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Submission to the National Inquiry into Sexual Harassment in Australian Workplaces

Australian Human Rights Commission

Submitted via online form

To the Australian Human Rights Commission

About the Women's Legal Centre (ACT & Region)

The Women's Legal Centre (ACT & Region) is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women's access to justice. The Centre prioritises services for women who require our services the most, particularly women who are not eligible for legal aid and cannot afford private legal assistance. Of the clients we assisted in the past year, 91% were affected by family and domestic violence, 75% earned under \$65K or had no income at all, 25% identified as having a disability, 13% were from culturally and linguistically diverse backgrounds, and 10% were homeless or at risk of homelessness.

Our primary practice areas are: domestic and family violence; family law (including divorce and separation, children's matters and property settlements); employment law; discrimination law; care and protection matters; and victims of crime compensation. The Centre's Mulleun Mura: Aboriginal and Torres Strait Islander Women's Access to Justice Program is an Aboriginal women-led Program. It provides culturally appropriate support services, including intensive case management and support for women's families and communities.

We are one of the few community legal centres in Australia that has maintained an employment practice, and we are the only community legal centre in the ACT that provides ongoing representation in employment matters. There is no Working Women's Centre in the ACT.

What we see in our employment and discrimination practice

Our employment and discrimination practice consists of one fulltime solicitor, who provides legal advice and representation to women in matters of underpayment of wages, breaches of general protections, workplace bullying, access to parental leave, unfair dismissal, discrimination and sexual harassment.

We know sexual harassment is rife in Australian workplaces; the Australian Human Rights Commission's Fourth National Survey on Sexual Harassment in Australian Workplaces (the **Fourth National Survey**) found that in the last 12 months, 23% of women in the Australian workforce have experienced some form of workplace sexual harassment.

While we are regularly contacted by women who have been underpaid, bullied at work or lost their jobs, women rarely contact us for the sole purpose of pursuing a sexual harassment claim. It is even rarer that we receive contact from women who are still working at a workplace where they have been sexually harassed; generally, women will only seek advice



from us on sexual harassment after they have been dismissed from their employment or felt forced to resign due to victimisation.

Our experience accords with the Fourth National Survey, which found the majority of people who were sexually harassed at work did not formally report their experience or seek support or advice. The survey found that many of these people believed a formal complaint would be viewed as an overreaction or that it was easier to stay quiet. The survey also found that almost one in five people who made a formal report or complaint were labelled as a troublemaker (19%), were ostracised, victimised or ignored by colleagues (18%) or resigned (17%).

While the #metoo movement has seen an increase in women in high-profile jobs reporting sexual harassment, the Women's Legal Centre has not seen the same increase in complaints from women in lower paying jobs or precarious employment situations.

Case studies

Of the few sexual harassment cases we have assisted with, there is a consistent theme that the employee experienced victimisation or reprisals for complaining about or rejecting their supervisor's sexual advances. The following case studies are real life situations experienced by our clients, with names and details changed to protect anonymity:

- **Breakdown of employment relationship:** Our client, Leslie worked for a small business. The owner and manager of the small business 'interviewed' Leslie by taking her out for dinner and back to his house afterwards, where he attempted to kiss her. Leslie made it clear that she only wanted a job, not an intimate relationship, and the owner agreed they could work together. Leslie started working for the small business, but the owner continued to flirt with her and be inappropriate towards her. This culminated when she took a trip interstate with him on the understanding that they had separate accommodation, only to discover after arriving that they did not and she was expected to share a bed with him. This caused a fight between them which affected their working relationship, with the owner bullying and belittling Leslie. Leslie developed anxiety and depression and took time off work.

Leslie made a successful claim for workers compensation. The Women's Legal Centre represented Leslie in an ACT Human Rights Commission complaint of sex and race discrimination. The matter resolved with an agreement that the business would pay Leslie \$40,000, provide training to its staff on appropriate workplace behaviour, and provide Leslie with a statement of service.

- **No action taken by large company:** Matilda worked as a casual employee for a large company in a traditionally male dominated industry. Matilda was sexually harassed by her supervisor. The supervisor regularly made inappropriate comments to Matilda, including about her bottom and breasts, wanting to give her a massage, and saying "anyone would run off with you and have an affair". The supervisor also asked Matilda to come over to his place for dinner and she did not respond to this invitation. The supervisor also yelled and swore at Matilda at work about minor issues. Despite Matilda reporting the sexual harassment to senior management, there was no action was taken by the company.



The Women's Legal Centre assisted Matilda to make a complaint of sexual harassment and sex discrimination to the Australian Human Rights Commission against the company and the sexual harasser. The matter was settled at conciliation for \$20,000 in general damages.

