

9 August 2021

Ministerial Taskforce on Workplace Sexual Harassment
Department of Justice and Community Safety

By email: workplacesafetyreform@justice.vic.gov.au

Dear Taskforce Members

Submission: Addressing sexual harassment in Victorian workplaces

WEstjustice and Springvale Monash Legal Service welcome to make a submission regarding measures to address sexual harassment in Victorian workplaces.

1. About our organisations and our employment law work

1.1. WEstjustice

WEstjustice is a community legal centre providing services to people who live or work in Melbourne's West.

Melbourne's western suburbs encompass six local government areas and a population of approximately 900,000 people and is growing rapidly.¹ It is one of the most diverse regions in Australia with significant representations of communities from Asia, Africa and the Pacific Islands. It is also an area with high levels of casual and low income workers.²

1.2. WEstjustice's Employment and Equality Law Program

WEstjustice's Employment and Equality Law Program (**EELP**) seeks to improve employment outcomes for vulnerable workers including migrants, refugees, temporary visa holders, young people and people who have experienced gender-based violence. We do this by empowering communities to understand and enforce their workplace rights through the provision of tailored legal services, education, sector capacity building and advocacy for systemic reform.

Our EELP Program has in-depth experience working with victims of sexual harassment. While sexual harassment is not the most common issue for our clients (sexual harassment claims account for less than 10% of our casework files), where our clients have been victims of sexual harassment the conduct has been egregious and has had a significant impact on our clients. In most cases we have supported these clients through to the completion of their legal claims.

Our practice confirms the findings of the Australian Human Rights Commission's *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (**Respect@Work Report**) - that culturally and linguistically diverse (**CALD**) communities are significantly overrepresented in sexual harassment claims and intersectional disadvantage is also present. All of our clients who have complained of sexual harassment have been women or identify as part of the LGBTIQ+ community. It was also

¹ Department of Jobs, Precincts and Regions (Vic), 'Western Region', *Suburban Development* (Web Page, 5 April 2019) <<https://www.suburbandevelopment.vic.gov.au/regions/western-region>>.

² See for example Ben Schneiders 'A city divided – Covid-19 finds a weakness in Melbourne's social faultlines' *The Age* 07 August 2020 Accessed at <https://www.theage.com.au/national/victoria/a-city-divided-covid-19-finds-a-weakness-in-melbourne-s-social-fault-lines-20200807-p55ji2.html> - based on ABS and DHHS data.

frequent for these clients to report to us with a range of other legal issues, as set out in more detail in the case studies below.

1.3. Springvale Monash Legal Service

Established in 1973, Springvale Monash Legal Service (**SMLS**) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community within the City of Greater Dandenong, the City of Casey and the Shire of Cardinia.

SMLS has a significant policy, advocacy, and law reform program. We contribute to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and people seeking asylum, particularly unaccompanied humanitarian minors and women escaping family violence.

1.4. SMLS and Employment Law

SMLS recognises that there is an ongoing need within our local community for free employment law assistance for workers. The complexities and constantly shifting nature of employment law is often difficult for our clients to navigate, particularly for clients from CALD communities.

At SMLS we aim to empower clients to become better informed of their rights and of the legal avenues available to assert those rights.

We also understand that our clients may not always be in a position to self-help if, for example, a matter is complex or if a client is facing disadvantage due to factors such as limited English or disability. Some clients may feel intimidated by the employer and may not otherwise be willing to assert their rights in the absence of a legal advocate. We seek to redress these power imbalances by providing ongoing assistance, which may include preparing applications to the Fair Work Commission and negotiating a settlement with employers.

Our employment law service may provide advice and assistance in relation to; unfair treatment in the workplace, unfair dismissal, workplace bullying, discrimination, disputes regarding unpaid or underpaid wages, unpaid leave, redundancy, sham contracting and other entitlements.

In addition to our onsite employment law clinic, we operate a duty lawyer outreach service at the Fair Work Commission in partnership with Job Watch in response to ongoing need within our local community for free employment law assistance. We also deliver the International Students Employment and Accommodation Legal Clinic, in partnership with Study Melbourne, WEstjustice and Jobwatch.

All client names contained in these submissions have been changed to preserve client confidentiality.

List of acronyms

CALD	culturally and linguistically diverse
CLC	community legal centre
CLE	community legal education
SMLS	Springvale Monash Legal Service Inc
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity Human Rights Commission

2. Summary of recommendations

Prevention

Strengthen the legislative frameworks to prevent sexual harassment

1. Increase the powers of the Victorian Equal Opportunity Human Rights Commission ('**VEOHRC**') to investigate non-compliance by amending the *Equal Opportunity Act* 2010 to:
 - a. Remove conditions which restrict investigations, including by removing the requirement that matters that cannot reasonably be expected to be resolved by dispute resolution or application to the Victorian Civil and Administrative Tribunal ('**VCAT**'); and
 - b. provide VEOHRC with the power to compel attendance and the production of information and documents for the purposes of an investigation without the need to seek an order from the Victorian Civil and Administrative Tribunal.
2. Codify the six minimum standards for discharging the duty to eliminate sexual harassment (as set out in the VEOHRC Guideline) in Equal Opportunity Act and/or the *Occupational Health and Safety Act* 2004.
3. Amend the Occupational Health and Safety Act to include a positive duty to eliminate sexual harassment in the workplace consistent with the definition under the Equal Opportunity Act.

Targeted education and assistance

4. Provide additional funding to WorkSafe and VEOHRC to engage with employers to help them better understand and implement their positive duty to eliminate sexual harassment in the workplace, including through:
 - a. delivery of targeted education and consultancy services to assist organisations to develop effective action plans to address the drivers of sexual harassment and prevent sexual harassment in the workplace; and
 - b. the promotion and distribution of VEOHRC's Guideline: Preventing and responding to workplace sexual harassment.
5. Small businesses should receive additional targeted support to better understand and comply with duty to eliminate sexual harassment, including through:
 - a. the provision of low or no cost targeted sexual harassment, gender inequality and antidiscrimination training; and
 - b. the provision of a small business portal for employers with template policies, a direct advice line for compliance with obligations relating to sexual harassment, and assistance reviewing draft policies and action plans to prevent and address sexual harassment.
6. Conduct campaigns to educate the public the broader community about conduct constituting sexual harassment, the key drivers of sexual harassment, the need to prevent and address sexual harassment at work and options for reporting or making complaints about sexual harassment.
7. Fund the community legal centre ('**CLC**') sector to deliver community legal education ('**CLE**') to difficult-to-reach communities about conduct constituting sexual harassment, the key

drivers of sexual harassment, the need to prevent and address sexual harassment at work and options for reporting or making complaints about sexual harassment.

Research to determine targeted responses for high-risk industries and at-risk individuals

8. Support research to:
 - a. better understand the experiences of sexual harassment of at-risk groups, including but not limited to young people, women, gender diverse people, people engaged in precarious and insecure work; LGBTIQ+ identifying people, people from migrant and refugee backgrounds, people with disabilities, men in all-male or male dominated workplaces;
 - b. better understand the prevalence of sexual harassment in certain industries; and
 - c. develop effective prevention strategies for high-risk industries in consultation with primary prevention and support services for gendered violence.

Support

Trauma-informed and complainant-centred reporting processes

9. Ensure that the process of reporting sexual harassment to WorkSafe, VEOHRC and VCAT is complainant-centred, trauma-informed, including by ensuring:
 - a. seamless coordination between regulators, agencies and decision-makers (which may also include Victoria Police and the Victims of Crime Assistance Tribunal);
 - b. that regulators, agencies and decision-makers develop best practice principles for communicating with complainants who have experienced sexual harassment;
 - c. that the confidentiality and privacy of the complainant is preserved unless the complainant consents otherwise; and
 - d. that multiple complaint handling options are made available for the complainant so that the response is tailored and minimises harm.
10. Ensure WorkSafe, VEOHRC and VCAT receive ongoing specialist training so that the response to complaints of sexual harassment is trauma-informed.

