

# Ministerial Taskforce on Workplace Sexual Harassment

Submission to the Taskforce

**31 August 2021**

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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> <https://www.lawyersalliance.com.au>.

## Introduction

1. The ALA welcomes the opportunity to provide a submission to the Ministerial Taskforce.
2. The proliferation of sexual harassment in Australia, especially in workplaces,<sup>2</sup> is an amplification of society's failure to address systematic inequality (including intersectional vulnerabilities) and to bring balance to the distribution of power.
3. It is uncontroversial that sexual harassment disproportionately affects women and that it is a form of gendered violence cultivated by a culture of silence and inaction.
4. Principally, the ALA considers that meaningful and effective reform requires sexual harassment in the workplace be considered, first and foremost, as an Occupational Health and Safety (OHS) issue.
5. The ALA supports the holistic approach in forging a path of progress reflected in the "Four Pillars" of reform: prevention, support, enforcement, and raising awareness.
6. Careful consideration must be given to the role of victim survivors, employers and workplaces, and government in each pillar of reform.
7. Given the pervasive nature of sexual harassment, victim survivors must be heard, supported and empowered. The burden of change can no longer sit with victims alone.
8. Leaders within workplaces – large and small – must take meaningful action to effect change. There must be a move from inaction and reaction, to prevention and support.<sup>3</sup> It is critical that workplaces engage with government and enforcement agencies openly to ensure that they have the knowledge and tools required to provide a workplace free from sexual harassment.
9. A lack of accountability drives inaction. It is incumbent on the Victorian Government, and the regulatory agencies within its purview, to show decisive leadership and require Victorian workplaces to implement practices to drive meaningful and effective change.

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<sup>2</sup> Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (Report, 2018) 26.

<sup>3</sup> Shi, Elizabeth; Zhong, Freeman "Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach" (2020) 43(1) UNSW Law Journal 155 pages, 164, 170-173.

10. Enforcement and awareness raising measures must ensure businesses of all sizes take their obligations to their employees seriously and access the tools they require to ensure the safety of their workforces.
11. There is not a single reform that will, in and of itself, lead to the implementation of preventative measures in workplaces, provide support to victim survivors or increase enforcement and raise awareness. Rather, a comprehensive suite of reforms – specifically-designed to address the aforementioned four pillars of reform – is required to address the alarmingly increasing rates of sexual harassment,<sup>4</sup> and the associated social and economic costs.<sup>5</sup>
12. With the above principles in mind, this submission contains discussion and recommendations regarding the Department of Justice and Community.
13. The ALA acknowledges that it has had the benefit of considering the submissions of the Victorian Trades Hall Council, Maurice Blackburn Lawyers, and Slater and Gordon Lawyers.
14. The ALA would welcome the opportunity to speak directly with the Taskforce on the contents of this submission.

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<sup>4</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), 96–97. According to this report, one-third of people in the 2018 National Survey reported experiencing sexual harassment at work in the previous five years, representing a “marked” increase as compared to the survey conducted in 2012.

<sup>5</sup> *Ibid* 81. In the first ever assessment of the cost of sexual harassment across the economy, a specially commissioned report by Deloitte assessed the cost of sexual harassment to the Australian economy at \$3.5 billion annually, including approximately \$2.6 billion in lost productivity.

## Summary of Recommendations

### Recommendation 1:

Embed the prevention of Gendered Violence, including sexual harassment in the regulatory mechanisms available pursuant to the *Occupational Health and Safety Act 2004 (Vic)* (“the OHS Act”) by:

- (A) Amending the *Occupational Health and Safety Regulations 2017 (Vic)* to include risks to psychological health;
- (B) The Minister making an order approving a compliance code or suite of compliance codes in respect of workplace gendered violence, including sexual harassment;
- (C) WorkSafe Victoria (“WorkSafe”) ensuring the training “approved” or “conducted” by the Regulator pursuant to section 67 of the OHS Act covers gendered violence, including sexual harassment;
- (D) WorkSafe establishing a dedicated Gendered Violence and Sexual Harassment Unit and providing specialised training to all inspectors and staff within the advisory service; and
- (E) Sexual harassment being classified as a notifiable incident under section 38 of the OHS Act.

#### **Recommendation 1(A):**

Amend the *Occupational Health and Safety Regulations 2017 (Vic)* to include risks to psychological health.

#### **Recommendation 1(B):**

The Minister should make an order approving a compliance code or suite of compliance codes in respect of workplace gendered violence, including sexual harassment.

#### **Recommendation 1(C):**

WorkSafe should ensure the training “approved” or “conducted” by the Regulator pursuant to section 67 of the OHS Act covers gendered violence, including sexual harassment.

#### **Recommendation 1(D):**

WorkSafe should establish a dedicated Gendered Violence and Sexual Harassment Unit and provide specialised training to all inspectors, and staff within the advisory service.

#### **Recommendation 1(E):**

Sexual harassment incidents should be notifiable incidents under section 38 of the OHS Act.

