment is occurring across Australian society and in workplaces. It is well recognised that the nature of sexual harassment and the impact that this has on a person, can create barriers in a person bringing and prosecuting a claim in a timely manner or at all. It is also undebatable that sexual harassment of any nature is not acceptable.
2. The focus of this submission is on the legal framework with respect to sexual harassment under the *Sex Discrimination Act 1984* (Cth) (**SD Act**) and the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). We also make a submission on the need for greater funding and resourcing to be devoted to this issue.
3. While ELC is not making a submission on other provisions in the SD Act and AHRC Act (for example, to do with sexual discrimination), ELC's recommendations could equally apply to those provisions. It is important to recognise in this respect that there is frequently an intrinsic link between sexual harassment, sexual discrimination and victimisation of complainants.

1.1 Term of Reference: The current legal framework with respect to sexual harassment

4. In ELC's view, the current legal framework with respect to sexual harassment can be improved in three key areas:
 - 4.1 Protections;
 - 4.2 Compliance; and
 - 4.3 Process.

Protections

5. The sexual harassment protections in the SD Act should be extended as follows:
 - The definition of sexual harassment be changed to remove some of the barriers that can make it difficult for a complainant to establish sexual harassment, while providing a defence to a respondent in limited circumstances.
 - The protections clearly cover unpaid workers and workers in non-traditional working arrangements.
 - There is a reverse onus of proof for victimisation claims brought under the SD Act.
 - There is a positive duty placed on employers and other relevant parties to eliminate sexual harassment and victimisation in working environments.

Compliance

6. The sexual harassment provisions in the SD Act should include civil penalty provisions to reflect the seriousness of breaches of these provisions, and to provide a greater deterrent against non-compliance.
7. The penalties for breaching the victimisation provisions in the SD Act should be increased to reflect the seriousness of breaches to these provisions, and to provide a greater deterrent against victimisation.

8. The Australian Human Rights Commission (**AHRC**) should be empowered to undertake greater proactive and reactive compliance functions with respect to sexual harassment, including:
- To investigate and commence sexual harassment proceedings on behalf of complainants.
 - To investigate compliance with, and alleged breaches of, the SD Act without requiring an identified complainant.
 - To accept anonymous tips concerning sexual harassment.

Process

9. The process for making a sexual harassment claim should be modified so that:
- The time frame for lodging a complaint is extended.
 - Each party bears their own legal costs in respect of making and responding to a sexual harassment claim in the Federal Court of Australia and the Federal Circuit Court of Australia (collectively the **Federal Courts**), and are not at risk of adverse cost orders except for in exceptional circumstances.

1.2 Term of Reference: Recommendations to address sexual harassment in Australian workplaces

10. Further, the ELC considers there needs to be greater funding and resources given to addressing the issue of sexual harassment, which funding should adopt a multi-layer approach of timely and adequate resourcing to:
- The AHRC to perform the additional proactive and reactive compliance and representation functions recommended by this submission.
 - The community legal sector and other third party legal assistance providers that assist vulnerable workers who have experienced sexual harassment.

2. Protections

2.1 Definition of sexual harassment

11. The current definition of sexual harassment under the SD Act has three main elements:
- 11.1.1 There must be conduct of a sexual nature;
- 11.1.2 The conduct must be unwelcome; and
- 11.1.3 The conduct must occur in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.¹

¹ SD Act s 28A.

12. Due to the circumstances in which sexual harassment commonly occurs, it can be difficult for complainants to prove the conduct in question has occurred and that it is unwelcome. The conduct can often be subtle or covert in its nature and the complainant may fear negative employment implications for openly rejecting it, particularly if they believe that the conduct is part of the 'normal culture' of the workplace.
13. There is then the additional burden where a complainant has established that the conduct was of a sexual nature and was unwelcome, that the complainant must also demonstrate that it occurred in circumstances where a reasonable person would have anticipated the possibility of causing offence, humiliation and intimidation.
14. Victoria Legal Aid notes that in its experience, clients who suffer discrimination often decide not to pursue a complaint due to the difficulty in proving the conduct.² The effectiveness of anti-discrimination laws is greatly reduced where complainants are discouraged from pursuing claims.
15. In ELC's view, the definition of sexual harassment should be modified so that sexual harassment occurs when a complainant can establish the first two elements above alone. Section 28A of the SD Act should be amended so that:

a person sexually harasses another person (the person harassed) if:

