Submission to the Australian Law Reform Commission

Inquiry into Justice Responses to Sexual Violence

14 June 2024

Circle Green Community Legal

Workplace Respect Project

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Acknowledgements of Country

Circle Green Community Legal acknowledges the Australian Aboriginal and Torres Strait Islander peoples as the traditional custodians of the lands where we live, learn and work, and particularly the Whadjuk people of the Noongar Nation, traditional custodians of the land where our office is located. We acknowledge and respect their continuing culture and the contribution they make to the life of this nation, and we pay deep respect to Elders past and present.

Attribution

This submission can be attributed to Circle Green Community Legal.

We wish to acknowledge and thank the following individuals who contributed to this submission:

- Aoife Daly, Lawyer – Workplace
- Fiona Yokohata, Lawyer – Workplace
- Imogen Tatam, Senior Lawyer (Law Reform) – Workplace
- Heidi Guldbaek, Workplace Respect Project Manager
- Elisha Butt, Principal Lawyer – Workplace
- Katy Welch, Principal Lawyer – Humanitarian

We also wish to acknowledge and highlight our Workplace Respect Project Lived Experience Advisory Panel (**LEAP**) for their contributions to our work and this submission.

Contact

If you have any questions about this submission please contact Heidi Guldbaek, Workplace Respect Project Manager, [redacted] or Imogen Tatam, Senior Lawyer (Law Reform) – Workplace, [redacted].

Case studies

We hope to reflect on our clients' experiences throughout our submission. Sometimes we reflect our experience in general terms. Other times, we share case studies of clients who have accessed our services. For all case studies, we have changed or removed names and other identifying information to protect client confidentiality.

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Contents

Glossary

2022 National Survey means the *Time for Respect: Fifth national survey on sexual harassment in Australian workplaces* published by the Australian Human Rights Commission in November 2022.

AHRC means the Australian Human Rights Commission.

ALRC means the Australian Law Reform Commission.

CaLD means culturally and linguistically diverse.

Circle Green means Circle Green Community Legal.

Enough is Enough Report is the *'Enough is Enough' Sexual harassment against women in the FIFO mining industry* report published by the Australian Government in September 2022.

EO Act means the *Equal Opportunity Act 1984* (WA).

EOC means the Equal Opportunity Commission - Western Australia.

FDV means family and domestic violence.

FVRO means Family Violence Restraining Order.

FW Act means the *Fair Work Act 2009* (Cth).

FWC means the Fair Work Commission.

FWO means the Fair Work Ombudsman.

Issues Paper means the Issues Paper, 'Justice Responses to Sexual Violence' published by the Australian Law Reform Commission (April 2024).

Inquiry means the Australian Law Reform Commission's Inquiry into Justice Responses to Sexual Violence.

LEAP means the Lived Experience Advisory Panel. In 2022, Circle Green convened the Lived Experience Advisory Panel, comprising members of the public who have personal lived experience of sexual harassment.

Respect@Work Report means the *Respect@Work: Sexual Harassment National Inquiry Report (2020)* published by the Australian Human Rights Commission in March 2020.

SAT means the State Administration Tribunal of Western Australia.

SD Act means the *Sex Discrimination Act 1984* (Cth).

WA means Western Australia.

WALRC means the Law Reform Commission of Western Australia.

1. Introduction

Circle Green welcomes the opportunity to make a submission to the ALRC on the Inquiry.

1.1 About Circle Green Community Legal

Circle Green is a community legal centre in WA providing state-wide specialist legal services in the areas of workplace, tenancy, humanitarian, and family and domestic violence to the WA community. Our services are aimed at assisting people from marginalised communities and who face disadvantage in gaining access to justice.

Circle Green is the only community legal centre in WA with a specialist workplace law practice that provides state-wide services to marginalised and disadvantaged non-unionised WA workers. Our workplace law services include legal advice, casework, representation, information, referrals and education on state and national workplace law, including workplace discrimination and harassment. This means Circle Green has expertise in providing legal assistance to WA workers targeted by sexual violence in connection with their work.