### Recommendation 2:

Primary duty holders must be obligated to report data that provides insight into gendered violence and sexual harassment.

### Recommendation 3:

Legislative change is required to prohibit the use of Non-Disclosure Agreements (NDAs) in all harassment and discrimination matters, except where expressly requested by survivors.

### Recommendation 4:

Funding should be allocated to establish a Working Women’s Centre.

### Recommendation 5:

Awareness raising initiatives must be improved.

## Discussion of Recommendations

### Recommendation 1:

Embed the prevention of Gendered Violence, including sexual harassment in the regulatory mechanisms available pursuant to the *Occupational Health and Safety Act 2004 (Vic)* (“the OHS Act”) by:

- (A) Amending the *Occupational Health and Safety Regulations 2017 (Vic)* to include risks to psychological health;
- (B) The Minister making an order approving a compliance code or suite of compliance codes in respect of workplace gendered violence, including sexual harassment;
- (C) WorkSafe Victoria (“WorkSafe”) ensuring the training “approved” or “conducted” by the Regulator pursuant to section 67 of the OHS Act covers gendered violence, including sexual harassment;
- (D) WorkSafe establishing a dedicated Gendered Violence and Sexual Harassment Unit and providing specialised training to all inspectors and staff within the advisory service; and
- (E) Sexual harassment being classified as a notifiable incident under section 38 of the OHS Act.

### The need for a regulatory approach

15. The OHS Act clearly requires employers and persons with management and control of workplaces to take proactive measures to prevent sexual harassment in the workplace by imposing an obligation to prevent, so far as reasonably practicable, risks to health, including psychological health.<sup>6</sup> For the purposes of this submission, these persons will be referred to as “primary duty holders”.

16. Save for the recent development of the March 2020 *Work-related gendered violence including sexual harassment* guide for employers (“the Guidance”) pursuant to the OHS Act,<sup>7</sup> the regulatory mechanisms and associated processes available under OHS Act have not been utilised to address gendered violence, including sexual harassment.

17. The OHS Act provides a suite of powers that can be utilised by workers, employers, the Regulator and the Minister to address sexual harassment. There is a need for a regulatory

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<sup>6</sup> *Occupational Health and Safety Act 2004 (Vic)* s 21, 26. See also section 5, which defines “health” to include psychological health.

<sup>7</sup> *Ibid* s 12, which provides WorkSafe with the power to make guidelines, including the Guidance.

approach to addressing sexual harassment,<sup>8</sup> and the OHS Act already contains a robust and comprehensive structure that can be utilised for this purpose.

18. It is the ALA's firm view that a broader range of mechanism available under the OHS be employed to address this pervasive and insidious problem. Utilising the OHS Act to address sexual harassment will serve as measures consistent with all four pillars of reform, and will ultimately result in fewer psychosocial injuries. This latter piece is critical to addressing the ever-increasing costs of psychosocial injuries.
19. The Victorian Government should ensure the mechanisms within the OHS Act are utilised to:
- facilitate preventative action by workers, employers and the Regulator;
  - enhance support for victim survivors;
  - facilitate enforcement of the obligations of employers and persons with management and control over workplaces, with a view to providing a workplace that is physically and psychologically safe, so far as is reasonably practicable;
  - raise awareness that drives change.
20. It is pertinent to emphasise that, when considering what is reasonably practicable to ensure workplaces are free from gendered violence and sexual harassment, the current standard of preventative action taken in workplaces across Australia is too low. It is the ALA's view that reasonably practicable measures have not been taken for a variety of reasons, including a lack of support, a lack of enforcement, a lack of awareness of the issue, and – most importantly – a lack of awareness of the practical steps that can and should be taken to address gendered violence, including sexual harassment.
21. The following recommendations address the concerns of ALA members.

**Recommendation 1(A):**

**Amend the *Occupational Health and Safety Regulations 2017 (Vic)* to include risks to psychological health.**

22. It is uncontroversial that sexual harassment causes psychological injuries. The ALA supports the Victorian Government's intention to address the risk to psychological health in the

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<sup>8</sup> Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach' (2020) 43(1) *UNSW Law Journal* 155, 164, 170-173.

workplace through amendment of the *Occupational Health and Safety Regulations 2017* (Vic) Regulations.<sup>9</sup>

23. The ALA has had the benefit of reading the submissions of Maurice Blackburn Lawyers and endorses its recommendation that these amendments:

‘Require intervention from the employer, rather than placing any risk or responsibility on an individual employee;

Provide clear guidance to employers as to how they are required to meet their legal obligation to provide a safe work environment within reasonably practical means in the context of psychological injury specifically; and

Include a number of base controls which may be referred to by Health and Safety Representatives, WorkSafe Inspectors and WorkSafe Prosecutors in the event of a breach.’<sup>10</sup>

24. Further, the ALA considers management of the psychosocial risks associated with sexual harassment is consistent with the recommendations of the Royal Commission into Victoria’s Mental Health System regarding the establishment of “mentally healthy workplaces”.<sup>11</sup>

**Recommendation 1(B):**

**The Minister should make an order approving a compliance code or suite of compliance codes in respect of workplace gendered violence, including sexual harassment.**

25. The OHS Act empowers the Minister to make an order approving a compliance code to provide practical guidance to persons with an obligation under the OHS Act.<sup>12</sup> The ALA recommends this power be utilised to create a compliance code in relation to the Guidance.