 - (a) *the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
 - (b) *engages in other unwelcome conduct of a sexual nature in relation to the person harassed.*
16. A defence to sexual harassment complaints could then be created so that a respondent will have a defence to a sexual harassment complaint if they can establish that the conduct in question occurred in circumstances where **both**:
 - 16.1 the respondent had no **actual** intention to offend, humiliate and intimidate; and
 - 16.2 a **reasonable person**, having regard to all the circumstances, would not have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.
17. These changes would address some of the barriers a complainant must overcome to establish a sexual harassment complaint.

² Victoria Legal Aid, Submission to The Australian Human Rights Commission, *On Age Barriers To Work In Commonwealth Laws*, 23 November 2012, 1.

RECOMMENDATION 1: That the definition of sexual harassment in the *Sex Discrimination Act 1984 (WA)* be amended so that:

- 1.1 sexual harassment occurs in circumstances where:**
- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or**
 - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed.**
- 1.2 a complainant does not need to prove that conduct occurred in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated; and**
- 1.3 a respondent has a defence against a claim of sexual harassment in circumstances where the respondent can establish both that:**
- (a) the respondent had no actual intention to offend, humiliate and intimidate; and**
 - (b) a reasonable person, having regard to all the circumstances, would not have anticipated the possibility that the person harassed would be offended, humiliated or intimidated’.**

2.2 Unpaid and non-traditional workers

18. The objects of the SD Act include to ‘*eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and **in other areas of public activity*** [ELC bolded emphasis].’³
19. Relevantly then, the objects under the SD Act have a broad reach in seeking to eliminate sexual harassment, referring to ‘*in other areas of public activity*’.
20. The SD Act then prohibits acts of sexual harassment by or against current or prospective employees, commission agents, contract workers and partners in a partnership.⁴
21. Section 28B(6) of the SD Act makes it unlawful for a ‘*workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons*’. Workplace participant is defined in subsection (7) to mean an employer, employee, commission agent, contract worker or partner in a partnership.

³ SD Act, s 3(c).

⁴ SD Act, s 28B.

22. Volunteers and other unpaid workers (including those completing internships or work experience) are not currently protected against sexual harassment under the SD Act. They are also not protected under the *Equal Opportunity Act 1984 (WA)* (**EO Act**), which means WA-based volunteers and unpaid workers effectively have no anti-discrimination laws to protect them from workplace sexual harassment.
23. Volunteers and other kinds of unpaid workers should have the same protections as the other kinds of paid workers covered by the SD Act provisions.
24. ELC also notes that the labour market in Western Australia has changed rapidly in recent years and that new types of workers have recently emerged as part of the “gig economy” – for example, Uber drivers, Deliveroo drivers, Airtasker workers and so forth. This type of work fits within the SD Act’s object to cover ‘other areas of public activity’.
25. The SD Act sexual harassment provisions should also be extended to protect persons performing work in non-traditional working arrangements, such as ‘gig workers’.

RECOMMENDATION 2: That the sexual harassment protections in the *Sex Discrimination Act 1984 (Cth)* be extended to cover volunteers and other kinds of unpaid workers.

RECOMMENDATION 3: That the sexual harassment protections in the *Sex Discrimination Act 1984 (Cth)* be extended to cover persons performing work in non-traditional working arrangements, such as ‘gig workers’.