Circle Green also has a specialist immigration law practice that provides state-wide services to people new to Australia from culturally and linguistically diverse (**CaLD**) backgrounds. Our Humanitarian law services include legal advice, casework, representation, information and referrals and education on immigration law with a focus on asylum seekers, refugees and people experiencing family violence. This means Circle Green has expertise in providing legal assistance to people on temporary and uncertain visas who are fearful of being returned to their home country due to experiencing violence.

For more information about Circle Green's services, please see our website: https://circlegreen.org.au./

1.2 About the Workplace Respect Project

Circle Green is also the lead agency in WA funded to provide legal assistance services under recommendation 53 of the Respect@Work Report. Our state-wide Workplace Respect Project (**the Project**) seeks to:

- Identify, understand, and monitor the prevalence and nature of workplace sexual harassment and discrimination in Western Australia so legal need can be met.
- Improve the integration and responsiveness of legal assistance and support services for marginalised groups who are experiencing workplace sexual harassment and discrimination, including those facing intersectional discrimination.
- Empower people, professions, workplaces and communities, to understand, respond to and prevent workplace sexual harassment and discrimination.
- Ensure discrimination and workplace laws protect workers and foster safe workplaces.

The Workplace Respect Project is underpinned by a Lived Experience Advisory Panel (the **LEAP**): a consumer panel of people with lived experience of being targeted by workplace sexual harassment, who provide advice on service design and content development to ensure the voice of lived experience is weaved into the work of the Project.

Further information about Circle Green's Workplace Respect Project is available here: circlegreen.org.au/projects/workplace-respect/.

2. Summary of recommendations

Issues Paper Question 48 *Which of the measures listed above[1] are likely to most improve civil justice responses to sexual violence?*	
Recommendation 1	There be sufficient and sustainable funding to community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid commissions to provide: • legal assistance services to marginalised and disadvantaged workers targeted by sexual violence at work; and • specialist asylum and refugee immigration legal services.
Recommendation 2	The amount and scope of funding for legal assistance services be sufficient to cover assistance with responding to defamation proceedings and other retaliatory legal proceedings, which may result from pursuing a workplace sexual harassment complaint.
Recommendation 3	There be a process for the government enforcement of court or tribunal orders to pay damages and costs in relation to workplace sexual harassment matters.
Recommendation 4	There be limits placed on the use of irrelevant prejudicial material in workplace sexual harassment dispute resolution processes, including: • evidence produced in a court or tribunal; • material used in any conciliation or mediation process; • and material used in any pre-litigation settlement discussions.

[1] Issues Paper, paragraphs 123 and 124.

Recommendation 5	Case law concerning aggravated damages in relation to workplace sexual harassment matters be codified into anti-discrimination legislation to deter respondents from engaging in aggravating conduct during workplace sexual harassment litigation processes.
Recommendation 6	Judges and tribunal members involved in hearing and determining remedies for workplace sexual harassment matters be trained on contemporary understandings of harm and lived experience in relation to sexual violence.
Recommendation 7	Civil remedy amounts in anti-discrimination legislation be increased to align with those in the FW Act.
Recommendation 8	Consideration be given to using public registers or databases of perpetrators and non-compliant workplaces involved in workplace sexual harassment to promote proactive compliance and facilitate general deterrence.
Recommendation 9	All Courts and tribunals be required to proactively consider the safety of people targeted by FDV in any legal proceedings involving the perpetrator, not just family law or family violence proceedings.
Issues Paper Question 49 ***Are there other recent reforms and developments which the ALRC should consider? Are there further reforms that should be considered?***	
Recommendation 10	Consideration be given to placing legislative limits of on the use of non-disclosure and non-disparagement agreements in relation to workplace sexual harassment matters to empower people targeted by workplace sexual violence to make choices about speaking about their experience.
Recommendation 11	The model confidentiality and non-disparagement clauses in Bargon and Featherstone's Let's talk about confidentiality report be included in any relevant court or tribunal education resources for parties to workplace sexual harassment complaints.