Free legal assistance for victim-survivors of sexual harassment

11. Adequately fund the CLC sector to increase access to the justice system and offer alternative referral pathways for persons who have experienced sexual harassment through their strategic service delivery model of community engagement, community legal education and direct legal assistance.
12. Persons who have experienced sexual harassment must have access to free independent legal assistance. The CLC sector should be resourced and supported to assist the most vulnerable and hard to reach clients within our community to progress claims of sexual harassment.

Integrated service delivery models

13. Prioritise integrated models of service delivery in both legal and non-legal settings in service planning and resourcing arrangements. Resourcing must incorporate support for partnership development, monitoring and evaluation.
14. Ensure that partnerships built between agencies include ongoing maintenance and resourcing.

Civil penalties for poor responses to sexual harassment

15. Give consideration as to whether it may be appropriate to introduce a reverse onus of proof under the Equal Opportunity Act.
16. Amend the Equal Opportunity Act to include civil penalties in circumstances where employers respond to complaints of sexual harassment in a way that causes further harm to the complainant.

Extend the time limit for reporting

17. Amend the Equal Opportunity Act so that the discretion of VEOHRC and the VCAT to decline dealing with a complaint of sexual harassment is extended to 6 years.

Enforcement

Shift the responsibility to enforce compliance away from individuals

18. Amend the Equal Opportunity Act 2010 to strengthen VEOHRC's functions and powers to enforce compliance and address systemic issues of sexual harassment (as well as discrimination and victimisation) following an investigation, including the functions and powers to
 - a. seek enforceable undertakings;
 - b. issue compliance notices;
 - c. prosecute serious non-compliance with the Equal Opportunity Act; and
 - d. secure penalties against employers and perpetrators of sexual harassment.
19. Amend the Equal Opportunity Act to include civil penalties for:
 - a. serious non-compliance with the positive duty to eliminate sexual harassment; and
 - b. contraventions of the provisions prohibiting sexual harassment.
20. Ensure that VEOHRC is adequately funded and resourced to effectively use its additional functions and powers.

Remedies to promote systemic change

21. Amend the Equal Opportunity Act to require VCAT decision makers to consider remedies which promote systemic and positive cultural change in the workplace in addition to remedies that compensate for harm to an individual, such as:
 - a. Consultation with VEOHRC (or other experts) to develop policies, procedures and/or action plans to address and prevent sexual harassment in the workplace; and/or
 - b. Mandatory sexual harassment, gendered violence and antidiscrimination training.
22. Resource VEOHRC and WorkSafe to monitor compliance with orders, enforceable undertakings or compliance notices regarding measures to prevent and address sexual harassment.

Appropriately recognise sexual harassment as a serious work health and safety issue

23. Provide expert training regarding sexual harassment and its impacts on psychological health is provided to WorkSafe inspectors, to ensure they respond appropriately to complaints and

incidents of sexual harassment in WorkSafe. Training must include how to communicate with victim-survivors in a complainant-centred, trauma informed manner, as mentioned above.

24. Provide expert training regarding sexual harassment and its impacts on psychological health, particularly for at-risk groups to claims assessors in all WorkCover insurers to ensure that claims relating to sexual harassment are appropriately accepted and progressed.
25. Ensure that adequate information and guidance is provided to employers regarding the psychological impacts of sexual harassment, and their obligations to prevent and minimise sexual harassment and other forms of gendered violence as a key element of the duty to control risks to health and safety in the workplace.

Provide redress for on-demand workers

26. Extend the scope of WorkCover benefits to gig economy workers.
27. Amend the Occupational Health and Safety Act to require platform providers who have a significant degree of control over gig-economy workers, such as Uber and other ride share providers, to take steps to eliminate sexual harassment and gendered violence in the workplace.

Raising awareness

28. Prioritise research into what specific barriers there may be to persons experiencing intersectional discrimination from reporting sexual harassment, including persons from culturally and linguistically diverse ('CALD'), non-English speaking backgrounds, new arrivals, persons on temporary visas and persons with a disability.
29. The CLC sector should be supported to explore the potential to convert its administrative data into data that could be used for research purposes to raise awareness of the issues relevant to the eradication of sexual harassment in the workplace.

3. Our submission

We echo the findings of the Sex Discrimination Commissioner in the Respect@Work Report that a workplace free from sexual harassment is a workplace right, a human right and a workplace safety issue. For these reasons, we see an urgent need for a more robust response to dealing with sexual harassment in Victoria's occupational, health and safety laws and anti-discrimination laws. We especially see the importance of elevating the work of the VEOHRC in the process of eliminating workplace sexual harassment.

On the ground, we see the realities of those experiencing disadvantage. This includes low-income earners, young people, persons from culturally and linguistically diverse ('CALD') backgrounds, temporary visa holders and persons living with a disability. The experience of navigating the legal system for these cohorts is already especially cumbersome. Our recommendations largely revolve around the urgent need of shifting the heavy burden of pursuing complaints of sexual harassment from the complainant and onto workplaces and regulators.

We are encouraged by the government's willingness to lead on eradicating sexual harassment in the workplace. We however we remind the government that this must be done in conjunction with the critical work needed to dismantle societal inequalities based on gender, race, abilities, sexuality and any other features of disadvantage. Sexual harassment is a manifestation of the fundamental structural inequalities entrenched in our society. The necessary reforms needed at a systemic level to address those inequalities cannot be overlooked.

Part of this work may demand a national approach to education in schools regarding consent and respectful relationships.

Fundamental attitudinal change may also be achieved through achieving more diversity in the workplace at managerial and leadership levels. We see a role for Victorian government in removing systemic barriers to achieving this diversity through for example:

- Offering paid parental leave
- Ensuring affordable childcare
- Promoting flexible work arrangements for parents, guardians and other caregivers.

3.1. Prevention

3.1.1. Strengthen the legislative framework to prevent sexual harassment

Enforceable positive duties to eliminate sexual harassment in the workplace

As a key measure to effectively prevent sexual harassment, we need strong legislative frameworks which require employers to take positive steps to prevent sexual harassment.

The positive duty in the *Equal Opportunity Act 2010 (Vic)* ('**Equal Opportunity Act**') requires employers to take reasonable and proportionate measures to eliminate sexual harassment ('**positive duty**').³ This is critical for implementing change; however the enforceability of this duty is currently limited, noting that:

1. The only consequence for a failure to meet this duty is the potential for the VEOHRC to investigate the circumstances in which the duty was not met.

³ *Equal Opportunity Act 2010 (Vic)*, s 15.

2. The circumstances in which VEOHRC are able to investigate are limited to matters which cannot reasonably be expected to be resolved by dispute resolution or an application to the Tribunal.⁴

As set out below, if the positive duty were accompanied by a suite enforcement and compliance measures, this would help to ensure that employers proactively prevent, rather than merely respond to, sexual harassment.

The *Occupational Health and Safety Act 2004* (Vic) ‘(Occupational Health and Safety Act’) also places a general obligation on employers to, so far as is reasonably practical, eliminate ‘risks to health and safety’ in the workplace.⁵ WorkSafe has a broad suite of powers to enforce this general duty, including powers to compel production of documents, accept undertakings, issue infringement notices and prosecute non-compliance with the Occupational Health and Safety Act. However, this general duty to provide a healthy and safe workplace is far from a clear and enforceable positive duty to prevent sexual harassment, and in our submission is ineffective to ensure that employers take active steps to prevent sexual harassment. Indeed the Respect@Work Report found that although the model workplace health and safety framework has the potential to address sexual harassment, it is presently underutilised. The AHRC highlighted the need for consistency between work health and safety and antidiscrimination frameworks.⁶

In addition to the positive duty in the Equal Opportunity Act, work safety legislation must also be bolstered to strengthen the legal protections against sexual harassment.