2.3 Reverse onus of proof: victimisation claims

26. It is an offence under the SD Act to commit an act of victimisation against another person.⁵ Victimisation is defined to as where a person ‘*subjects, or threatens to subject, the other person to any detriment*’ based on various grounds set out in sections 94(2)(a) to 94(2)(g) of the SD Act. There is also a similar offence under the AHRC Act.⁶
27. The onus of proof requirements in having to establish the link between the detriment suffered and the various listed grounds, puts complainants at a significant disadvantage.
28. It can be very difficult for a complainant to establish that there was a discriminatory reason for the respondent’s behaviour. The complainant does not have access to relevant evidence, while the respondent has a ‘monopoly of knowledge’ about the decision-making process that led to the complainant’s treatment.⁷
29. As noted by Professor Gaze, “*proving the reason for an action or decision that exists in another person’s mind, where all the evidence is controlled by the other person and they are not required to give any reason, is very difficult.*”⁸

⁵ SD Act, s 94(1).

⁶ AHRC Act, s 26(2).

⁷ Laurence, Lustgarten, ‘Problems of Proof in Employment Discrimination Cases’ (1977) 6 *Industrial Law Journal* 212, 213.

⁸ Gaze, Beth, ‘Has the Racial Discrimination Act contributed to eliminating racial discrimination? Analysing the litigation track record 2000-2004’ (2005) 11(1) *Australian Journal of Human Rights* 171, [50].

30. The SD Act and the AHRC Act should be amended to provide for a reverse onus of proof in victimisation complaints, in line with the equivalent provisions in the *Fair Work Act 2009* (Cth) (**FW Act**).
31. A reverse onus of proof under the SD Act and the AHRC Act would be in line with the FW Act.⁹ It would allow for a consistent approach in handling discrimination complaints and assist complainants in pursuing their claims.

RECOMMENDATION 4: That the *Sex Discrimination Act 1984* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth) be amended to provide for a reverse onus of proof for a victimisation offence, similar to the general protections provisions in the *Fair Work Act 2009* (Cth).

2.4 Positive duty to eliminate sexual harassment

32. It is well recognised that the role of leadership is critical to culture, and that in turn an organisational culture of integrity is critical to legal compliance – “*Culture is one of the biggest determinants of how employees behave*”¹⁰
33. A culture of integrity requires, among other things, a proactive focus on legal and regulatory compliance. In respect of sexual harassment, it also requires a workplace culture where sexual harassment is clearly not tolerated or said to be part of the normal ‘sexual banter’ in the office.
34. As noted at paragraphs 18 and 19 above:
 - 34.1 the objects of the SD Act include the **elimination** of sexual harassment in the workplace, in educational institutions and in other areas of public activity;¹¹ and
 - 34.2 the sexual harassment prohibition in the SD Act covers current or prospective employees, commission agents, contract workers and partners in a partnership.¹²
35. If an act of sexual harassment occurs, the process for redressing that conduct commences with the making of a written complaint.¹³
36. Employers or agents may then be held vicariously liable for acts of sexual harassment that occur in connection with the employment unless they can show that they took ‘*all reasonable steps to prevent*’ such acts.¹⁴

⁹ FW Act, s 361.

¹⁰ ‘Corporate culture: the second ingredient in a world-class ethics and compliance program’ *Deloitte* (Web Publication, 2015) <<https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-corporate-culture-112514.pdf>>

¹¹ SD Act, s 3(c).

¹² SD Act, s 28B.

¹³ AHRC act s 46P.

¹⁴ SD Act, s 106.

37. This means that a person must make a complaint that a breach of the SD Act has occurred for any actions an employer has taken to prevent sexual harassment to be considered or called into question.
38. In ELC's view, the SD Act should place a positive duty or obligation on parties who can be held vicariously liable for the actions of others (such as employers) to also eliminate sexual harassment and victimisation. This positive duty or obligation should be in line with the duty that section 15(2) of the *Equal Opportunity Act 2010* (Vic) places on Victorian employers, which provides:
- A person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.*
39. Section 15(6) of the *Equal Opportunity Act 2010* (Vic) then sets out the factors in determining whether a measure is reasonable and proportionate as follows:
- In determining whether a measure is reasonable and proportionate the following factors must be considered—*
- (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.*
40. A positive duty of this nature is consistent with the existing objects of the SD Act to eliminate sexual harassment¹⁵, would encourage employers and other relevant parties to adopt a proactive approach to address and eradicate sexual harassment in the working environment and may have the benefit of facilitating a positive workplace culture of integrity.
41. In association with this positive duty, there needs to be increased regulatory investigation and enforcement powers to ensure parties are complying with this duty, so that regulatory action can be taken even where there is no complaint or incident (see ELC's submission below on enhanced regulatory powers for the AHRC).

