

Australian Law Reform Commission

PO Box 209
Flinders Land
Victoria 8009

24 May 2024

Submission in response to the *Justice Responses to Sexual Violence: Issues Paper*

Dear Justice Bromberg,

Basic Rights Queensland welcomes the opportunity to provide comment on the Australian Law Reform Commission's Review of the *Justice Responses to Sexual Violence: Issues Paper*.

About Basic Rights Queensland and Working Women Queensland

Basic Rights Queensland Inc. (BRQ) is an incorporated non-profit organisation and community legal centre registered with the Australian Charities and Not-for-profits Commission.

BRQ provides free information, advice, advocacy and legal services in Queensland state-wide. BRQ supports vulnerable and disadvantaged people in relation to social security, disability discrimination and to those who experience mental health concerns.

Working Women Queensland (WWQ) is a part of BRQ. WWQ provides provide free advice, support and information for vulnerable women in relation to employment related matters, including sexual harassment and gender discrimination. WWQ employ a team of solicitors, industrial advocates and one social worker who offer a holistic, interdisciplinary approach. WWQ is the only specialist women's employment service of its kind in Queensland.

BRQ and WWQ receive requests for support and information from people who have experienced sexual assault/s and rape at work. Sexual assault and rape are included in the terminology that is legally defined as sexual harassment.

We recognise the significance of the Australian Human Rights Commission's landmark *Respect@Work Report*, (and it's 55 recommendations), and the AHRC's follow-up *Time for Respect Report*. In response to these reports, there has been significant law reform at the State and Federal level, including the creation of a positive duty to identify and manage psychosocial hazards and their risks, the recognition of sexual harassment as an Industrial issue, and positive changes to discrimination legislation.

These reforms seek to create safer workplaces, and sexual harassment is now defined as serious misconduct under the National Employment Standards. However, there remain opportunities to ensure all people have equitable access to pathways for reporting sexual violence. We need to ensure the processes for reporting violence and to access justice consider the emotional and physical safety of the people accessing them, and overtly

recognise the additional supports and trauma-informed practice needed so the processes themselves do not create further harm and trauma. This submission outlines three areas of concern: to Justice and Self for Women Experiencing Sexual Violence in the Workplace, to increasing equitable access to justice, and to ensuring just outcomes.

1. Barriers to Justice and Self for Women Experiencing Sexual Violence in the Workplace.

Because exposure to violence and harassment is highly contextual and results from a convergence of drivers of violence and harassment, such as discrimination, conditions and risk factors, it is important not to reduce the analysis to a list of who is 'most vulnerable' to violence and harassment. Doing so could mistakenly imply that who people are or what they do makes them victims.¹

When women have experienced sexual violence in the workplace, they face many barriers to seeking justice. WWQ provides substantial support and advocacy to victim-survivors of sexual assault in the course of their employment. Outlined below are common barriers that we observe for victim-survivors of sexual violence in their place of work.

a) Positional Power

The 2022 findings continue to highlight what we already know: power imbalances and the misuse of power related to gender inequality and other forms of discrimination and disadvantage, combined with specific workplace risk factors, continue to drive sexual harassment against some people more than others. Women, people with disability, young people, Aboriginal and Torres Strait Islander people, people with an intersex variation, and people with minority sexual orientations are significantly more likely than others to experience workplace sexual harassment.²

Women are more likely to experience sexual violence in the workplace due to entrenched power imbalances driven by gender inequality. People with positional power in the workplace can exploit this status, increasing the difficulty for victims to challenge their abusers without risking significant consequences to their employment and economic security.

¹ International Labour Organization, Ending Violence and Harassment in the World of Work, Report V(1), International Labour Conference, 108th sess, Agenda Item 5, Geneva, ILC.108/V/1 (2019) para. 119 (emphasis in original).

² https://www.respectatwork.gov.au/sites/default/files/2022-11/2022.11.18_Time%20for%20Respect%202022%20%28Full%20Report%29.pdf

Research has found that a hierarchical workplace structure can increase the risk of sexual harassment.³ And “just over a third of individual harassers (36%) were more senior than the person harassed⁴

The imbalance of power in the workplace has a direct impact on women’s health and safety in the workplace and increases financial insecurity and insecurity of employment. This imbalance is gendered and intersects with other areas of marginalisation and discrimination in the workplace.

b) Victim-Blaming and Acceptance of Gender-Based Violence in Workplace Culture

Change the Story notes that violence against women is condoned through social norms and structures that justify, excuse or trivialise the behaviour, or shift the blame from the harasser to the victim.⁵