Recommendation 1

Increase the powers of VEOHRC to investigate non-compliance by amending the Equal Opportunity Act to:

- a. Remove conditions which restrict investigations, including by removing the requirement that matters that cannot reasonably be expected to be resolved by dispute resolution or application to the Victorian Civil and Administrative Tribunal; and
- b. provide VEOHRC with the power to compel attendance and the production of information and documents for the purposes of an investigation without the need to seek an order from the Victorian Civil and Administrative Tribunal.

Recommendation 2

Amend the Occupational Health and Safety Act to include a positive duty to eliminate sexual harassment in the workplace which is consistent with the position duty contained within the Equal Opportunity Act.

Codify minimum standards for preventing and responding to sexual harassment

In our experience, many employers do not fully understand their obligations in relation to the positive duty under the Equal Opportunity Act, nor do they consider preventing sexual harassment to be a key part of their obligations under the Occupational Health and Safety Act. Our clients’ employers

⁴ *Equal Opportunity Act 2010* (Vic), s 127.

⁵ *Occupational Health and Safety Act 2004* (Vic), pt 3.

⁶ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) 598
<https://humanrights.gov.au/sites/default/files/document/publication/ahrc_wsh_report_2020.pdf> (‘Respect@Work Report’).

commonly lack policies or procedures relating to sexual harassment. Moreover, even those employers who do have relevant policies often fail to effectively prevent or address sexual harassment in the workplace, often because they:

- do not understand of the drivers of sexual harassment in the workplace; and/or
- fail to take appropriate measures to implement relevant sexual harassment policies.

This results in incredibly damaging outcomes for our clients.

CASE STUDY – AUGUSTINA

Augustina was one of only two female employees at her workplace. When she started, she was given an induction pack from her office manager which included a number of different policies, including a sexual harassment policy – however none of these were explained to her. She was also given basic safety training, but this only extended to physical safety risks in the workplace. During her induction, her office manager, who was also a woman, told Augustina to watch out for a few male colleagues who were known for using sexist and offensive language.

Throughout her employment, Augustina was subject to repeated sexual harassment. This included unwelcome comments about her looks and unwelcome sexual advances from multiple different male colleagues, as well as being shown photos of a sub-contractor’s genitals. Augustina was also sexually harassed by the office manager at a work function, who became intoxicated and asked Augustina invasive questions about her sex life and pushed Augustina to admit she was attracted to one of her colleagues. As a result of these experiences, Augustina developed a severe anxiety disorder.

WEstjustice assisted Augustina to make a discrimination and sexual harassment complaint. At mediation, Augustina received an apology, and her employer agreed to pay her a significant amount of compensation and undergo sexual harassment training for all employees in the workplace. However, Augustina continues to be fearful of working in male-dominated workplaces, which has affected her career progression in the construction industry.

The experiences of clients such as Augustina demonstrate that it is not enough that employers to merely have policies regarding sexual harassment. They must identify the drivers of sexual harassment in their workplace and take the steps to effectively prevent sexual harassment.

VEOHRC has created a comprehensive guideline for preventing and responding to workplace sexual harassment (the **VEOHRC Guideline**), which has been informed by the experiences of victims of sexual harassment, as well as extensive consultation with employers, industry bodies, worker advocacy groups and other regulators. This includes six minimum standards that must be met by employers to comply with their positive duty to eliminate sexual harassment under the Equal Opportunity Act. While this guideline may be considered in judicial proceedings, decision makers are not required to take it into account.

It is essential that employers are mandated to take clear steps to prevent and respond to sexual harassment. This will provide certainty to employers about how to discharge positive duty, and will ensure that active measures are taken to prevent sexual harassment in the workplace.

Recommendation 3:

Codify the six minimum standards for discharging the duty to eliminate sexual harassment (as set out in the VEOHRC Guideline) in the Equal Opportunity Act and/or the Occupational Health and Safety Act.

3.1.2. Targeted education and assistance

The Respect@Work report highlighted that gendered violence, which includes sexual harassment, is fundamentally a societal rather than an individual problem.⁷ Some of the key cultural and systemic drivers of gendered violence include:

- intersecting forms of disadvantage, including gender inequality, and discrimination on the basis of race, sexuality and disability;⁸
- a lack of awareness across the workforce and the broader community of conduct that constitutes sexual harassment, the harm caused by sexual harassed, as well as complaint processes and options for support;⁹ and
- workplace cultures which tolerate sexual harassment.¹⁰

This is broadly consistent with the trends identified in our casework and education activities. In our experience, low awareness (by employers and employees alike) of the harms associated with sexual harassment and the laws regulating this conduct, has been one of the key drivers of sexual harassment in the workplace:

1. For employees, a lack of awareness of conduct constituting sexual harassment and the options for making a complaint and seeking assistance in relation to this behaviour is a key barrier to the enforcement of rights and allows sexual harassment to go unaddressed in workplaces.
2. For employers, the lack of understanding of conduct constituting sexual harassment and/or their obligations in relation to the positive duty means that sexual harassment is tolerated and sometimes even perpetrated by those in positions of responsibility in workplaces.

Government must invest in public campaigns which make clear the type of conduct that constitutes sexual harassment and call on the community to address and respond to the sexual harassment and gendered violence. Any such campaign must adopt a best practice approach to communication and education and ensure that the messaging is clear and easy to understand for individuals with low literacy and low English skills. These campaigns must be Government led to appropriately reflect that sexual harassment and gendered violence is a societal problem.

We welcome WorkSafe's 'Let's Be Very Clear' campaign which frames sexual harassment as a workplace health and safety issue and provides some examples of behaviour constituting sexual conduct. However, more is needed to be done to highlight sexual harassment and other gendered violence in the workplace as both a human rights and occupational health and safety issue, and targeted the underlying drivers of sexual harassment.

In addition, as outlined below public campaigns must be accompanied by targeted education programs to ensure that at-risk individuals can be reached, and employers can meaningfully implement change to prevent sexual harassment.

⁷ Respect@Work Report (n 6) 138.

⁸ Ibid.

⁹ Ibid 385.

¹⁰ Ibid 138.

Recommendation 4:

Conduct public campaigns to educate the community about conduct constituting sexual harassment the key drivers of sexual harassment the need to prevent and address sexual harassment at work and options for reporting or making complaints about sexual harassment.

Employees need targeted support in understanding their rights

Often those of our clients who are vulnerable workplace exploitation, in particular young workers and workers from CALD backgrounds, have a limited understanding of what conduct constitutes sexual harassment and their rights and options to seek support and address when they experience this behaviour. This means that sexual harassment is often not reported to employers and therefore cannot be appropriately addressed.

As some community leaders have told WEstjustice:

“A guy at a factory grabbed a girl on the bottom. The girl started laughing because she didn’t know it was abuse or her rights under law here. At the end of the day I spoke to her and she said it was a joke and I said no joke no joke.”

“Working in my community I find that women don’t want to share their sexual harassment experiences are not aware of the law and don’t understand what constitutes sexual harassment.”

Through our experience in community education, development and engagement we have found that mainstream messaging often doesn’t reach the more vulnerable members of our communities.

A number of barriers to workers learning about and understanding their rights include language, literacy, cultural understandings and practical considerations.¹¹ In relation to sexual harassment specifically, we have heard from several community leaders that many communities find it very difficult to have conversations about gendered violence and sexual harassment for cultural reasons, as there is a lot of shame associated with discussing these topics and/or they are considered to be ‘taboo’.

It is extremely important to provide vulnerable and at risk cohorts with accessible information and education. Research conducted by WEstjustice has shown that effective targeted community legal education (CLE) for newly arrived and refugee communities requires the following features:¹²

Face-to-face and verbal: Information provided face-to-face, both verbally as well as in writing

Client’s language and community workers: Using interpreters, community guides and bilingual community workers from relevant communities

Visual materials and multimedia: Use of pictures, visual aids (such as DVDs) or other multimedia (including community radio)

¹¹ WEstjustice, Submission No 397 to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (February 2019) 16.