- **Reprisals:** Jessica worked in the building industry and was sexually harassed by a colleague, who repeatedly asked her to enter into a sexual relationship with him, despite Jessica telling him on multiple occasions she was not interested in him that way. He also phoned and sent inappropriate text messages to Jessica late at night and touched her inappropriately while at work, including stroking her hair and touching her hands. When Jessica asked her colleague to stop, he became aggressive and bullied her. Jessica complained about her colleague's conduct to her manager. The employer directed the sexual harasser not to work in the same area as Jessica and requested that he not communicate with Jessica unless it related to a business matter and within business hours. They also changed Jessica's hours of work to minimise her exposure to the sexual harasser. Less than two months later, Jessica's employment was terminated, and the employer claimed her role had been made redundant.

With the assistance of the Women's Legal Centre, Jessica lodged a general protections claim to the Fair Work Commission, on the basis that her employment was terminated because she made a workplace complaint. The matter settled at conciliation for \$7,500 and Jessica was provided with a statement of service.

- **Viewed as problematic by prospective employer:** Marie worked in the construction industry and made a complaint of sexual harassment. A year later, Marie applied for a job at a different company in the same industry in the same city and was told the work advertised was no longer available. When Marie's partner called to inquire about the advertised work, he was told the work was still available. Marie believes that because she made a complaint in the past, she is now viewed as a problematic employee and will not be able to get another job in that industry.

Our concerns

The AHRC Survey findings and our experience indicate that current measures for preventing and addressing sexual harassment are not working.

Our major concerns with current measures are:

- **Onus on individuals:** The current legal framework places the onus on individuals who have been sexual harassed to pursue individual remedies and potentially jeopardise their current and future employment.
- **Lack of confidence in the process:** Most individuals who have been sexual harassed do not believe that making a formal complaint or pursuing legal remedies will be in their best interests.
- **Fear of reprisals:** Individuals worry that if they complain, they will be bullying at work, treated as a problematic employee, dismissed from their job, and that it could



negatively affect future employment and career prospects. Individuals may also fear being sued for defamation.

- **Inherent conflict in employers being liable and responding to sexual harassment:** There is an inherent conflict in employers being vicariously liable for sexual harassment and being responsible for investigating and responding to sexual harassment. We see reluctance on the part of employers to acknowledge and act on reports of sexual harassment for the fear of being held vicariously liable.
- **Lack of legal information and advocacy for women on low incomes:** There is not enough support available to women with vulnerabilities to understand their rights and options when they have been sexually harassed at work. We are one of the few legal assistance services in Australia to have an employment lawyer.

Suggested solutions

We encourage the Australian Human Rights Commission to explore and consult on new measures to prevent and address sexual harassment in Australian workplaces, including:

- **Positive duties:** Introducing positive duties obligations on Australian workplaces to take preventative action to better protect workers from sexual harassment in anti-discrimination legislation. This should include financial penalties for workplaces who fail to comply with positive duties obligations, including where there is no individual complaint. This shifts the onus away from individuals who have experienced sexual harassment.

There have been calls for the introduction of positive duties obligations for over a decade. In its report of 12 December 2008, the Senate Standing Committee on Legal and Constitutional Affairs recommended further consideration should be given to amending the *Sex Discrimination Act 1984* (Cth) to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment and promote gender equality.

- **WHS regulation:** Regulating sexual harassment issues in employment in a similar way to other work, health and safety issues. Again, this would shift the onus away from individuals who have experienced sexual harassment.
- **Greater funding for the legal assistance sector:** Advocating for greater funding for the legal assistance sector, particularly specialist women's legal services. With greater resources, not only could we provide formal legal assistance and representation to more women, we could also:
 - Reach out to women who are unaware of their rights and options or who are reluctant to seek assistance after being sexual harassed at work;
 - Engage in informal conversations with employers to address incidents of sexual harassment, without the need for formal complaint or legal processes; and
 - Conduct community education and awareness activities for employers and employees with the aim of: improving employer responses to sexual



harassment, increasing the community's understanding of the law and legal options, and changing the culture of acceptance in Australian workplaces.

- **Greater ability for human rights commissions to conduct own-motion inquiries, with enforceable remedies:** Currently, human rights and anti-discrimination commissions can conduct 'own-motion inquiries' into suspected breaches of anti-discrimination legislation. However, there is uncertainty and inconsistency in the scope of these inquiries, and it is often unclear whether commissions can take matters to a tribunal or court for determination without an individual complainant. Broadening and/or clarifying these options may assist to shift the onus away from individuals who have experienced sexual harassment and who are fearful of the repercussions of pursuing an individual complaint. It would also increase the ability of the commissions to identify and remedy systemic issues that go beyond the experiences of particular individuals.

We would be happy to speak further with the Commission about these issues and we look forward to reading the recommendations resulting from the National Inquiry.

Yours sincerely

WOMEN'S LEGAL CENTRE

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