Many workplaces have a deeply ingrained culture of victim-blaming and acceptance of gender-based violence. This cultural norm silences victims and normalises abusive behaviour, perpetuating a cycle where sexual violence is tolerated and unaddressed. This workplace culture is a reflection of our wider community, where the prevalence of victim-blaming was the focus of the research report *Reducing violence against women and their children*, commissioned by the Australian Government Department of Social Services. The Report’s findings included:

- *from an early age, young people begin to believe there are reasons and situations that can make disrespectful behaviour acceptable*
- *girls blame themselves, questioning whether the trigger for the behaviour is potentially their fault, rather than questioning the behaviour of the male*
- *boys blame others, particularly the female, and deflect personal responsibility telling each other it was a bit of a joke – it didn’t mean anything⁶*

The persistence of victim-blaming in our wider cultural responses to sexual assaults – in and out of the workplace – is often perpetuated by people in power when responding publicly to violent attacks on women. This was demonstrated in the comments made in 2021 by the then-Chief of the Australian Defence Force, General Angus Campbell in an address to women cadets in relation to how they could avoid sexual predators by being aware of the “four As: alcohol, out after midnight, alone, and attractive”⁷.

³ file:///C:/Users/PennySpalding/Downloads/ahrc_wsh_report_2020.pdf p 241

⁴ https://www.respectatwork.gov.au/sites/default/files/2022-11/2022.11.18_Time%20for%20Respect%202022%20%28Full%20Report%29.pdf p 64

⁵ file:///C:/Users/PennySpalding/Downloads/ahrc_wsh_report_2020.pdf p 151

⁶ <https://www.respect.gov.au/the-campaign/the-issue/>

⁷ <https://www.theguardian.com/australia-news/2021/mar/03/adf-chief-criticised-for-advising-cadets-against-going-out-alone-while-attractive-to-avoid-sexual->

c) Economic Worth Over Safety and Wellbeing.

Some of the negative outcomes for the person harassed were that they were ostracised, victimised or ignored by colleagues (13%), they resigned (13%), or they were labelled a troublemaker (12%).⁸

In many workplaces, economic contributions to an organisation are prioritised over the safety and wellbeing of employees. This often leads to environments where sexual violence is overlooked or inadequately addressed, as the focus remains on productivity and profit. When the focus is not on safety or valuing gender equality, those who seek to report unsafe behaviour or sexual violence are often dismissed and blame is directed towards the victim as a strategy of minimising and normalising unacceptable behaviours.

The professional repercussions from speaking out about when they experience these kinds of forms of harassment, because they're "making a fuss", or they're "hard to work with", or they're just being "overly sensitive", that kind of thing. (Woman RPI)⁹

Non-Disclosure Agreements have often been utilised to protect the reputation of the organisation and to maintain a climate of silencing victims. In their stead, the sexually violent behaviours are not addressed, potentially leading to more harm in the workplace.

...that NDAs were used by some employers to protect against damage to their reputation and business, often at the expense of the victim's wellbeing, reinforcing imbalances of power in these cases¹⁰

Workers, often lower-paid women and other marginalised categories of workers, can be seen as expendable, allowing companies and employers to prioritise protecting and retaining "valued" employees over those who may report sexual violence. This point is also directly tied to the role of positional power in relation to sexual violence and workplaces. This devaluation discourages women from speaking out, fearing job loss or professional retaliation.

d) Financial Impacts of Seeking Justice

[predators#:~:text=Angus%20Campbell%20released%20a%20statement,avoid%20the%20%E2%80%9Cfour%20As%E2%80%9D%3A](#)

⁸ Some of the negative outcomes for the person harassed were that they were ostracised, victimised or ignored by colleagues (13%), they resigned (13%), or they were labelled a troublemaker (12%). p 143

⁹ [SH.22.03_FLYNN_REPORT-Workplace-technology-facilitated-sexual-harassment-Perpetration-responses-and-prevention.pdf \(anrowsdev.wpenginepowered.com\)](#) – pg 37

¹⁰ [file:///C:/Users/PennySpalding/Downloads/ahrc_wsh_report_2020.pdf](#) p 557

The financial burden of accessing ongoing support is nearly always carried by the victim.¹¹

The financial impost of seeking justice is a further and significant barrier to women who experience sexual violence in the workplace. There remains a persistent gender wage gap in Australia with women, on average, having less financial security across all their working lives and into retirement, than men.¹²

"I've been fighting this [since 2010] and I've lost our house, our super. We have nothing left virtually. But I'm still here because something needs to change. People need to be held accountable"¹³

The financial cost of accessing and retaining legal support to navigate the complex, lengthy reporting pathways creates a further barrier, and making a complaint carries the risk of consequences for their ongoing employment, including a loss of employment or a reduction in work hours. The potential loss of employment and/or loss of hours and the extended time frames to access justice processes are real barriers for many women. The financial strain can be overwhelming, prohibitive and discourages sexual violence victims from coming forward.