¹² Catherine Hemingway, *Not Just Work: Ending the Exploitation of Refugee and Migrant Workers* (Report, WEstjustice, 2016) 23–26.

Information sessions, English classes and pre-arranged community meetings:

Delivering community education via information sessions or as part of English classes is effective, as is visiting existing community groups

Clear language: Using clear and simple language

Key information only: Outlining key concepts and where to go for further information/assistance

Cultural awareness: Ensuring presenter understands the community culture.

Convenient locations: Considering location of CLE and contacting existing organisations. As one community worker recommended: 'I think taking time to identify a number of community groups and associations that are already established and are meeting for a purpose on a regular basis. Request to be invited to talk about this issue which I think would be very popular within these communities.'

Practical and timely: Providing information 'that is linked to outcomes', for example by facilitating employment in industries and workplaces where rights can be realised. Ensuring that workers receive the right amount of information at the right time so it is not abstract. Understanding audiences' level of understanding and targeting information at the appropriate level.

Developed in consultation with communities: Ensuring that education is developed in consultation with community members and community workers, and responds to identified needs. There is strong evidence to suggest that face-to-face assistance and advocacy is essential to provide a service to refugee clients, and that without targeted assistance focused on relationships, collaboration and trust, government employment services are often inaccessible to refugee and newly arrived communities.

In addition, through each of SMLS and WEStjustice's School Lawyer Programs, we have identified that delivering CLE sessions in schools is an extremely effective way to teach young workers about their work rights and responsibilities, often before they enter the workforce. In particular, recent research conducted by WEStjustice, which included focus groups with 9 young people and surveys of 52 young people and 190 young CLE participants, found that there is a low appetite among young people to attend CLE to learn about work rights outside of school and other formal programs.

However young people who did attend a CLE (the majority of whom attended a CLE at school) reported an increase in knowledge and confidence regarding their work rights, and told us they found value in the presentation. For example:

- **98%** agreed that after attending a CLE presentation, they felt confident they understood their rights and responsibilities at work;
- **96%** agreed that after our presentation, they felt prepared to stand up for their rights at work
- the majority (**35%**) said the best thing about the presentation was learning about their work rights.

The CLC sector, who provide targeted accessible legal education as a core function of their activities are well placed to deliver targeted CLE to difficult-to-reach communities about their rights, options and avenues to seek support in relation to sexual harassment.

Recommendation 5:

Fund the CLC sector to deliver CLE to difficult to reach communities about conduct constituting sexual harassment and options for making complaints and seeking assistance in relation to sexual harassment.

Employers need support in understanding their responsibilities

Through our casework we encounter employers and managers who do not understand the meaning of sexual harassment under the Equal Opportunity Act, and are therefore ill-equipped to prevent and address it. In particular, many employers have lacked an understanding of the more nuanced behaviour which constitutes sexual harassment. We have seen many examples where employers have not understood that behaviours such as staring, leering, suggestive comments, jokes, intrusive questions about ones private life, or deliberately brushing up against someone, is inappropriate and can constitute sexual harassment.

Given that the drivers of sexual harassment vary between workplaces and industries, public campaigns such as the 'Let's Be Very Clear' campaign must be accompanied by targeted information, education and assistance to ensure that employers are able to effectively discharge their positive duty. Regulators must be resourced to provide such education, support and guidance to employers to comply with their positive duty.

One of VEOHRC's core functions is to educate workplaces and the broader community about their rights and responsibilities under the Equal Opportunity Act, including in relation to sexual harassment. VEOHRC delivers sexual harassment education sessions to the public, and specialised sexual harassment training sessions to employers.

On a number of occasions where we have represented clients in claims for sexual harassment claims, we have negotiated outcomes which include an undertaking by employers to engage VEOHRC to provide sexual harassment and antidiscrimination training. However, limited resourcing has meant that on occasion employers have wait for months to receive a response to a request to arrange such training. The VEOHRC must be adequately funded to ensure that its education activities are effective and have the broadest possible reach.

Recommendation 6:

Provide additional funding to WorkSafe and VEOHRC to engage with employers to help them better understand and implement their positive duty to eliminate sexual harassment in the workplace, including through:

- a. delivery of targeted education and consultancy services to assist organisations to develop effective action plans to address the drivers of sexual harassment and prevent sexual harassment in the workplace; and
- b. the promotion and distribution of VEOHRC's Guideline: Preventing and responding to workplace sexual harassment.

Small business requires targeted assistance

Small business in particular requires targeted assistance. The majority of our clients who have been victims of sexual harassment have been employed in small-to-medium sized workplaces with no dedicated human resources department. Our experience has shown us that these businesses are far from being in a position to prevent sexual harassment in the workplace. In fact, in many cases it is owners or managers within small businesses who have been the perpetrators of sexual harassment.

CASE STUDY: PRIYA

Priya worked as a casual kitchen hand in a family-owned restaurant. She was sexual harassed by the owner of the company throughout her employment. This included repeatedly asking Priya invasive questions about her love life, making indirect suggestions that she should date him and standing uncomfortably close to Priya and brushing up against her in the workplace. Priya deflected his advances, which made the owner verbally aggressive towards Priya.

Priya was also significantly underpaid, receiving only \$12 per hour for the work she performed. We have Priya advice about her rights and entitlements and offered to assist her to make a sexual harassment and underpayment claim against her employer. However, Priya decided not to pursue her sexual harassment claim, she told us that the behaviour of her boss had ruined her confidence and self-esteem and she didn't feel she had the emotional capacity to make a claim.

Active regulator engagement and targeted support is paramount to ensure employers have a firm understanding of their positive duty and associated obligations.

Recommendation 7:

Small businesses should receive additional targeted support to better understand and comply with duty to eliminate sexual harassment including through:

- a. the provision of low or no cost targeted sexual harassment gender inequality and antidiscrimination training; and
- b. the provision of a small business portal for employers with template policies a direct advice line for compliance with obligations relating to sexual harassment and assistance reviewing draft policies and action plans to prevent and address sexual harassment.

3.1.3. Research to determine targeted responses for high-risk industries and at-risk individuals

The Respect@Work Report, among other literature, highlights the relevance of intersectional disadvantage in workers' experiences of sexual harassment. Workers in certain industries and from certain backgrounds are more likely than others to be the victims of sexual harassment. As identified in the consultation paper, these include young workers, LGBTIQ-identifying individuals, people with a disability, and/or from Aboriginal and Torres Strait Islander or CALD backgrounds. The consultation paper also sets out high risk industries for sexual harassment identified in the AHRC's 2018 Sexual Harassment Survey.

For the most part, those of our clients who have been victim-survivors of sexual harassment have been women or LGBTIQ-identifying individuals and from CALD backgrounds (particularly people on temporary visas and new-arrivals). The industries in which they are commonly employed include:

- Accommodation and food services
- Cleaning
- Construction
- Waste-management

In addition, our Centres' casework and research has demonstrated that certain cohorts are less likely than others to make complaints about workplace issues, particularly sexual harassment.

"Sometimes it's not that easy. From a Pacific Islander background we have a duty to help our family through financial stability. So to keep our families well and looked after we cannot afford to make complaints that may result in reducing our hours or even getting fired/let go of. We have to brush those issues off and harden our hearts. Our families lively hoods [sic] are heavily relied on us we will never jeopardise that. Workplaces are also bias and have favoritism so you already know the issues wont [sic] be resolved. There is no point in wasting your breath and energy!"¹³

- **Young workers** are unlikely to make a complaint to their employer or external body about unfair or unlawful treatment at work such as sexual harassment due to such factor as; a lack of awareness of employment laws, processes and available supports; overrepresentation in precarious or insecure work; and/or fear of retribution from employers;
- **Workers from a CALD background (particularly temporary visa holders and new-arrivals)** are unlikely to report workplace issues such as sexual harassment due to a lack of understanding about employment laws and available supports, cultural barriers regarding challenging people in authority and cultural understandings/experiences of legal systems.