Recommendation 12	The Equal Opportunity Act 1984 (WA) be reformed to align with federal anti-discrimination legislation.
Issues Paper Question 51 ***What provisions or processes would best facilitate the use of civil proceedings in this context?***	
Recommendation 13	Compulsory trauma-informed practice training be provided to all members and staff of courts and tribunals that deal with sexual violence, including sexual harassment matters.
Recommendation 14	A trauma-informed practice manual be published for conciliators and mediators who deal with workplace sexual violence matters in courts and tribunals.
Recommendation 15	Court or tribunal interpreters with appropriate training in trauma-informed practices be used in workplace matters involving sexual violence.
Recommendation 16	There be funding for legal assistance service providers (such as community legal centres) to deliver integrated, wraparound, holistic non-legal support services to people seeking help with workplace sexual violence.
Recommendation 17	Courts and tribunals implement practice directions or other guidance to ensure adequate notice and timeframes are provided to parties to workplace matters involving sexual violence.
Recommendation 18	Courts and tribunals provide facilitated referrals to legal assistance service providers for unrepresented applicants in workplace sexual violence matters.
Recommendation 19	Fee waivers be extended to all workplace sexual harassment and sex discrimination matters to remove this cost barrier to pursuing legal claims.

Recommendation 20	There be increased funding to the Australian Human Rights Commission to facilitate the handling of workplace sexual harassment complaints in a timely, trauma-informed and culturally sensitive manner.
Recommendation 21	Workplace sexual harassment complaints to the Australian Human Rights Commission be allocated to a conciliator within 60 days of an applicant filing a complaint.
Recommendation 22	The time limit for making all types of workplace sexual harassment complaints be increased to 6 years.

3. Submissions

3.1 Introduction

This submission is based on Circle Green's experience and expertise assisting WA workers who have been targeted by workplace sexual harassment. We observe first-hand the impacts of workplace sexual harassment on our clients and the barriers they face in accessing justice, particularly for our client cohort who are generally unable to access legal advice from a private lawyer or are experiencing other disadvantage or challenges.

Workplace sexual harassment is a form of sexual violence committed in the workplace. It is an unwelcome sexual advance, unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature. It is important to note that sexual violence describes a range of behaviours—including assault, abuse and harassment—committed without consent and 'directed against a person's sexuality using coercion'.[2]

In 2022, Circle Green partnered with the Centre of Social Impact (University of Western Australia) to undertake research into the prevalence, nature and occurrence of workplaces sexual harassment and discrimination, and the identification of legal need priorities to address this type of conduct. The research report includes findings across a broad range of topics, including a series of key recommendations for legal assistance service providers, workplaces, and employees, and systems and legal reform.

Amongst other things, the research found that:

- workplace sexual harassment is a prevalent and pervasive form of sexual violence, with approximately 20% of workers experiencing sexual harassment over a 12-month period;[3]
- people who are targeted by workplace sexual harassment may experience significant consequences including those related to physical and mental health, finances, employment opportunities, and relationships;[4] and
- there are many barriers to reporting or responding to workplace sexual harassment, including lack of awareness of reporting options, lack of trust in reporting systems and the justice system, and access to justice issues.[5]

Following the Respect@Work Report being published in 2020, workplace sexual harassment laws have undergone significant reform. However, through our work, we still observe many challenges that our clients experience in responding to workplace sexual harassment.

Our submission draws on our professional experience and the experiences of our clients, findings from the Centre for Social Impact Report, feedback from our LEAP and other relevant research, to highlight common issues, and make proposals for the improvement of civil justice responses to workplace sexual harassment.