RECOMMENDATION 5: That the *Sex Discrimination Act 1984* (Cth) be modified to place a positive duty on employers and other responsible parties to eliminate sexual harassment and victimisation, in line with the duty that section 15(2) of the *Equal Opportunity Act 2010* (Vic) places on Victorian employers.

¹⁵ SD Act, s 3(c).

3. Compliance

3.1 Introduction of sexual harassment penalties

42. Limited remedies are available for a breach of the SD Act.¹⁶ No penalties are available for a breach of the sexual harassment provisions of the SD Act, unlike other similar regimes, such as workplace relations or work health and safety legislation.
43. The risk of penalties, and the associated risk of adverse publicity, would encourage employers to take the issue of sexual harassment more seriously. Additionally, with the increase in protections ELC is recommending, it would encourage employers to be more proactive in preventing sexual harassment in the workplace and to better respond to sexual harassment complaints.
44. In ELC's view, civil penalties should be available as a remedy for breaches of the sexual harassment provisions in the SD Act. Such penalties should be capable of being paid to the victim of sexual harassment.
45. Guidance could be drawn from the penalties payable under the FW Act in determining the penalties applicable under the SD Act.
46. The civil penalty provisions for breaches of the general protections provisions under the FW Act are currently a maximum of:
- 46.1 60 penalty units per breach for a natural person;¹⁷
 - 46.2 300 penalty units per breach for a body corporate (based on being five times the maximum number of penalty units for a natural person).¹⁸

RECOMMENDATION 6: That there are civil penalties for breaches of the sexual harassment provisions in the *Sex Discrimination Act 1984 (Cth)*, and the power to allow for such penalties to be paid to the victim of sexual harassment.

3.2 Increase in victimisation penalties

47. The penalties which may be imposed for breaches of the victimisation provisions of the SD Act and AHRC Act are currently low compared to the penalties available for similar breaches of comparable legislation.
48. Under the SD Act and AHRC Act, the penalty for breaching the victimisation provisions is currently 25 penalty units or 3 months imprisonment for a natural person or 100 penalty units for a body corporate.¹⁹

¹⁶ AHRC Act, s 46PO(4).

¹⁷ FW Act, s 539(2).

¹⁸ FW Act, s 546(2)(b).

¹⁹ SD Act, s 94(1); AHRC Act, s 26(2).

49. The general protections in the FW Act similarly prohibit a person taking (or threatening to take) adverse action against another person because they have, exercise, or propose to exercise certain workplace rights, including the right to make and pursue a complaint about their employment under that Act or under other workplace laws.²⁰
50. As mentioned above, the penalty for breaching these provisions is currently a maximum of:
- 50.1 60 penalty units per breach for a natural person;²¹
- 50.2 300 penalty units per breach for a body corporate (based on being five times the maximum number of penalty units for a natural person).²²
51. This ratio between individual person and body corporate is consistent with the ratio set out in section 4B(3) of the *Crimes Act 1914* (Cth).
52. There are also increased penalties available for serious contraventions of certain sections of the FW Act up to 600 penalty units for natural persons and 3,000 penalty units for bodies corporate.²³
53. In ELC's experience, sexual harassment is an especially serious workplace issue that affects the most vulnerable workers. Greater penalties should be available for breaches of the victimisation provisions in the SD Act in line with those available for serious contraventions of the FW Act.

RECOMMENDATION 7: That the penalties for a victimisation offence be substantially increased to be aligned to those available for serious contraventions of the *Fair Work Act 2009* (Cth).

3.3 Powers of AHRC

54. Whilst the AHRC has an investigative and advisory role in relation to sexual harassment complaints, its role is essentially limited to performing functions such as:²⁴
- inquiring into and attempting to conciliate complaints;
 - requiring parties to attend a compulsory conciliation;
 - obtaining documents relevant to the complaint;
 - terminating a complaint on various grounds.
55. The AHRC cannot pursue legal action against employers who breach the SD Act. In contrast, other similar agencies with responsibilities under workplace laws, such as the Fair

²⁰ FW Act Part 3-1.