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<sup>9</sup> Victorian Government, ‘Keeping Workers Safe from Psychological Harm’ (Media Release, 17 May 2021).

<sup>10</sup> Maurice Blackburn Lawyers, Submission entitled *Submission in Response to the Consultation Paper: Addressing Sexual Harassment in Victorian Workplaces* to the Taskforce (9 August 2021) 10.

<sup>11</sup> Royal Commission into Victoria’s Mental Health System *Final Report: Summary and Recommendations* (Final Report, February 2021)52. See especially ‘Recommendation 16: Establishing healthy workplaces’, through which the Royal Commission recommends that, as an initiative of the Mental Health and Wellbeing Cabinet Subcommittee, the Victorian Government should “foster the commitment of employers to create mentally healthy workplaces”.

<sup>12</sup> *Occupational Health and Safety Act 2004* (Vic) s 149(1).

26. While acknowledging the progress of the Guidance, this important work can be enhanced and elevated by the creation of a compliance code. The ALA recommends the Taskforce consider a general compliance code that can be utilised by all workplaces, as well as a set of compliance codes that are tailored to industries with high rates of sexual harassment, or with high proportions of particularly vulnerable workers (such as young people, or women from culturally or linguistically diverse backgrounds). Further, any compliance codes developed should have practical steps suited to small and large businesses. However, the ALA does not support differentiations in any code that impose a lower standard of conduct for small businesses.<sup>13</sup>
27. ALA members report encountering resistance from the Regulator in advocating for the creation of new compliance codes.
28. Therefore, the ALA provides the following analysis to assist the Taskforce in formulating any recommendation regarding compliance codes that it may wish to make to the Minister.

### **A compliance code is preferred over the Guidance**

29. Compliance codes are different to the Guidance materials published by WorkSafe, as they are more focused on the appropriate, 'practical'<sup>14</sup> measures that a primary duty holder may take to discharge their obligations under the OHS Act. In contrast, the Guidance offers WorkSafe's opinion on the relevant obligations in particular set of circumstances.<sup>15</sup>
30. Furthermore, compliance codes are more suited to compelling primary duty holders to implement effective measures to manage the hazard in question and serve an enhanced preventative purpose.

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<sup>13</sup> See, eg, the "Small Business Dismissal Code" pursuant to section 388 of the *Fair Work Act 2009* (Cth), which seeks to provide practical guidance to small businesses when considering terminating an employment agreement. This code has the perverse effect of undermining the rights of workers in small businesses by lowering the standard procedural fairness afforded to employees.

<sup>14</sup> *Occupational Health and Safety Act 2004* (Vic) s 149(1).

<sup>15</sup> *Ibid* s 12(1).

## The use of a compliance code is justified

31. The compliance codes developed to date reflect just *some* of the industries that have the highest numbers of claims,<sup>16</sup> as well as the highest numbers of fatalities,<sup>17</sup> as determined by WorkSafe’s data. Notably, the industries with the highest number of claims, in descending order according to the most recent publicly available data, are as follows.

32. **Table 1.** Industries with the highest claims and gender segregation

Number of claims in the 2018/19 Financial Year <sup>18</sup>	Gender Segregation by industry in the 2017/18 Financial Year <sup>19</sup>
1. Health care and social services: 4217 claims	Female-dominated industry
2. Construction: 3862 claims	Male-dominated industry
3. Public administration and safety: 2179	Mixed industry
4. Transport postal and warehousing: 2142	Male-dominated industry
<i>Note: The top four industries with respect to the number of claims has remained the same for 10 years.</i>	

33. The majority (70 per cent) of the 17 compliance codes in operation manage occupational health and safety risks in male-dominated industries, and do not prioritise hazards that pose a risk to psychological health in addition to physical risks to health.<sup>20</sup> This is despite the fact that the industry with the highest level of claims has consistently been Health care and social services, which is a female-dominated industry. The ALA considers the lack of extant compliance codes that address hazards predominantly affecting female workers is a symptom of culturally ingrained gender bias at a societal level.

<sup>16</sup> WorkSafe Victoria *Claims Statistical Report 2018-2019: Industry* (Report, 1 August 2019) <<https://www.worksafe.vic.gov.au/resources/claims-statistical-report-financial-year>>.

<sup>17</sup> WorkSafe, “[Confirmed work-related fatalities by industry & category: Industry and Category](#)” (July 2021).

<sup>18</sup> WorkSafe Victoria (n16).