The Humanitarian law practice was invited and contributed to the roundtable for barriers asylum seekers and refugees experience with reporting sexual violence and the ways in which the justice

[2] Australian Institute of Health and Welfare, 'Sexual Violence', *Family, domestic and sexual violence,* https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/sexual-violence; World Health Organization, 'Sexual Violence', *Violence Info,* https://apps.who.int/violence-info/sexual-violence/.
[3] Paul Flatau et. al., *Understanding workplace sexual harassment: Trends, barriers to legal assistance, consequences and legal need* (2023) 18.
[4] Ibid 28.
[5] Ibid 36.

system could improve its response to asylum seeker and refugee victim survivors reporting sexual violence. Our submission provides additional comments of those discussed during the roundtable.

We ask that the ALRC consider our proposals, and the need for continuing reform in the area, in order to continue sending out a clear message that workplace sexual harassment, and any form of sexual violence, is unacceptable.

3.2 Issues Paper Question 48: Which of the measures listed above[6] are likely to most improve civil justice responses to sexual violence?

Increased and sustained government funding for applicant proceedings

a. Funding legal assistance services for persons targeted by workplace sexual harassment

Paragraph 123 of the Issues Paper refers to government funding for some applicants in civil proceedings as a recommendation to make civil litigation processes more accessible and effective.

We agree with this recommendation, and strongly consider that funding should be ongoing and sustained as per Recommendation 53 of the Respect@Work Report which recommends increased *and recurrent* funding to community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid commissions to provide legal advice and assistance to marginalised workers who experience sexual harassment.

Particularly where the legal framework has undergone, and will continue to undergo, significant reform, and where there is an ongoing and increased demand for our services, ongoing and sustained funding is crucial.

With the recent reform in the legal framework introducing more legal complaint options and reporting options for applicants, and with some legal reforms still being implement, including:

- the Fair Work Commission's (**FWC**'s) new sexual harassment jurisdiction which commenced 6 March 2023;
- the Australian Human Rights Commission's (**AHRC**'s) new compliance powers in relation to the positive duty which commenced 12 December 2023; and
- costs protection provisions yet to be implemented via the *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023*;

it is crucial that government funding is sustained so that applicants, particularly from marginalised groups, are able to access timely, trauma-informed, and culturally sensitive legal advice so they can make an informed decision about their matter and follow through with correct and appropriate legal processes.

Funding legal assistance services reduces the strain on the courts by ensuring people are informed at an early stage about all their options and possible outcomes, so that they can take the best next step. A substantial proportion of the matters we assist with settle prior to a legal claim. Often it can be appealing particularly for workers who face marginalisation and disadvantage, to settle matters early and avoid the ongoing stress and re-traumatisation involved in making a legal claim.

[6] Issues Paper, paragraphs 123 and 124.

Case study

Mandy was targeted by workplace sexual harassment from a manager who was significantly older than her and controlled her shifts. Mandy's complaint to her employer was unsuccessful so she moved to another department to avoid her manager, and as a result, her income decreased.

Mandy felt she couldn't keep working for the employer because of the way they handled her complaint. Circle Green advised Mandy about her options and she decided to negotiate an exit from her job by coming to a settlement with her employer.

Circle Green drafted a settlement letter for Mandy, proposing that she would resign and asking for compensation to avoid making a legal claim. The employer offered to pay Mandy 6 months' wages plus her minimum entitlements. Mandy accepted the offer and Circle Green provided advice on the terms of the settlement agreement.

In the absence of funding beyond the current end date of June 2025, there is a real risk of community legal need not being met, loss of sector capability and expertise, and damage to the trust and goodwill of the community due the inability to continue to offer services. This will affect not only legal assistance services but also the AHRC, and will halt progress made to date on addressing workplace sexual harassment in Australia.

Additionally, funding for community legal centres, such as Circle Green, which undertake advocacy and law reform in the area of workplace sexual harassment, should be holistic and include systemic advocacy activities. CLCs need to be funded on an ongoing basis, as unintended consequences are a common teething problem after significant legal reform, and could have unfair impacts on certain groups, particularly marginalised groups. Therefore, careful monitoring and advocacy is necessary to ensure that intended measures are achieved.