²¹ FW Act s 539(2).

²² FW Act, s 546(2)(b).

²³ FW Act, ss 539(2) and 546(2)(b).

²⁴ AHRC Act s 11; Division 1, Part IIB.

Work Ombudsman (**FWO**), can investigate and commence legal proceedings on behalf of employees.

56. If a complaint of sexual harassment cannot be resolved at the conciliation stage and the complainant wishes to proceed with the matter, the complainant must apply to have the matter heard by the Federal Courts.²⁵
57. Even if a settlement agreement is reached at conciliation, if the employer later refuses to fully comply with the agreement, then the employee may only enforce the agreement by applying to the state courts for a breach of contract claim.
58. In either case, applications for relief to the Federal Courts or state courts are procedurally complex and very difficult to pursue without the assistance of legal representatives. The effect is that many victims of sexual harassment have limited access to justice, regardless of the severity of the breach and the culpability of the employer.
59. Litigation is inherently stressful, complex and time-consuming. For ELC's clients, these challenges are magnified by the risk that the victim of sexual harassment may also have to pay the other party's costs.
60. Academic Dr Belinda Smith highlights the weakness of Australian anti-discrimination laws, including the SD Act.²⁶ She states that victims of discrimination are often from disempowered groups, which adds to the weakness of the current system when a complainant is expected to go through a complicated legal process without public assistance.²⁷
61. Dr Smith also notes that with public prosecution and assistance for complainants, discrimination could be perceived as more than just a private harm. It could be used for public policy considerations.
62. In light of these issues, ELC is of the view that:
 - 62.1 the AHRC Act should be amended so that the AHRC may investigate and commence proceedings on behalf of employees;
 - 62.2 the AHRC Act should be amended to give the AHRC the power to conduct workplace investigations without requiring a particular identified complainant, similar to the FWO (see ELC's submissions above on creating a positive duty for employers to eliminate sexual harassment);
 - 62.3 the AHRC should be able to seek compensation for the victim of the sexual harassment and penalties for breaches of the SD Act (see ELC's submissions above on penalties);
 - 62.4 further consideration should be given to how to make settlement agreements reached at or through AHRC conciliation easier to enforce for complainants; and

²⁵ AHRC Act s 46PO(1).

²⁶ Smith, Belinda, 'Not the Baby and the Bathwater: Regulatory Reform For Equality Laws To Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 124; Smith, Belinda, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' (2010) 23 *Australian Journal of Labour Law* 199.

²⁷ Smith, 'Fair and Equal in the World of Work', above n 30, 112.

- 62.5 an anonymous sexual harassment complaints mechanism should be made available on the AHRC's website to assist with identifying non-compliance and to inform workplace investigations.

RECOMMENDATION 8: That the Australian Human Rights Commission be empowered to:

- 8.1 investigate and commence proceedings on behalf of complainants;**
- 8.2 investigate and commence proceedings without requiring a particular identified complainant; and**
- 8.3 seek compensation and penalties for breaches of the SD Act.**

RECOMMENDATION 9: That further consideration be given to how to make settlement agreements reached at or through Australian Human Rights Commission conciliation easier to enforce for complainants.

RECOMMENDATION 10: That the Australian Human Rights Commission establishes an anonymous sexual harassment complaints function to assist with identifying non-compliance and to inform workplace investigations.

4. Process

4.1 Time-frame for making a complaint

- 63. Where a sexual harassment complaint under the SD Act is lodged more than six months after the relevant conduct occurred, the President of the AHRC may terminate the complaint.²⁸ Prior to 13 April 2017, the President of the AHRC could terminate a complaint if more than twelve months had passed since the relevant conduct occurred.²⁹
- 64. The six-month time-frame is not a "limitation period" in the strict sense of this term, since the AHRC is not **obliged** to terminate a complaint after six months have passed.
- 65. Additionally, even if the AHRC terminates a complaint, a complainant may still make an application to the Federal Courts alleging sexual harassment.³⁰ However, the application can only be made if the relevant court grants leave to make the application.³¹
- 66. While this six month time-frame may not be a strict limitation period, in practice, it operates as an effective time limit on making a complaint and potentially deters victims of sexual harassment from pursuing legal action under the SD Act once it has expired.