<sup>19</sup> Workplace Gender Equality Agency, Australian Government, *Gender segregation in Australia's workforce* (Publication, 17 April 2019) <<https://www.wgea.gov.au/publications/gender-segregation-in-australias-workforce>>.

<sup>20</sup> Compliance codes have been developed in relation to Stonemasonry (*Compliance Code: Managing exposure to crystalline silica – engineered stone*); and to Mining, Manufacturing and Construction (including but not limited to: *Compliance Code: Confined Spaces*; *Compliance Code: Demolition*; *Compliance Code Excavation*, *Compliance Code: Facilities on Construction*; *Compliance Code Foundries*; *Compliance Code: Plant*; *Compliance Code: Prevention of Falls in Housing Construction*).

34. Moreover, it must be acknowledged that claims data cannot be accurately relied upon for assessing which hazards and industries ought to be prioritised by the Regulator. Any such assessment is skewed by the barriers associated with reporting and the outdated elevation of physical injuries over psychological injuries.
35. The wicked and pervasive nature of gendered violence, including sexual harassment, and the associated social and economic costs, require measures that are more capable of compelling change by those with power and control over Victorian workplaces.
36. The capacity of a compliance code to increase the use of preventative measures, provide support to victim survivors, aid enforcement and raise awareness is outlined below.

### **A compliance code will encourage preventative action**

37. While non-conformity with a compliance code is not a standalone offence, compliance codes are more capable of compelling preventative action on the part of a primary duty holder because:
  - 1) adherence to a compliance code will demonstrate that a primary duty holder has complied with its obligation to provide a safe working environment, particularly in large corporate organisations, where persons with management or control of workplaces are more likely to implement measures that limit liability owing to their primary duty to their shareholders.
  - 2) compliance codes can be utilised by Health and Safety Representatives when issuing Provisional Improvement Notices, and by WorkSafe Inspectors when issuing Improvement Notices. Hence, non-compliance can result in enforcement action being taken,<sup>21</sup> the benefits of which are discussed in further detail in the next section's discussion pertaining to Health and Safety Representatives.
38. ALA member's report that, when representing victim survivors, it is clear that primary duty holders do not consider sexual harassment as an occupational health and safety issue, and generally do not have effective systems in place to address the concerns of workers, including to take preventative action, or address problematic conduct in the first instance. Furthermore, practitioners report that victim survivors experience a deterioration in their

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<sup>21</sup> *Occupational Health and Safety Act 2004 (Vic)* s 62.

psychological health owing to the failure of duty holders to address the issue effectively if complaints are made.<sup>22</sup>

39. ALA members also report complaints of sexual harassment are primarily managed to protect businesses from being held vicariously liable for the conduct of perpetrators, as opposed to being managed to support victims, and take preventative action.
40. Compliance codes will provide a meaningful launch pad for preventative action and early intervention because they provide primary duty holders and workers with a roadmap to a resolution. The prevalence of sexual harassment in all manner of workplaces indicates a lack of knowledge amongst workers and primary duty holders as to how the hazard of gendered violence and sexual harassment should be properly managed. It is time for the Regulator in Victoria to step up and provide resources that provide a pathway forward.
41. A compliance code will support victim survivors because, in contrast to reactionary corrective approaches to addressing sexual harassment (such as bringing a claim for unlawful discrimination), a code does not place the burden of proving wrongdoing on the victim survivor. Rather, it requires employers and persons with management and control over workplaces to demonstrate they have complied with their positive obligation to provide a healthy and safe workplace, including managing risks of sexual harassment.
42. Gendered violence, including sexual harassment, can be committed in a variety of ways and the dynamics, nature and hazards presented by different industries may require tailored approaches. The ALA recommends that, in creating compliance codes to address sexual harassment, a general compliance code be considered, along with considerations regarding small and large business and industry specific codes. For example, it is well documented that persons working in the hospitality industry are particularly vulnerable to sexual harassment, as are women from culturally and linguistically diverse backgrounds, and persons from the LGBTIQ+ community.

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<sup>22</sup> See also Slater and Gordon Lawyers, Submission entitled *Response to the Victoria Government's consultation paper addressing sexual harassment in Victorian Workplaces* to the Taskforce (August 2021)<sup>22</sup>.