Funding legal assistance for asylum seekers, refugees and those with uncertain visa status. Our Humanitarian law practice stated during the roundtable discussion that for asylum seekers, an experience of sexual assault occurs alongside an immigration matter. The attendees, ourselves included expressed that in our professional opinion the most significant barrier to asylum seekers reporting sexual violence was their fear that reporting may affect their visa status or lead to their detention and deportation. Therefore the funding of legal assistance to this unique cohort will allow specialist services provide advice regarding their visa status and support, including relevant referrals for asylum seekers to report and go through the justice process in Australia.

Recommendation 1

There be sufficient and sustainable funding to community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid commissions to provide:

- legal assistance services to marginalised and disadvantaged workers targeted by sexual violence at work; and
- specialist asylum and refugee immigration legal services.

Applicants in workplace sexual harassment matters face an increased risk of retaliatory defamation action. Bargon and Featherstone's *Let's talk about confidentiality*[7] report highlighted a trend of accused perpetrators instigating defamation proceedings against workers who have reported sexual harassment allegations to their employer. Defamation concerns notices may be given to individuals when they are only at the stage of making an internal complaint, and in the absence of any public comments to the media.[8]

The instigation of retaliatory processes against those who speak up about experiencing workplace sexual harassment is a concerning trend, and may be a deterrent to pursuing a complaint. Funding to assist marginalised workers in navigating retaliatory defamation proceedings could improve access to civil justice processes. We note that in these circumstances the person targeted by workplace sexual harassment might be considered a 'respondent', and it is important to consider the position of the person who needs assistance rather than strictly providing funding for 'applicants'.

Recommendation 2

The amount and scope of funding for legal assistance services be sufficient to cover assistance with responding to defamation proceedings and other retaliatory legal proceedings, which may result from pursuing a workplace sexual harassment complaint.

Government enforcement of orders to pay damages

Even if applicants are successful in a workplace sexual harassment complaint and are awarded damages, they may face further barriers in receiving payment of the monies, particularly where an individual perpetrator or a small business employer chooses to ignore the order.

If this happens, the burden is on the applicant to return to the court or commission to commence further action for enforcement of the order, which is typically a bailiff process. This can be complicated for marginalised workers and particularly challenging for persons targeted by workplace sexual harassment to have to fight further to enforce a successful outcome.

We agree with the recommendation at paragraph 123 of the Issues Paper regarding government enforcement of orders to pay damages. We suggest this may be done by either:

- the Fair Work Ombudsman (**FWO**) with the use of their enforcement powers, including making applications for enforcement on behalf of workers, and issuing penalty notices when an individual or business fails to pay damages in workplace sexual harassment matters brought under the FW Act; or

- establishing a registry, similar to the Fines Enforcement Registry[9], that registers court orders to pay damages in discrimination matters, and can take relevant enforcement action, such as by issuing a penalty notice or commencing legal proceedings to enforce.

These measures would significantly reduce the burden for applicants in workplace sexual harassment and discrimination matters, where currently the overall burden rests heavily on the applicant throughout the whole complaint process.

[7] *Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work Report.*
[8] Regina Featherstone & Sharmilla Bargon, 'Lets talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work Report' (6 March 2024) 51-52.
[9] https://www.wa.gov.au/service/justice/administrative-law/fines-enforcement-registry-fer.

Recommendation 3

There be a process for the government enforcement of court or tribunal orders to pay damages and costs in relation to workplace sexual harassment matters.

Excluding the admissibility of prejudicial evidence of little or no probative value

In the course of our work, we have observed respondents raising irrelevant matters in response to workplace sexual harassment complaints as a tactic to re-traumatise applicants, often just before conciliation conferences, where applicants are often feeling especially anxious about having to hear from the perpetrator and / or their employer. Circle Green has seen similar, irrelevant relationship history raised, including involving family and domestic violence (**FDV**). These matters are not relevant in a workplace sexual harassment complaint, and are simply detrimental for a client to have to sort through this triggering and irrelevant information, particularly before an intimidating conciliation or court event.