²⁸ AHRC Act s 46PH(1)(b)), as amended by *Human Rights Legislation Amendment Act 2017* (Cth) s 39.

²⁹ AHRC Act s 46PH(1)(b) prior to amendment by the by *Human Rights Legislation Amendment Act 2017* (Cth).

³⁰ AHRC Act s 46PO(1).

³¹ AHRC Act s 46PO(3A).

67. In ELC's view, both the existing six month time-frame and the previous twelve month time-frame for lodging a complaint are too short.
68. In ELC's experience, and as demonstrated by numerous recent sexual harassment complaints made as part of the #metoo movement, victims of sexual harassment often wait for longer than six months (and in some cases, many years) before being capable of speaking up and seeking redress for the sexual harassment they experienced.
69. In ELC's experience, for many vulnerable and disadvantaged victims of sexual harassment, their initial concern is with getting out of the situation while maintaining their physical, mental and financial wellbeing as far as possible.
70. Victims of sexual harassment should not be prevented (or additional barriers imposed) from seeking redress under the SD Act merely because they did not make a complaint in the six months immediately after the conduct occurred. The time-frame for lodging a complaint should be extended to six years, similar to non-dismissal based general protections claims under the FW Act.

RECOMMENDATION 11: That the *Australian Human Rights Commission Act 1986 (Cth)* be amended so that the time-frame for lodging a sexual harassment complaint (and other discrimination-based complaints) is extended to 6 years.

4.2 Costs

71. Where a sexual harassment complaint cannot be resolved through conciliation at the AHRC, the next step for the complainant is to commence proceedings in the Federal Courts.
72. While the AHRC is a no costs jurisdiction, once the matter proceeds to the Federal Courts, it becomes a costs jurisdiction.³² If the complainant is unsuccessful in establishing a sexual harassment complaint against the respondent, the complainant is likely to be liable for the respondent's costs.
73. By contrast, under both the EO Act and the FW Act the standard position is that the parties bear their own costs even if the complaint or claim proceeds beyond conciliation.³³ In these jurisdictions, costs are rarely awarded. For example, under the FW Act, costs orders are generally limited to situations where a claim is found to be made or responded to vexatiously, without reasonable cause, with no reasonable prospect of success, or where a party behaves unreasonably (and causes the other party to incur costs unnecessarily).³⁴
74. The fact that complaints under the SD Act proceed to a costs jurisdiction is a significant deterrent for employees seeking to address sexual harassment. This is particularly so where the complainant is a low-income earner who cannot risk a costs order, regardless of how meritorious his or her claim may be. Where a client has a choice as to which jurisdiction they may bring a claim, ELC will rarely advise that client to pursue a sexual harassment complaint under the SD Act because of this risk.

³² *Federal Circuit Court of Australia Act 1999 (Cth)* s 79; *Federal Court of Australia Act 1976 (Cth)* s 43.

³³ *State Administrative Tribunal Act 2004 (Cth)* s 87(1); FW Act, s 611(1).

³⁴ FW Act, s 611(2).

75. The legal framework for sexual harassment complaints under the SD Act should be modified so that:
- the parties to a complaint before the Federal Courts generally bear their own costs; and
 - costs can only be awarded in limited circumstances – for instance, where a claim is frivolous, vexatious or has no reasonable prospect of success.

RECOMMENDATION 12: That the legal framework for sexual harassment complaints under the *Sex Discrimination Act 1984* (Cth) be modified so that parties to a sexual harassment complaint before the Federal Circuit Court of Australia or Federal Court of Australia bear their own costs, and that the parties are not at risk of adverse cost orders except for in exceptional circumstances (such as a complaint being made or responded to frivolously, vexatiously or without a reasonable prospect of success).