## **Compliance codes will promote victim centred preventative action by Health and Safety Representatives**

43. Coupled with the high-quality training detailed at Recommendation 1(C) (discussed below), compliance codes will also support the work of Health and Safety Representatives.
44. Health and Safety Representatives are elected from the workforce by the workforce. They can build trusted connections with their colleagues and have the capacity to promote, and participate in, bystander interventions and influence the culture within a workplace in a meaningful way. This will assist in breaking down barriers to reporting and add a level of support for victim survivors. In the experience of ALA members, victim survivors tend to confide in their colleagues rather than management and are more likely to seek support from persons they trust.
45. Furthermore, with respect to the practical measures victim survivors can take within the workplace, ALA members report advising their clients, where appropriate, to find ‘allies’ in the workplace and address issues collectively. Health and Safety Representatives can provide support and limit silencing of the issue, and when properly trained, they have the capacity to be highly effective on the ground. They can not only provide support in a manner that encourages the use of preventative strategies but are a genuine way to raise awareness of the issue and how to address it.
46. Critically, Health and Safety Representatives have the power to issue Provisional Improvement Notices and may direct a primary duty holder to comply with a compliance code if consultation with the primary duty holder is ineffective.<sup>23</sup> Therefore, Health and Safety Representatives have the capacity to be allies equipped with the tools and power to assist victim survivors and influence the culture of a workplace.
47. Worksafe Inspectors can be called upon to evaluate Provisional Improvement Notices in the event that the risk is disputed by the employer, or where the employer does not comply. Therefore, compliance codes provide for a graduated escalation of consequences and a course of action, and seek to involve the relevant parties in the process. This is reflective of a restorative justice approach.
48. The ALA considers ensuring Health and Safety Representatives are equipped with compliance codes, as a critical reform that will support all four pillars of reform. The ALA

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<sup>23</sup> See *Occupational Health and Safety Act 2004* (Vic) Part 7, Division 5– Powers of health and safety representatives.

considers the power to elect Health and Safety Representatives pursuant to the OHS Act is underutilised across Victoria, and that awareness-raising efforts should be undertaken in this respect.

## **Compliance codes facilitate enforcement**

49. As discussed above, compliance codes provide scope of worker-initiated action to lead to enforcement. Similarly, WorkSafe Inspectors can issue Improvement Notices based on a specialised compliance codes without the involvement of a Health and Safety Representatives.
50. The compliance code regarding Crystalline Silica was created in the wake of alarming rates of illness and deaths amongst stone masons working with engineered stone. The compliance code is being used by the Inspectorate to demonstrate non-compliance with the OHS Act, facilitate prosecution,<sup>24</sup> and raise awareness that compels preventative action in the community.<sup>25</sup> Compliance codes are also used in enforcement activities, such as safety blitzes conducted by WorkSafe at workplaces across Victoria, and provide the inspectorate with a roadmap to addressing the issues at hand.
51. A compliance code that can be utilised by use by WorkSafe Inspectors is particularly important for casual employees, contractors, labour hire workers and volunteers, who are generally not ingrained in the workplace to an extent that they have meaningful access to their Health and Safety Representatives. Hence, they rely on action from the Regulator.
52. ALA members report, that the higher burden imposed on workers seeking compensation for a psychosocial injury (as opposed to a physical injury) exacerbates the harm caused to victim survivors. ALA members report that insurers vigorously defend claims for psychosocial injury in unreasonable circumstances,<sup>26</sup> and that a compliance code would assist victim survivors in demonstrating that their employer failed to take reasonable measures to prevent the harm

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<sup>24</sup> See, eg, WorkSafe Victoria, News, 'Quarry Operator Charged Over Silica Exposure'(Media Release, 26 August 2021); WorkSafe Victoria News 'Charges Laid over Silica Dust Exposure'(Media Release, 25 August 2021).

<sup>25</sup> See the media coverage of the compliance code and enforcement blitz regarding Crystalline Silica, eg, Sumeyya Ilanbey, 'New code and 'enforcement blitz' to protect stone workers from deadly silicosis', *The Age* (online, 11 February 2020) <<https://www.theage.com.au/national/victoria/new-code-and-enforcement-blitz-to-protect-stone-workers-from-deadly-silicosis-20200211-p53zth.html>>.

<sup>26</sup> See also, Victorian Ombudsman, WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims, (Report, December 2019), 31. This report discusses the prevalence of unreasonable decision making by agents.

caused by sexual harassment. This would thus assist with the enforcement of entitlement of those injured at work.

## **Compliance codes raise awareness for all stakeholders**

53. WorkSafe Inspectors play a very important role in supporting primary duty holders to provide a healthy and safe working environment. They assist them in determining what they need to do to manage the hazards in their workplace. They also sanction those who fail to take reasonable measures to prevent harm to workers.
54. The availability of a compliance code will assist the work of the WorkSafe Inspectors on the ground by providing roadmap to a resolution. Additionally, a compliance code will raise awareness within the Regulator’s own workforce, the business community and workers about the issue of gendered violence including sexual harassment and, importantly, the practical measures that can be taken to address it.

### **Recommendation 1(C):**

**WorkSafe should ensure the training “approved” or “conducted” by the Regulator pursuant to section 67 of the OHS Act covers gendered violence, including sexual harassment.**

55. The ALA endorses the recommendation of the Victorian Trades Hall Council in respect of ensuring Health and Safety Representatives are specifically trained in Gendered Violence including sexual Harassment:<sup>27</sup>

“Recommendation: Make ‘HSR Refresher Training Course - Work-related gendered violence including sexual harassment’ compulsory for all HSRs.”

“Recommendation: Amend the current ‘5-day HSR Initial OHS Training Course’ to include specific content addressing work related gendered violence.”