Contrary to final hearings, or criminal proceedings, we often see irrelevant matters being raised in pre-litigation or alternative dispute resolution processes, such as in response to settlement offers, responses to workplace sexual harassment complaints, and at conciliation conferences where there are no rules of evidence.

We suggest that it could be useful to:

- publish guidelines around material to include in applications and responses for complaints relating to workplace sexual harassment, including in conciliation conferences, to attempt to mitigate unnecessary trauma and re-traumatisation for persons targeted by workplace sexual harassment. Conciliators or commission members running conciliation conferences should enforce these guidelines during these proceedings; and / or

- add a list of irrelevant matters into the SD Act and FW Act, which respondents should be prohibited from including in any written or verbal responses to workplace sexual harassment matters.

Recommendation 4

There be limits placed on the use of irrelevant prejudicial material in workplace sexual harassment dispute resolution processes, including:

- **evidence produced in a court or tribunal;**

- **material used in any conciliation or mediation process; and**

- **material used in any pre-litigation settlement discussions.**

In addition to irrelevant matters being raised, we have also seen matters where respondents have taken a very aggressive stance in addressing or defending allegations of workplace sexual harassment, including questioning the applicant's character, credibility, and motives for raising allegations. Though it can be expected that respondents will defend against allegations, measures need to be put in place to reduce aggression in responses and to protect applicants from unnecessary re-traumatisation or further trauma, especially in pre-litigation, or settlement processes.

One proposed measure is to codify case law on aggravated damages into anti-discrimination legislation. It has been established that aggravated damages may be awarded in discrimination jurisdictions[10], and there have been a number of workplace sexual harassment cases where damages have included a component of aggravated damages.[11] Aggravated damages can be awarded as additional compensation in circumstances where the wrongful act has been further aggravated by the manner or motive in which the act was done[12], as well as awarded where distress is made worse by the respondents' conduct after the wrongful act.[13] This can include the way a matter is defended.

Although case law shows that aggravated damages are a potential outcome when a workplace sexual harassment matter is litigated, we recommend that aggravated damages are included in the SD Act and FW Act, to ensure that it is expressly clear in the legislation that it is a potential outcome for respondents if the matter proceeds to court and the applicant is successful. In our experience, respondents are not always aware of, or informed about, the recent case law and the increasing amounts of damages awarded in these types of cases. Adding aggravated damages into the legislation may assist in underscoring the seriousness of the conduct and deter respondents from engaging in aggravating conduct during workplace sexual harassment litigation processes.

Recommendation 5

Case law concerning aggravated damages in relation to workplace sexual harassment matters be codified into anti-discrimination legislation to deter respondents from engaging in aggravating conduct during workplace sexual harassment litigation processes.

Extending available remedies

a. *Ensuring remedies ordered reflect contemporary understandings of harm and lived experience concerning sexual violence*

When considering remedies, Circle Green calls for consistent awards of damages that reflect contemporary understandings of harm. Community expectations have changed greatly over time, particularly in light of the cultural shift around the #MeToo movement, and there is a better understanding of the ongoing and long-lasting hurt and distress that eventuates from sexual harassment.

> *The horse has bolted when you've left your workplace…. you don't necessarily want to revisit your past to pursue a legal case, given the stats around outcomes… The cultural wakeup opportunities in terms of what has come out since #MeToo… it's shifting expectations. My experience was 7 years ago, pre-#MeToo, so I didn't push any further and I just accepted it because I didn't have better awareness that I could have asked for more. There wasn't the cultural appetite.*
>
> - LEAP member

General damages can be difficult to quantify, and as awards are decided by individual judges, amounts turn on the judge's understanding of the impact of workplace sexual harassment. Though

[10] Section 46PO(4), *Australian Human Rights Commission Act 1986* (Cth).
[11] $50,000 for aggravated damages in *Hughes v Hill* [2020] FCAFC 126, and recently $15,000 in *Taylor v August and Pemberton* [2023] FCA 1313 (as part of a total award exceeding $268,000).
[12] *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1124
[13] *Triggell v Pheeney* (1951) 82 CLR 497 at 514.

cases with higher awards of damages are increasing, Circle Green recommends that information and education should be made available for judges to participate in regarding contemporary understandings of harm and lived experience.