It is important that any prevention strategies adopted by Government are informed by a thorough investigation of at-risk groups and high-risk industries specific to Victoria. In particular, special attention must be paid to industries with high concentration of young and CALD workers who are less likely to report sexual harassment.

We also recommend that further investigation be conducted into the experiences of workers in high-risk and often-overlooked industries such as sex workers and live-in nannies. While we have assisted a few of these clients, they appear to be under-represented in our casework and in the literature.

Recommendation 8:

Support research to:

- a. better understand the experiences of sexual harassment of at-risk groups, including but not limited to young people, women, gender diverse people, people engaged in precarious and insecure work; LGBTIQ+ identifying people, people from migrant and refugee backgrounds, people with disabilities and men in all-male or male dominated workplaces;
- b. better understand the prevalence of sexual harassment in certain industries; and
- c. develop effective prevention strategies for high-risk industries in consultation with primary prevention and support services for sexual harassment and gendered violence.

3.2. Support

3.2.1. Trauma-informed and complainant-centred reporting processes

As outlined above, from what we have seen on the ground, there may be a range of reasons why a person opts not to pursue complaints of sexual harassment. We do highlight that more research is needed to better understand why certain cohorts of clients do not report sexual harassment, particularly in instances where the person is experiencing intersectional discrimination.

¹³ Young WEstjustice survey participant.

One of the more common reasons that clients may choose not to pursue a complaint of sexual harassment is due to concerns about the repercussions of doing so. Many of our clients are from non-English speaking backgrounds, new arrivals or on temporary visas. For this cohort of clients, job security is of paramount concern. Clients fear losing their job if they complain. We have indeed seen several instances of clients being dismissed soon after making a complaint of sexual harassment. This was the case for *Paula*.

CASE STUDY: PAULA

Paula complained about being sexual harassed by a work colleague to her employer. This was not the first time she had been sexual harassed in this workplace. Not long after she was dismissed. Paula opted to deal with her matter as a claim at the Fair Work Commission disputing the dismissal. Although she had not yet formally lodged a complaint of the sexual harassment, the parties were prepared to consider that claim in negotiations at the Fair Work Commission conciliation. The matter settled. Paula was very distressed throughout the entire process that SMLS had assisted her with and the experience had a significant impact on her mental health and sense of trust.

This case highlights that there is indeed a very real risk that a complainant will lose their job if they complain.

For close-knit communities, there may be cultural factors that may make it difficult to make complaints of sexual harassment against another person within that cultural community, particularly if the perpetrator is in a position of power within the community.

We see therefore the importance of having a range of options available to the person for dealing with their complaint of sexual harassment. It may be for example that the complainant wishes to make their complaint anonymously, be offered a forum to have their experience heard and validated, be offered an opportunity to informally discuss incidents of sexual harassment with the employer or regulator and later have the option for the matter not to be dealt with formally.

From our work assisting victims of sexual harm, we see the critical importance of a coordinated and seamless response between different agencies. To the victim-survivor, they may not necessarily distinguish between different agencies and it all forms part of the same 'system'. We have seen for example that if a client has a poor experience of reporting sexual harassment to WorkSafe, it may tarnish that clients' perception of the entire justice system and impact their willingness to pursue a sexual harassment complaint.

Any measures to support complainants to report sexual harassment therefore must include seamless cross-referrals between agencies. It may include the development of shared goals and best practice principles for communicating with complainants.

CASE STUDY: DEV

Dev, a young international student, worked as a casual kitchen hand at a restaurant. One night, he was forced by one of his colleagues to come out as gay in front of the rest of the kitchen staff. His colleague then made a number of sexual gestures towards Dev and throughout the rest of the shift, repeatedly asked Dev invasive questions about his sex life. Dev refused to answer these questions and told his colleague to leave him alone. When Dev finished his shift, he received a message cancelling his shift for the next day. He then had the rest of his shifts cancelled and was offered no further shifts by his employer. Prior to coming out in the workplace, Dev had been praised for his performance. His employer also failed to pay Dev for the work he had performed for the workplace. This treatment had a serious impact on Dev's mental health.

In the first instance, Dev made a general protections claim to the Fair Work Commission, seeking compensation for his unlawful and discriminatory treatment and the recovery of his outstanding entitlements. At conciliation, Dev explained to the conciliator that he was feeling very emotionally fragile and asked to excuse himself during the joint session while the employer provided a response because he was worried about listening to his experiences being denied or minimised.

However, during private session, the conciliator repeated to Dev the employer's comments to the effect that Dev was lying and that Dev had engaged in inappropriate behaviour in the workplace. The conciliator showed no regard for Dev's feelings and Dev was made to feel that his story was not believed. The conciliation severely exacerbated Dev's pre-existing anxiety and depression and he ended up being hospitalised for mental health reasons a few months later.

Dev withdrew his complaint from the Fair Work Commission and, once his mental health recovered, WEstjustice helped him to lodge a sexual harassment and discrimination complaint with VCAT. At the VCAT compulsory conference Dev was given an opportunity to read a victim impact statement highlighting the impact of his experiences. After listening to this statement, his employer and the perpetrator of the sexual harassment provided a verbal apology without being prompted. The VCAT member mediating the dispute was able to provide information on the risks of litigation without discrediting or undermining Dev's experience. This assisted Dev to negotiate a settlement, which included a substantial amount of money to compensate him for the harm he had suffered, and the employer agreeing to run anti-discrimination and sexual harassment training for all staff in the workplace. Dev described the compulsory conference as providing a 'safe place' for him to share his experiences without being accused of lying, and said to us: '[it] was extremely empowering...I finally feel like I am free'.

Our colleagues at Victorian Aboriginal Legal Service have also reported to us the therapeutic value of having a person-centred approach to dealing with disputes at the VEOHRC.

CASE STUDY: JIM

Victorian Aboriginal Legal Service (VALS) VALS assisted 'Jim' who is an Aboriginal man in his early 30's. Jim came to VALS after racist remarks were made to him by a salesperson when he was purchasing a car. The remarks caused great distress to Jim and he wanted to take action. After considering his options Jim decided he wanted to lodge a complaint with the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).

VALS attended the zoom conciliation with Jim and explained what Jim wanted which was financial compensation, an apology and a commitment from the Respondent to do cultural awareness training with all their staff. During the conciliation Jim got to explain to the Respondent the impact the racists comments had on him and how distressing it was for him because of his life experience as an Aboriginal man. The more informal nature of the VEOHRC conciliation allowed Jim to feel comfortable expressing himself. Jim sharing his story helped the Respondent understand the impact the incident had on him and why Jim wanted to resolution he was seeking.

The VEOHRC conciliator ensured both parties had time to express themselves and helped negotiate a solution during private sessions, which made the back and forth negotiations smooth. Jim found the conciliation challenging but ultimately rewarding and less stressful than a hearing. Jim was happy he chose to take action and he was pleased with the outcome achieved.

These case studies highlight the importance of ensuring that the complainant is not re-traumatised by their experience of the civil justice system. It also highlights the importance of developing best practice principles in communicating with complainants of sexual harassment and ensuring regulators, agencies and decision-makers receive ongoing specialist training so that the response is trauma-informed.

Recommendation 9:

Ensure the process of reporting sexual harassment to WorkSafe, VEOHRC and VCAT is complainant-centred, trauma-informed including by

- a. ensuring seamless coordination between regulators, agencies and decision-makers (which may also include Victoria Police and the Victims of Crime Assistance Tribunal);
- b. that regulators, agencies and decision-makers develop best practice principles for communicating with complainants who have experienced sexual harassment;
- c. that the confidentiality and privacy of the complainant is preserved unless the complainant consents otherwise; and
- d. that multiple complaint handling options are made available for the complainant so that the response is tailored and minimises harm.

Recommendation 10:

Ensure WorkSafe, VEOHRC and VCAT to receive ongoing specialist training so that the response to complaints of sexual harassment is trauma informed.