56. ALA members consider the Gendered Violence Training provided by the Victorian Trades Hall Council to be of a very high standard, and as such the Taskforce should recommend funding be allocated to expand such training.

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<sup>27</sup> Victorian Trades Hall Council, “Ending Sexual Harassment in the Workplace” (September 2021), page 7.

**Recommendation 1(D):**

**WorkSafe should establish a dedicated Gendered Violence and Sexual Harassment Unit and provide specialised training to all inspectors, and staff within the advisory service.**

57. The ALA is concerned that the majority of WorkSafe’s inspectorate is male, and that there are no staff members dedicated to assisting with complaints of sexual harassment.
58. Given the gendered nature of sexual harassment, we are of the view that the lack of diversity within WorkSafe’s inspectorate, and the absence of a dedicated unit to assist with complaints of sexual harassment present barriers to reporting. The ALA understands that WorkSafe has generalist inspectors and has established dedicated units to address industries and other hazards that pose a particularly high risk (for example, crystalline silica) or for incidents that require inspectors to have a specialised skillset (when responding workplace fatalities).
59. When assisting victim survivors, ALA members consider it best practice to ensure that the persons assisting:
- have an appropriate understanding of the issues at hand;
  - are skilled in being able to support victims through the available process in a manner that minimises the risk of re-traumatising the victim survivor; and
  - have knowledge of the agencies to which they can refer people for other necessary supports (such as health care providers and counselling services).
60. The ALA recommends that WorkSafe establishes a dedicated gendered violence inspectorate and prosecution unit that is equipped to deal with matters of gendered violence and workplace sexual harassment.
61. ALA members report that they rarely advise victim survivors to report a matter to WorkSafe because it is very unlikely to result in any action to be taken, victim survivors are not informed of the action taken in relation to their report, and victim survivors lack confidence in the ability of the Inspectorate to support the victim in a practical sense. ALA members report that they would refer victim survivors to WorkSafe if they have the confidence that the staff taking the report:

- were trained in receiving reports of gendered violence and sexual harassment;
- applied a victim centred approach;
- were from a diverse cohort; and
- appropriately and clearly outlined the action that could be taken and the possible outcomes.

62. A specialised unit would equip inspectors to work with workers and employers to implement preventative measures, provide support to victim survivors, conduct enforcement activities and raise awareness on the ground but also within WorkSafe itself.

63. The establishment of a dedicated unit is not a silver bullet to upskilling the Inspectorate. In addition, all staff, including inspectors and those working at the advisory service, should undertake gendered violence training, including sexual harassment training. The ALA considers this critical to ensuring that staff members who engage with the public and contribute to making Victoria a safer place have the knowledge and skills to manage the culturally ingrained gender bias at a societal level in their day-to-day work.

64. The establishment of a dedicated unit contributes to all four pillars of reform. However, in particular, it will aid in prevention, support and enforcement, providing it:

- ensures that employers understand the systems of work that need to be addressed, minimised or removed in order to prevent sexual harassment in the workplace (which the creation of compliance codes will assist with);
- engages effectively with health and safety representatives;
- is representative of the community and comprised of staff that identify as female, come from culturally and linguistically diverse communities and have experience working in and/or with industries that have particularly high rates of sexual harassment;
- reports back to the victim; and
- is adequately equipped and willing to utilise section 76 of the OHS Act that imposes a prohibition on discrimination and victimisation of persons who make complaints with respect to their health and safety (as well as with respect to the health and

safety representatives assisting with such matters).<sup>28</sup>

**Recommendation 1(E):**

**Sexual harassment incidents should be notifiable incidents under section 38 of the OHS Act.**

65. The ALA considers it critical that primary duty holders share data with the Regulator with respect to incidents of sexual harassment, so that WorkSafe can take preventative action, provide support and enforce the OHS Act.
66. Section 37 of the OHS Act outlines the circumstances in which an employer is required to notify WorkSafe of an incident. The ALA endorses the recommendation of the Victorian Trades Hall Council with respect to making sexual harassment a Notifiable Incident.
67. In addition to measures to break down the barriers to reporting by victim survivors in the first instance, there is no reason that incidents of sexual harassment should not be reported to the Regulator. The data can be de-identified, if desired by victim-survivors, to maintain the privacy of individuals, just as the data relating to workplace fatalities is de-identified. With respect to mandatory incident notifications, WorkSafe's website is user-friendly, provides an assessment tool and clearly articulated the types of incidents to be reported.
68. Mandatory incident notification data can be utilised to inform preventative, education initiatives and will also serve as a mechanism through which the aforementioned regulatory incidents can be evaluated. Further, it will raise awareness amongst employers with respect to the factors contributing to gendered-violence and sexual harassment and their corresponding obligations under the OHS Act (as opposed to just being aware of the issue of sexual harassment alone).

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<sup>28</sup> Victorian Trades Hall Council, "Ending Sexual Harassment in the Workplace" (September 2021), page 7, recommendation 3.