5. Resourcing

5.1 Resourcing for AHRC

76. Necessarily the effectiveness of a regulator is inextricably tied to the clarity of its role, clear and appropriate regulatory powers, and its approach to regulation among other things.
77. A key factor to an effective regulator is then to have sufficient funding and resources to enable it to fulfil its objectives.
78. In ELC's view and as submitted above, the AHRC needs to have a greater proactive and reactive compliance functions. This requires the AHRC to have adequate funding levels to perform these functions properly.

RECOMMENDATION 13: That adequate resourcing is provided to the Australian Human Rights Commission to perform the additional proactive and reactive compliance functions recommended above.

5.2 Resourcing for legal assistance services

79. ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia dedicated to offering free employment law advice, assistance, education and representation to vulnerable non-unionised employees.
80. Unfortunately, the demand for ELC's services greatly exceeds ELC's resources.
81. To provide a State-wide service that is not geographically limited, ELC primarily operates a telephone service through an Advice Line. Currently, ELC is only able to answer approximately one in six calls on our Advice Line. This potentially means as many as five in six vulnerable non-unionised employees in WA who cannot otherwise afford to pay for a lawyer are missing out on receiving legal or employment advice on their situation.

82. In addition to providing one-off advices to callers on its Advice Line, ELC provides some particularly vulnerable workers with further legal assistance. However, ELC is unable to provide most clients with ongoing further assistance or representation due to resourcing and funding requirements constraints.
83. ELC does not currently receive any Commonwealth funding to provide representation to victims of sexual harassment.
84. The majority of callers are unable to afford representation and must then self-represent if they are not members of a union, often against well-resourced employers.
85. As outlined above, in addition to being vulnerable or disadvantaged, ELC's clients face several barriers to overcome in pursuing sexual harassment proceedings under the SD Act without ongoing legal representation or assistance. Again, this results in many victims of sexual harassment having limited access to justice, regardless of the severity of the breach and the culpability of the employer.
86. To try and alleviate this ELC adopts a multi-faceted approach to maximise the benefit of the services it provides. For example, it also:
- conducts community legal education, information and training sessions across the State;
 - offers 20 Fact sheets and eight Information Kits that cover a range of employment issues and remedies on the ELC website (www.elcwa.org.au);
 - provides an online InfoGuide on the ELC website (www.elcwa.org.au) to help users find the relevant referral or information they need, either within the tool itself or via links to appropriate ELC or external information;
 - will refer some of these callers to federal and State regulators to obtain assistance; and
 - secures pro bono representation support for a limited number of ELC's callers.
87. In December 2014, the Productivity Commission released its inquiry report on Access to Justice Arrangements.
88. In looking at legal assistance funding of community legal centres, the report noted the uncertainty of funding (under the heading of 'Getting off the funding merry-go-round'). This uncertainty of funding is something the ELC has experienced, and recently led to a significant contraction of its services, before being able to expand its services as further funding was obtained.
89. The Productivity Commission considered that greater predictability of funding is required. The Productivity Commission also recommended that:
90. "Given the dearth of data, and having regard to the pressing nature of service gaps, the Commission considers that an interim funding injection in the order of \$200 million — from the Australian, state and territory governments — is required per year."

91. Interestingly in the Inquiry Report, the Productivity Commission examined the top five most accepted areas of pro bono practice and the top five most rejected pro bono practice areas. On a percentage basis, employment law was the fourth highest area under both the top five most accepted and most rejected pro bono practice areas. The Productivity Commission noted that the rate of rejection for employment law may “simply reflect the volume of applications”.
92. ELC regularly reviews the effectiveness and efficiency of service delivery in relation to the amount of funding received each year. ELC can leverage an average of \$700,000 annually in pro bono and volunteer support from the funded services. Further, according to a social return on investment research project conducted in 2016, every dollar invested in ELC returns conservatively \$1.53 on the investment.
93. ELC recommends that further funding and resources be provided to the community legal sector for the purpose of enabling further legal assistance to be given to vulnerable workers who experience sexual harassment.

RECOMMENDATION 14: That immediate additional funding and resources be provided to the community legal sector for the purpose of enabling legal assistance to be given to vulnerable workers who experience sexual harassment.