3.2.2. Free legal assistance for victim-survivors of sexual harassment

It is not unusual that a client may present to our services seeking legal advice regarding other matters and only later make disclosures regarding sexual harassment in the workplace. We have encountered instances where the client has not readily characterised the behaviour as sexual harassment. The majority of sexual harassment claims made by our clients also incorporated additional components of

exploitation, including sham contracting, multiple different types of discrimination, unfair dismissal and underpayments.

CASE STUDY: VALENTINA

Valentina was engaged as a cleaner in a sham contracting arrangement. On top of receiving a rate of pay which was below minimum wage, she was subject to multiple instances of sexual harassment from her supervisor who regularly sent her text messages asking her out on dates and made other romantic advances which made her feel very uncomfortable.

Before coming to see WEstjustice for assistance, Valentine quit her job as she couldn't cope being in that environment any longer. However, WEstjustice was able to assist Valentina to negotiate with Valentina's employer to receive compensation for the sexual harassment and payment for her outstanding wage entitlements.

CASE STUDY: OLGA

Olga was one of the only females in her workplace. Throughout her period of employment she was subject repeated sexual harassment, this included unwelcome comments about her looks and unwelcome sexual advances from her male colleagues and invasive questions about her sex life. She was also bullied by a male colleague who called her sexist slurs towards her and treated her differently to her male counterparts. When Olga finally complained to management her experiences, she was interrogated about her allegations, mocked based on her lack of fluency in English, and then after three shifts, she was provided with no further work. Following the termination of her employment, Olga also learned that her employer had failed to make any superannuation contributions for her benefit.

WEstjustice assisted Olga to make a complaint to VCAT for sexual harassment and discrimination. At compulsory conference, Olga received an apology, and the employer agreed to pay a substantial amount of compensation for the harm suffered and arrange sexual harassment training for the workplace.

The broad range of legal options available to a person to deal with complaints of sexual harassment is complex. When a client is also facing other employment law related issues, it becomes even more difficult to navigate. This illustrates the vital importance for community legal education and early access to independent legal assistance.

Many of our clients do not have the means or confidence to self-advocate and certainly are not in a position to engage a private solicitor. Many opt not to join a union as the cost of the fees is prohibitive.

The CLC sector plays a critical role in ensuring that the most vulnerable and disadvantaged workers are empowered with knowledge of their workplace rights and responsibilities. We engage in community legal education and are a trusted source of help for some of the hardest to reach members of the community. It is a fundamental part of our ethos to proactively enhance community access to justice through for example providing outreach legal services and offering community legal education. Through our work, we seek to reach those who may not otherwise have the means, confidence or inclination to report sexual harassment. Our legal practices' ethical and professional duty to maintain client confidentiality offers a reassuring incentive to clients to make disclosures to us of sexual harassment. This enables our clients to weigh up their legal options and make informed choices as to how they wish to proceed with dealing with their experience of sexual harassment.

Our embedded and multidisciplinary service delivery models (for example, by having lawyers provide outreach services at Study Melbourne and in schools) also optimises our accessibility to the community.

In instances where the sexual harassment constitutes a criminal offence, we highlight the CIJ's findings that '*... current access pathways are over-reliant on police referrals (VPeRs) despite clear evidence that certain cohorts and victims of specific crime types are less likely to report to police.*'¹⁴ We support the recommendation that the justice system response should focus on taking an innovative approach to developing a wider range of access pathways. CLCs may offer an alternative access point to the justice system, especially those clients who are unlikely to report to police.

Recommendation 11:

Adequately fund the CLC sector to increase access to the justice system and offer alternative referral pathways for persons who have experienced sexual harassment through their strategic service delivery model of community engagement community legal education and direct legal assistance.

Recommendation 12:

Persons who have experienced sexual harassment must have early access to independent legal assistance. The CLC sector should be resourced and supported to assist the most vulnerable and hard to reach clients within our community.

3.2.3. Integrated service delivery models

With the inherent benefits to taking a holistic approach to responding to sexual harassment, we see value in integrated service models such as WJs and SMLS school lawyer programs, whereby our lawyers is readily accessible to young people of school grounds. The school lawyer is based together with the school's wellbeing team. The immediate physical proximity of services provides a useful prompt for agencies to make cross-referrals; often promotes better inter-agency collaboration for efficient service delivery; and may minimise the risk of overlooking any gaps in the support offered to the person experiencing sexual harassment.

Better collaboration and partnerships between agencies may be achieved through identifying shared objectives; agreeing and clearly articulating the respective roles and expectations of each of the agencies; developing a clear understanding of the agreed policies and procedures in circumstances where there may be any tensions between the objectives and functions of the individual agencies; developing a shared monitoring and evaluation framework; and incorporating partnership management and coordination in the funding of any partnerships or collaboration between agencies.

Recommendation 13:

Prioritise integrated models of service delivery in both legal and non-legal settings in service planning and resourcing arrangements. Resourcing must incorporate support for partnership development, monitoring and evaluation.

Recommendation 14:

Ensure that partnerships built between agencies include ongoing maintenance and resourcing.

¹⁴ Centre for Innovative Justice *Strengthening Victoria's Victim Support System: Victim Services Review Final Report* (Final report, November 2020) 43.

3.2.4. Civil penalties for poor responses to sexual harassment

We support measures that aim to reorientate the focus onto the conduct of the perpetrator of sexual harassment and the workplace. One of the ways in which this may be achieved could be by introducing a reverse onus of proof once the complainant makes out a prima facie case of sexual harassment. This may also alleviate any evidentiary hurdles which may otherwise disincentivise a complainant from coming forward.

Recommendation 15:

Give consideration as to whether it may be appropriate to introduce a reverse onus of proof under the Equal Opportunity Act

Under the current anti-discrimination legislation, the remedies that flow from a claim is based on the injury and losses suffered by the complainant, rather than the conduct of the perpetrator and workplace. The final award granted to a complainant may not fully reflect the extent of the wrongdoing, if faced for example, with a particularly resilient complainant. The elimination of sexual harassment in the workplace is matter of public concern. It needs to be open to decision-makers to impose civil penalties where appropriate. We see the option of imposing civil penalties duly re-orientates the focus on the conduct of the wrongdoer, signals the public disapproval of that conduct and may act as a general deterrence.

Recommendation 16:

Amend the Equal Opportunity Act to include civil penalties in circumstances where employers respond to complaints of sexual harassment in a way that causes further harm to the complainant.

3.2.5. Extend the time limit for reporting

In our experience it can often take clients months to come forward and have the courage to talk about their experiences of sexual harassment. In some instances, clients may defer coming forward until they have moved on from the workplace where they experienced the sexual harassment. Clients on temporary visas who may have exceeded their work rights may be particularly unwilling to complain for fears of its impact on their visa or any future visa applications. In these circumstances, it may be some time before the complainant feels ready to come forward.

From SMLS' experience of assisting victims of crime in applications to the Victims of Crime Assistance Tribunal ('**VOCAT**'), the very process of seeking to have an extension of time itself can be a re-traumatising experience. Many of our clients have experienced historical sexual abuse and so find themselves needing to seek an extension of the usual 2-year time limit in the VOCAT application. For our clients, the process of seeking an extension may be perceived by the complainant that their story is not believed. A trauma-informed approach to dealing with sexual harassment understands there may be long delays in reporting the incident.

Applicants have up to 6 years to lodge a complaint for other forms of unlawful treatment (not involving dismissal) under the general protections framework in the *Fair Work Act 2009* (Cth). In our submission this timeframe more adequately reflects the needs of victims of harmful conduct.

Recommendation 17:

Amend the Equal Opportunity Act so that the discretion of VEOHRC and the VCAT to decline dealing with a complaint of sexual harassment is extended to 6 years.

3.3. Enforcement

3.3.1. Shift the responsibility to enforce compliance away from individuals

It is necessary that better enforcement powers be introduced to ensure employers who fail to provide a working environment free from sexual harassment are compelled to proactively address the issue or face penalties for breaching their duties.