Building on these financial costs, the extended timeframes and delays require those who do pursue reporting and legal frameworks to continue to live through this time period with the hope of accessing justice "hanging over their heads". This is in addition to the immediate and ongoing harm of the sexual violence itself.

e) Evidence and the Burden of Proof

The current evidentiary requirements and the burden of proof in cases of workplace sexual violence are often insurmountable for victims seeking justice. Victims are required to provide substantial evidence to have complaints processed, validated or believed. In addition to placing the burden on the victim, this can be challenging in cases of sexual violence where physical evidence or "proof" may be minimal or non-existent. This high standard of proof can be used by employers to dismiss complaints and/or undermine allegations.

This requirement also fails to recognise that certain cohorts of workers with diminished power in the workplace have an increased likelihood of experiencing sexual violence in their workplace. This power imbalance creates further barriers for victim-survivors to access "proof". Or, to access support to identify and gather documentation relevant to the sexual

¹¹ file:///C:/Users/PennySpalding/Downloads/ahrc_wsh_report_2020.pdf p 274

¹² <https://www.wgea.gov.au/pay-and-gender/gender-pay-gap-data>

¹³ file:///C:/Users/PennySpalding/Downloads/ahrc_wsh_report_2020.pdf p 274

violence they have experienced, and the failures of their employers to implement preventative measures and comply with their positive duties.

The need to navigate and produce “proof” of sexual assaults the “correct” way fails to recognise how specific groups of workers experience unintended barriers that others does not, through no fault or action of their own. It also does not recognise that these decisions and legal processes need to be navigated when the complainant is likely to be under considerable psychological (and physical) distress. Women’s words need to be enough.

Recommendation 1

WWQ seeks an increased focus on the monitoring of workplaces’ adoption of a positive duty in relation to psychosocial hazards, and that education for employers and employees about sexual violence in the workplace, and other measures to prevent sexual violence, are widely implemented and adopted as part of positive workplace cultures and inherent WHS requirements.

2. Increasing equitable access to justice

Fewer than one in 5 people (18%) who experienced workplace sexual harassment in the last 5 years made a formal report or complaint about the harassment. Of those who did make a report or complaint, one quarter said it resulted in no consequences for the harasser.¹⁴

WWQ welcomes the recent appointment of the Interim Victims’ Commissioner in Queensland and recognises the benefit that the increased powers in this role will have on assisting and managing individual victim-survivors’ complaints when there has not been a just outcome. There is a strong need for improved oversight and accountability, including review and appeal processes that are accessible, clearly understood and accessed for victims of sexual violence in Queensland.

Having an independent reviewer/body for the civil legal outcomes of victim-survivors of sexual violence offers several significant benefits:

- a) Expertise: Independent reviewers could hold specialised knowledge and experience in handling cases of sexual violence. This expertise ensures that the nuances and complexities of such cases are properly understood and considered, leading to more informed and appropriate outcomes as well as enhancing systemic change.

¹⁴ Fewer than one in 5 people (18%) who experienced workplace sexual harassment in the last 5 years made a formal report or complaint about the harassment. Of those who did make a report or complaint, one quarter said it resulted in no consequences for the harasser.

- b) **Transparency and Accountability:** The presence of an independent reviewer increases transparency in the legal process. It helps hold all parties accountable, ensuring that procedures are followed correctly and that the survivor's interests are prioritised.
- c) **Emotional Support:** Knowing that an independent party is overseeing their case can provide emotional support to survivors. It can alleviate some of the stress and anxiety associated with the legal process, as survivors can trust that there is someone dedicated to ensuring justice is served.
- d) **Holistic Approach:** Independent reviewers can take a more holistic approach to cases, considering the broader context of the survivor's experience and needs. This can lead to more comprehensive support, informed systemic change and more just outcomes.
- e) This role could support a nationally consistent approach to improve the coordination, consistency and clarity between the anti-discrimination, employment and work health and safety legislative schemes (as recommended in the *Respect@Work Report*)

Increased powers would enhance the purpose of driving improvements and systemic change for the benefit of victim-survivors. This role, or the development of a specific role of an independent reviewer, needs to include a focus on civil legal outcomes of victim-survivors of sexual violence not limited to the outcomes of criminal legal matters. We believe there is a need for the establishment or widening of an existing body/role to undertake this approach nationally.