## **Recommendation 2:**

**Primary duty holders must be obligated to report data that provides insight into gendered violence and sexual harassment.**

69. In addition to mandatory incident notification, the ALA supports the provision of the following information to WorkSafe and/or another agency considered appropriate by the Taskforce.

70. Incorporating the disclosure of the following types of information could be easily incorporated into existing processes:

- The number of male, female, and binary/intersex/non-identifying (where known) employees in the business;
- A breakdown of which genders occupy which positions within the business structure;
- Where individual contractors or suppliers are regularly used, reporting on the genders of those contractors or businesses;
- Where labour hire or temporary staff are engaged, reporting on the genders of those workers and the positions they occupied (temporarily) within the business; and
- Outlining policies that promote equality of access to parental leave, flexible work and the shared distribution of caring responsibilities across gender lines.

71. The reporting of this data will raise awareness about how gender segregation and hierarchical structures contribute to sexual harassment.

72. This data could be utilised by other government agencies through information sharing arrangements, pursuant to memorandums of understandings. For example, this information could be shared with the Victorian Equal Opportunity and Human Rights Commission.

## **Recommendation 3:**

**Legislative change is required to prohibit the use of Non-Disclosure Agreements (NDAs) in all harassment and discrimination matters, except where expressly requested by survivors.**

73. Non-Disclosure Agreements (NDAs) refer to all manner of agreements and agreement clauses that impose an obligation of confidentiality on one or more parties.
74. The manner in which NDAs silence victim survivors is wide-ranging, and NDAs can include all or some of the following prohibitions on disclosure:
- an obligation not to disclose a monetary amount;
  - a prohibition on discussion of any matter relating to an actual or potential claim of sexual harassment, including naming the perpetrator or commenting on the process that was followed; and
  - a prohibition on speaking with other victim survivors.
75. ALA members report that NDAs are widespread in the settlement of sexual harassment and discrimination claims, and that they are most often required by an employer who is offering to pay a sum of money in respect of an actual or potential claim.
76. The ALA recognises that NDAs can play a valuable role in protecting a business' confidential information. The ALA also recognises that some form of privacy or confidentiality is often important to victim survivors - particularly because of the perceived risk of being subjected to adverse action because of making a complaint or claim – whether that be a discrimination claim, workers' compensation claim, or other employment dispute.
77. ALA members report the increasing use of wide-ranging non-disclosure agreements, that serve no legitimate business purpose, silence the victim and protect the perpetrator. ALA members are particularly concerned about the manner in which defendants seek to use non-disclosure agreements as a matter of course and the manner in which the costs of litigation (both financial and emotional) is utilised by primary duty holders to wedge victim survivors in to agreement.
78. Additionally, ALA members report that NDAs can make victim survivors reluctant to seek support from family and friends, or even from health professionals, in relation to harm they have suffered as a consequence of harassing conduct. Regardless of the impracticality of enforcing an NDA against a victim after any alleged breach of the confidentiality requirements, there is little doubt that their use has a deterrent effect on the victims who sign them.<sup>29</sup>

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<sup>29</sup> Maureen A. Weston 'Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era', (2021) 507 *University of Illinois Law Review*, 532.

79. Community sentiment reflects a growing dissatisfaction to the silencing of victim survivors, particularly following the advocacy of victim survivors of abuse like Brittany Higgins and Grace Tame.<sup>30</sup> Further, given the prevalence of gendered violence, including sexual harassment in settings such as the legal profession, the ALA holds concerns regarding whether NDAs are being used ethically, especially in professional settings.<sup>31</sup>
80. The ALA considers that legislative change is required to prohibit the use of NDAs in all harassment and discrimination matters, except where expressly requested by survivors.
81. The ALA refers the Taskforce to the Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 before the Irish Parliament, which is currently in its third stage of the Seanad Éireann for debate; after which, assuming passage, it will move to the Dáil Éireann.<sup>32</sup>

#### **Recommendation 4:**

**Funding should be allocated to establish a Working Women’s Centre.**

82. The ALA recommends that funding be allocated for the establishment of a Working Women’s Centre in Victoria.
83. A Working Women’s Centre would be a species of Community Legal Centre and clearing house for any workplace issue affecting any person who identifies as female. The Working Women’s Centre in South Australia is a good example of such an organisation.<sup>33</sup> Similarly,

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<sup>30</sup> See, eg, Grace Tame is the 2021 Australian of the Year and Survivor Participant in the #LetHerSpeak campaign; Brittany Higgins bravely went public regarding her complaint of sexual assault (rape) in early 2021 which resulted in community condemnation of the culture of silence (Louise Milligan, ‘The Brittany Higgins allegations have unearthed fury among women staffers and politicians’, *ABC News* (online, 23 February 2021) <<https://www.abc.net.au/news/2021-02-23/brittany-higgins-sexual-assault-fourth-allegation-parliament/13178072>> and see also the Champions of Change Coalition: *Disrupting the System – Preventing and responding to sexual harassment in the workplace* (Report, May 2021), 40, which states: “The use of non-disclosure agreements in particular has silenced people impacted, allowed the behaviour to continue and at times, appeared to condone it.”