At present there is no proactive regulator who can commence proceedings on behalf of vulnerable victim-survivors, or gather evidence in support of these proceedings and prosecute an employer for contraventions of the Equal Opportunity Act. Rather the expectation is for individuals to drive and progress legal action. This is inconsistent with the barriers individuals face in reporting or seeking advice in respect of sexual harassment and which presently prevent workers from taking legal action.

Currently, individuals are responsible for reporting and taking action with respect to sexual harassment. This is often not a feasible option for vulnerable workers and victim-survivors of sexual harassment.

In particular, each of the legal avenues available to workers to address sexual harassment requires the victim to make a written complaint or application and/or file proceedings in a Court or Tribunal. This necessitates significant levels of legal capacity and/or emotional investment, which is often beyond our clients.

Of the clients that contacted our Centres for assistance with reports of sexual harassment, very few decided to pursue their sexual harassment claims, despite meritorious cases and offers of assistance.

Clients reported that it was simply too much to recount their story, that they were suffering psychological issues as a result of the harassment, and/or that they were worried that pursuing a case would have an adverse impact on their health. Some others felt concerned that they didn't have enough evidence to make a claim.

A stronger regulatory framework is needed to remove the burden from individuals to address sexual harassment in workplaces.

CASE STUDY – NYALA

Nyala was employed as an Administrative Officer. She was sexually harassed by the owner of her employer, which included:

- Touching her arms and legs;*
- Telling her she would only keep her job if she slept with him;*
- Buying a piece of carpet which he placed under her desk and told her to sleep on;*
- Booking a hotel room for the two of them and leaving the keys on her desk; and*
- Telling her she should move to the city and that he would pay her rent and he would move in.*

In addition to the sexual harassment Nyala was bullied and discriminated against at work. This included being taunted and laughed in relation to her accent and appearance at comments that were frequently made to Nyala about her accent and appearance (which she believed was directly linked to her African background) and made to feel excluded by her colleagues. On one occasion, a colleague intentionally locked Nyala in a bathroom after office hours.

When Nyala would reject the owner's sexual advancements the bullying behaviour would become worse. Nyala even started to experience bullying from Human Resources. The behaviour included asking Nyala to report directly to Human Resources when she started and finished work every day

and redirecting her to perform menial manual duties such as carrying heavy files or unpicking staples.

WEstjustice gave Nyala advice about her options and offered to assist Nyala to make a claim. Nyala was concerned about sharing her story with anyone other than WEstjustice and said that she would contact WEstjustice if and when she felt ready to pursue her legal rights, however she never contacted WEstjustice for assistance.

Many of our clients who experience sexual harassment in the workplace do not necessarily want monetary compensation. Often their main priority is having an opportunity to have their experiences validated and an empowering process to effect systemic change in their workplaces and prevent the same thing from happening to others.

In different contexts such as underpayment matters, many of our more vulnerable clients are not willing to pursue a wage claim, but request that we make an intelligence report to the Fair Work Ombudsman in the hope that they will take action to protect other workers. However, in cases of sexual harassment, it is not possible for victims to report concerns to a regulator who can investigate and enforce the law. As a result, employers and perpetrators can act with impunity and the abuse continues.

Empowering VEOHRC to enforce the positive duty would shift the burden away from victim-survivors to respond to sexual harassment as well as assisting to addressing the fundamental causes of discrimination and sexual harassment in the workplace. This would also provide victim-survivors with a mechanism to institute change in the workplace without being required to go through an adversarial process.

Recommendation 18:

Amend the Equal Opportunity Act to strengthen VEOHRC's functions and powers to enforce compliance and address systemic issues of sexual harassment (as well as discrimination and victimisation) following an investigation, including the functions and powers to:

- a. seek enforceable undertakings;
- b. issue compliance notices;
- c. prosecute serious non-compliance with the Equal Opportunity Act; and
- d. secure penalties against employers and perpetrators of sexual harassment.

Recommendation 19:

Amend the Equal Opportunity Act to include civil penalties for:

- serious non-compliance with the positive duty to eliminate sexual harassment; and
- contraventions of the provisions prohibiting sexual harassment.

Recommendation 20:

Ensure that VEOHRC is adequately funded and resourced to effectively use its additional functions and powers.

3.3.2. Remedies to promote systemic change

On the occasions where individuals do feel empowered to lodge formal complaints in relation to sexual harassment, the current complaints system has a very individualistic focus. Under the Equal Opportunity Act, if a complaint of sexual harassment is successful, VCAT is limited to making orders

for the purposes of providing redress to the applicant. This means outcomes cannot make any meaningful change to address problem offenders or prevent future unlawful conduct.

On the other hand, when we have settled our clients' sexual harassment matters through a conciliation or mediation process, we have sometimes been able to negotiate outcomes with a more broad-reaching impact for the workplace, such as agreements to run training regarding sexual harassment and anti-discrimination training in the workplace.

In our experience these outcomes, which allow victims to feel like they have contributed to substantial and tangible changes in their workplace, have been the most beneficial for our clients. In several of these cases, clients have reported a feeling of a 'weight being lifted' as a result.

Two WEstjustice clients who achieved such outcomes at the conclusion of a compulsory conference said to us:

“...afterwards the weight was lifted off my shoulders as we had achieved a very positive outcome on my behalf”
“[It] lifted an enormous amount of weight from my chest, and I finally feel like I am free!”

By including a legislative requirement for courts and tribunals to consider systemic remedies, VCAT can ensure that employers are required to take steps to prevent future harm (for example, through training, audits and/or the introduction of relevant policies).

Recommendation 21:

Amend the Equal Opportunity Act to require VCAT decision makers to consider remedies which promote systemic and positive cultural change in the workplace in addition to remedies that compensate for individual harm such as:

- a. Consultation with VEOHRC (or other experts) to develop policies
- b. procedures and/or action plans to address and prevent sexual harassment in the workplace; and/or
- c. Mandatory sexual harassment
- d. gendered violence and antidiscrimination training.

Recommendation 22:

Resource VEOHRC to monitor compliance with orders enforceable undertakings or compliance notices regarding measures to prevent and address sexual harassment.

3.3.3. Appropriately recognize sexual harassment as a serious work health and safety issue

While the Consultation Paper and recent 'Let's Be Very Clear' campaign recognizes that risks to psychological health, such as work-related sexual harassment, are health and safety hazards within the remit of the Occupational Health and Safety Act, historically they have not been treated as such under the work safety legislative and regulatory frameworks.

For example, on occasion where we have assisted clients to make reports of very serious incidents of bullying to WorkSafe, we have been told that such issues are not within their remit or worthy of their

intervention. We have also heard stories within the community of WorkSafe adopting a similar approach to sexual harassment.

In addition, although we do not provide detailed Work Cover advice and usually refer our clients to private injury lawyers in those cases, often our clients who have received this advice have been told that claims for psychological injury (including as a result of sexual harassment) are readily rejected and our clients must be prepared to challenge the claim decision at conciliation. When our clients who have been sexually harassed receive this advice they rarely wish to file a WorkCover claim. Often they are battling with mental injury as a result of the sexual harassment and, if they have chosen to make a sexual harassment claim, they do not have the capacity to manage several legal processes at once, especially when aren't high hopes of success.

CASE STUDY – INGRID

Ingrid, a casual labourer, experienced serious and ongoing sexual harassment and sex-based harassment at work from a number of different colleagues. When she made a complaint to her employer about the behaviour, she was dismissed. As a result of her experiences, Ingrid developed severe anxiety, which required her to take multiple different types of medication and prevented her from working for several months after her dismissal. We agreed to help Ingrid to lodge a sexual harassment and discrimination complaint at VCAT and referred her to a personal injury lawyer for WorkCover advice. After receiving advice that her WorkCover claim was likely to be rejected, Ingrid informed us that she did not want to lodge a claim. She told us that the idea of pursuing two legal battles at the same time was too much for her to handle given her mental state.