Recommendation 2

An independent review of decisions should be considered to ensure victim-survivors of sexual violence at work have access to justice. The implementation of an accessible independent reviewer would significantly enhance the legal experience for victim-survivors of sexual violence, promoting justice, fairness, and healing.

WWQ calls for the increased protection of victim-survivors of sexual violence in civil proceedings. Protections are commonly provided to adult victims of domestic and family violence, and sexual assault complainants in other legal settings such as family law matters, domestic violence protection order matters and criminal cases. When women have experienced sexual violence in the workplace these protected and person-centred measures are not widely considered.

We believe that additional measures and protections are needed to consider the well-being of the victim and make available the same adjustments that are provided in other legal proceedings. These adjustments include: the offer of using telephone or video conferencing facilities rather than being physically in the tribunal, disallowing direct questioning or cross-examination of victim-survivors by the alleged perpetrator in the proceedings, and ensuring any direct communication with and questioning of victim-survivors comes from the Commissioner only in the event that the alleged perpetrator is

unrepresented. We also see the value in the adaptation of shuttle-style communication where the parties concurrently discuss their issues with the commissioner, and other trauma-informed and victim-survivor centred practices such as allowing the presence of support persons, choice of interpreter, rest breaks or a direction that questions be kept simple.

Embedding a trauma-informed approach is imperative. Without these protections, victim-survivors continue to experience re-traumatisation and negative impact on the proceeding and outcomes.

Recommendation 3

Special victim provisions are made widely available to all victim-survivors of sexual violence in all civil proceedings. This will minimise the delays and disruptions to the proceedings, enhance victim-survivors' capacity to give instructions to lawyers and ability to provide coherent evidence, and ensure that victim-survivors' safety and wellbeing is prioritised.

The wide-spread use of non-disclosure agreements (NDAs) in response to reports of sexual violence continues to decrease the visibility of gendered violence in workplaces and silences the experiences of women. BRQ notes the campaign by Union Women in Victoria, *End NDAs*,¹⁵ and their push to remove the use of NDAs in relation to sexual violence in the workplace. Their campaign outlines the damage and harm their use creates and how they help contribute to the barriers to reporting. We note the recent changes to the annual reporting requirements from the Women Gender Equality agency (WGEA) concerning the employer's sexual harassment reporting processes and number of reports. We believe this area would be strengthened if it included the collation of data about the use of NDAs.

Recommendation 4

That WGEA widens the annual reporting framework in relation to sexual harassment in the workplace to include reporting the use of NDAs in sexual harassment matters within their organisations.

3. Ensuring just outcomes

The wide-spread underreporting of sexual violence in Australian workplaces was the foundation of the *Respect@Work Report* and has been widely discussed since the release of the report and its 55 recommendations. People who do not report sexual violence do so for a range of reasons. The system continues to place additional and unnecessary burdens on the victim, with processes and information being overly complex and confusing, and there is a level of social capital required to access justice.

¹⁵ https://www.weareunion.org.au/end_ndas

WWQ recognises that women without the necessary resources fail to access the information and support on *how* to report. The complex reporting avenues available can be overwhelming. Legal support and advice are needed to fully comprehend and consider the complexities of the multifaceted pathways to reporting. *The Queensland Regulator Map*¹⁶ is an example of the multitude of pathways and the options available dependent on the circumstances. Australian women require a national hub, where trusted and person-centred materials and information is made available.

WWQ support women having information in relation the variety of pathways available to them when they experience sexual violence in the workplace. We support women's self-agency in navigating options and determining the best course of action for their individual situation. Clear and consistent information from a trusted authority that outlines all the options is needed. We believe the legislation, litigation options and pathways need to be represented and made more easily understood.

The creation of a positive duty in Queensland in relation to the prevention of psychosocial hazards in the workplace was adopted in 2023. Many workplaces are still to develop risk assessments and adopt improved systems in consultation with their employees to improve reporting mechanisms and training about sexual harassment, for all employees and managers.

Recommendations 5

BRQ recommends that there be the establishment of a national person-centred guideline for reporting options that includes timeframes, legal support options and union assistance. It is important that this resource is widely available, accessible, and promoted for people who have experienced the trauma of sexual violence in their workplace.

WWQ is thankful for the opportunity to provide our experiences and our five key recommendations. We are available should you require any further information or would like to discuss this submission in more detail. Please contact Penny Spalding on 07 3421 2505 or email pennys@brq.or.au.

Yours sincerely



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Working Women Queensland

¹⁶ https://www.rshq.qld.gov.au/__data/assets/pdf_file/0003/1844166/Queensland-Regulator-Map-Workplace-sexual-harassment-and-sexual-assault.pdf