<sup>31</sup> The Victorian Legal Services Board, ‘Sexual harassment in the Victorian Legal Profession’ (Statement, 6 February 2019) 1, which states an intention to “[develop] guidance for legal professionals on the proper drafting and use of non-disclosure agreements”.

<sup>32</sup> Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021 (Ireland).

<sup>33</sup> See [Working Women’s Centre’s website](https://wwcsa.org.au/) <<https://wwcsa.org.au/>>.

the Young Workers' Centre and the Migrant Workers Centre have been successfully supporting vulnerable workers with funding from WorkSafe.

84. A Working Women's Centre would primarily support victims, by empowering them to take action after receiving further education as to their rights, and connecting victims with appropriate advice.

85. A Working Women's Centre would also raise awareness to the issue of sexual harassment as well as pathways to a resolution, provide on the ground support to workers and a source of independent advice and information.

86. A Working Women's Centre should include the following key features:

- It should be staffed by experienced employment lawyers and advocates who can advise employees of their rights in respect of any matter arising in the workplace, including experiences of gendered violence;
- Clients would also be offered other social supports by the Centre as appropriate, including access to counselling, social workers, and refuge supports;
- The Centre would run litigation on a discretionary basis on behalf of clients and would otherwise provide initial assistance to clients in respect of workplace issues;
- All clients would be advised about their rights to join and participate in the activities of their appropriate trade union; would be invited to join their union; and, with consent, would be referred to the relevant registered organisation for their work;
- The Centre would work with the Victorian Trades Hall Council, registered organisations and WorkSafe to offer training to community members in respect of workplace safety, gendered violence and basic employment rights; and
- The Centre would advocate publicly for workplace equality and an end to gendered violence.

87. A Working Women's Centre would incorporate restorative justice practices by being victim-centred, validating victim survivors and being solution-oriented.

## **Recommendation 5:**

### **Awareness raising initiatives must be improved.**

88. Raising awareness requires more than an advertising campaign. Awareness can be raised through regulation, training of workers, training of business and the raising of community expectations with respect to gendered violence and sexual harassment more broadly. The ALA is of the view that the Victorian Government should seek to embed consideration of the issue of sexual harassment (and gendered violence more broadly) in the workplace as a matter of course. Awareness raising measures must be designed to elicit an understanding of the issue they seek to address, motivate the desire to take action, and provide a pathway for taking action by all stakeholders.
89. The ALA understands that WorkSafe receives very few reports of sexual harassment. It is quite clear that the reporting system, in and of itself, is a barrier to reporting. This must be addressed.
90. With respect to WorkSafe specifically, ALA members report that the resources available to workers and business regarding gendered violence, including sexual harassment, are not user-friendly.
91. First, reports about occupational health and safety issues are managed through WorkSafe's Advisory Service, which is a phone line in operation 7:30am to 6:30pm, Monday to Friday (which are typical working hours). Further, there is no online reporting mechanism or out of hours services for occupational health and safety issues that are not an emergency.
92. The online reporting form (which is a PDF and must be downloaded) only relates to noncompliance with the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), and not the OHS Act. WorkSafe must develop an accessible reporting tool that allows complaints to be made at a time convenient to the victim; that indicates the next steps; and ensures that follow-up is conducted. This recommendation relies on the creation of a dedicated Gendered Violence Unit within WorkSafe, which possesses the ability to effectively respond to any such reports.
93. WorkSafe's website is particularly difficult to navigate and contains lengthy documents which are not fit for purpose and in particular do not adequately provide guidance to smaller business that lack the resources to dedicate the time and money to consider the available information.

94. WorkSafe’s “Let’s Be Very Clear” campaign has minimal visibility, is confusing in its messaging and is not engaging. The ALA recommends the creators of education campaigns *effectively* consult with experts, such as persons working with victim survivors, criminologists, psychologists and sociologists, unions and Health and Safety Representatives. Effective consultation requires engagement in the concept creation stage and an opportunity to provide feedback prior to final concept selection.

95. The ALA suggests that WorkSafe provides fit for purpose training materials for employers and workers in a range of industries including:

- compliance codes;
- plain language, easy-to-understand videos that outline the issue of gendered violence, including sexual harassment, employer obligations, preventative measures and information on how to get help. These videos should be developed in a variety of languages, should be engaging, and must be tailored to industries with high rates of sexual harassment. These videos would mean more than commercials and serve a means of delivering the necessary content in an effortless, accessible format.
- Plain language, electronic training modules for employers. Large corporations have the funds and resources to deliver engaging and fit for purpose training modules regarding sexual harassment to their workforce. Small businesses do not have these resources and are unlikely to seek them out. Further, such resources could be developed in concert with compliance codes.

## Conclusion

96. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the Ministerial Taskforce on Workplace Sexual Harassment. The ALA is willing to speak directly with and further assist the Taskforce in its deliberations.



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