We welcome WorkSafe's provisional payments scheme for work-related injuries, which provides much needed support to workers who have suffered mental injury. However, this framework must be accompanied by other complimentary measures which appropriately recognise the mental harm caused by sexual harassment and other forms of gendered violence, including training to WorkSafe inspectors, claims assessors employed by WorkCover insurers as well as adequate training and information to employers.

Recommendation 23:

Provide expert training regarding sexual harassment and its impacts on psychological health is provided to WorkSafe inspectors, to ensure they respond appropriately to complaints and incidents of sexual harassment in WorkSafe. Training must include how to communicate with victim survivors in a complainant centred, trauma informed manner, as mentioned above.

Recommendation 24:

Provide expert training regarding sexual harassment and its impacts on psychological health, particularly for at risk groups to claims assessors in all WorkCover insurers to ensure that claims relating to sexual harassment are appropriately accepted and progressed.

Recommendation 25:

Ensure that adequate information and guidance is provided to employers regarding the psychological impacts of sexual harassment and their obligations to prevent and minimise sexual harassment and other forms of gendered violence as a key element of the duty to control risks to health and safety in the workplace.

3.3.4. Provide redress for on-demand workers

Workers engaged in precarious or insecure working arrangements are more likely to experience sexual harassment in the workplace.¹⁵ Generally speaking this rings true for our clients. In particular, our casework and consultation reveals that on-demand work is particularly unsafe and isolated.

However, these workers, who tend to be engaged as contractors rather than employees, have limited rights to recourse when they are sexually harassed, despite being among the most vulnerable workers to it. In these arrangements, it is common for platform providers to shirk any responsibility for controlling risks relating to sexual harassment, even where they may otherwise have the power to do so.

Case Study – Irini

Irini, an international student, worked as a driver for a ride-share company. She was engaged as a contractor. Irini did not have her own car, so she rented one from a company that had a contract with the ride-share company.

One weekend Irini received a late-night job to pick up a group of male passengers. When Irini arrived, the men were noticeably intoxicated. During the trip, one of the men tried to climb through the sunroof of the car, causing significant damage. Irini stopped the car and the man jumped out. All the other men, except for one, got out. The man that stayed sexually harassed Irini. He made unwanted advances and said words to the effect of ‘do you want to kiss me?’ which made Irini feel very uncomfortable.

Irini reported the incident to the ride-share company. They refused to cover the full cost of fixing the car, leaving her with a considerable debt to pay. Instead, they offered her a small amount of money on the condition that she would make no further attempts to claim money from them. The company also refused to take any steps to identify the passengers who damaged the car and sexually harassed her and told her she must obtain this information through the police. In addition, although the ride-share company has terms of use which prohibit sexual harassment, Irini was not aware of the ride-share company taking any action to investigate the incident or penalise the passengers for their conduct.

We advised Irini that, unfortunately as a contractor, her rights against the company were uncertain. WESTjustice suggested that, alternatively, Irini could pursue the men responsible for damaging the car to pay for the repair, however, this would require identifying them. Irini contacted the police to try to identify the men, but after months heard no response. Ultimately Irini gave up on making a claim because the process of trying to identify the perpetrators was too hard.

Under the Equal Opportunity Act, workers in the on-demand workforce are protected against sexual harassment.¹⁶ However, the same cannot be said of the work safety framework. Although sexual harassment poses serious risks to physical and mental health and safety, the obligations under the Occupational Health and Safety Act to provide a safe place of work do not extend to companies in the on-demand economy, even where those companies have a significant degree of influence or control

¹⁵ See e.g. Anthony D LaMontagne et al, ‘Unwanted Sexual Advances at Work: Variations by Employment Arrangement in a Sample of Working Australians’ (2009) 33(2) *Australian and New Zealand Journal of Public Health* 173.

¹⁶ *Equal Opportunity Act 2010* (Cth), s 99.

over the environment in with their workers operate. In addition, the WorkCover scheme does not extend WorkCover benefits to on-demand workers.

This leaves workers like Irini with little-to-no options for redress in cases when they have been victims of sexual harassment.

By extending WorkCover benefits to on-demand workers, and extending work safety responsibilities to on-demand platform providers, the Government can help to ensure that vulnerable workers in the on-demand economy are able to seek redress if and when they are sexually harassed.

Recommendation 26:

Extend the scope of WorkCover benefits to on demand workers.

Recommendation 27:

Amend the Occupational Health and Safety Act to require on demand platform providers who have a significant degree of control over their workers, such as Uber, Ola, Didi and other ride share providers, to take steps to eliminate sexual harassment and gendered violence in the workplace.

3.4. Raise awareness

3.4.1. Understand barriers to reporting sexual harassment

As outlined above, there are a multitude of factors that may prevent victim-survivors from reporting sexual harassment. More work is needed to better understand the impact of intersectional discrimination on a person's experience of sexual harassment and willingness to complain of sexual harassment.

Recommendation 28:

Prioritise research into what specific barriers there may be to persons experiencing intersectional discrimination from reporting sexual harassment, including persons from CALD, non-English speaking backgrounds, new arrivals, persons on temporary visas and persons with a disability.

3.4.2. Leverage data collected by the CLC sector

The laws, regulations and policies must be continually monitored and evaluated to ensure that it keeps evolving with contemporary issues, particularly for those workers who are most disadvantaged.

CLCs have the potential to contribute to the ongoing review of the existing legal framework dealing with sexual harassment through their administrative data. As outlined by McDonald et al (2020:10) '*[a]dministrative data is information collected and stored as part of the everyday functions of organisations.*' It is data which is '*... not primarily collected for research purposes*' but may offer an efficient and cost-effective way to build evidence and gain insights to inform policy¹⁷. (McDonald et al, 2020: 14) In 2017, the Australian Productivity Commission's *Data Availability and Use report*

¹⁷ McDonald H, McRae C, Balmer N L, Hagland T and Kennedy C, *Apples, Oranges and Lemons: The use and utility of administrative data in the Victorian legal assistance sector*. Victoria Law Foundation, accessed January 2021.

recommended increased use of administrative data to improve the delivery of government services and policy. (Productivity Commission, 2017:111 and 113)

We highlight that SMLS is currently undergoing a research project mapping out the client journey in recovering income from unpaid work. The research will also consider the extent that our administrative data can be used for research purposes.

Recommendation 29:

The CLC sector should be supported to explore the potential to convert its administrative data into data that could be used for research purposes to raise awareness of the issues relevant to the eradication of sexual harassment in the workplace.

In principle, we support the suggestion of imposing greater obligations on employers to regularly report on instances of sexual harassment in the workplace. It may serve as a signal to employers that the work of fulfilling their positive obligation to eliminate sexual harassment in the workplace is an ongoing process of reflection, refining and implementation.

We highlight though that any reporting obligations must be meaningful, to avoid it being treated simply as a tick-box exercise or give employers the misconception that simply satisfying their reporting obligations is enough to eliminate sexual harassment in the workplace.

We do also see there may be difficulties with ensuring the reliability of any data collected from employers in circumstances where they have been asked to self-report on instances of sexual harassment in the workplace. From our casework, we have seen examples where the perpetrator of sexual harassment was indeed the employer themselves. There is a risk then that the results of these employer reports may paint a distorted or incomplete picture. There needs to be mechanisms in place to ensure the reliability of the data presented in these employer reports.

We highlight that any data collected from these employer reports should be subject to human ethics approval if used for research purposes.

We are also mindful of ensuring that any reporting obligations must be balanced against the need to ensure complainants' privacy is preserved and maintaining the complainant's sense of control over their personal information.

We also recommend that if mandatory reporting obligations are imposed on employers, that it be subject to a robust monitoring and evaluation framework to regularly test its effectiveness in improving employer accountability. Primarily though, we consider that a more effectively strategy for improving employer accountability would be to strengthen the enforcement powers of regulators.

Yours sincerely,

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