Recommendation 6

Judges and tribunal members involved in hearing and determining remedies for workplace sexual harassment matters be trained on contemporary understandings of harm and lived experience in relation to sexual violence.

b. Increasing civil remedies under anti-discrimination legislation.

Under the SD Act, victimisation is unlawful and attracts civil penalties of:

- $2,500 or imprisonment for 3 months, or both, for individuals; and
- $10,000 for corporations.

This is significantly less than the penalties for breaches of civil remedy provisions in the FW Act. By way of comparison, breaches of the FW Act could result in penalties of:

- $18,780 per contravention for an individual;
- $93,900 per contravention for a company with less than 15 employees (small business); and
- $469,500 per contravention for a company with 15 or more employees.

For serious contraventions[14] of civil penalty provisions of the FW Act, individuals and companies could face penalties of up to 10 times the amounts listed above, per contravention.

From 6 March 2023, workplace sexual harassment is prohibited under section 527D of the FW Act[15], and is a civil remedy provision, which means that a contravention of the section could attract penalties in the amounts listed above. However, under the SD Act, penalties cannot be awarded for the same conduct. Further, acts of victimisation are protected under the existing general protections of the FW Act[16], which are also civil remedy provisions, attracting penalties as listed above, which are significantly higher than those under the SD Act for victimisation.

It is inconsistent to have differing civil remedy amounts potentially apply to the same conduct depending on the jurisdiction under which a claim is heard and litigated. To rectify this inconsistency, we recommend that the civil remedy amounts in anti-discrimination legislation be increased to align with those under the FW Act to ensure that penalties are aligned across jurisdictions for the same, unlawful conduct.

Recommendation 7

Civil remedy amounts in anti-discrimination legislation be increased to align with those in the FW Act.

[14] Serious contraventions are where the person or business knew they were contravening the FW Act, or the person or business was reckless as to the contravention.
[15] FW Act, Part 3-5A.
[16] FW Act, Part 3-1.

c. Other options for extended remedies

Some additional options for further remedies include:

- Industry-wide registers: Recommendation 3 of the Enough is Enough Report reflects on the potential for an industry-wide workers register or accreditation to prevent perpetrators of serious sexual harassment from finding re-employment on other sites, or on-site with other companies in the mining industry.[17]The Enough is Enough Report highlights the prevalence of preparators reappearing at mine sites run by different companies. This has been an issue experienced by Circle Green clients as well, and often the employer will protect the interests of the perpetrator by allowing them to stay on site, reasoning that they have not engaged in the type during their current employment.

- Public database or register of non-compliant businesses: Outside of the mining industry, the potential to have a database or register of companies that have poor track records with workplace sexual harassment would be invaluable, both for those targeted by workplace sexual harassment and as an indication to businesses that they can be 'named and shamed' publicly when handling complaints poorly, providing an incentive to take a best-practice approach to managing reports of workplace sexual harassment. This is justified as businesses already have a positive duty to take reasonable and proportionate measures to eliminate, amongst other things, sexual harassment at work. Any conduct that could risk the business being 'named and shamed' would be a breach of the positive duty, and reportable to the AHRC for investigation as part of its new enforcement powers.

> *I thought I was the first person ever in the company to go through something like this, because it's so hush-hush. Only the executive team get to know the statistics of the formal investigations and incidents that occur… they don't want the negative branding, and they don't want it to get out to the media. I wish I'd known that I wasn't alone. I'd also like to see the outcomes of the investigation – how many people were fired?… We get annual refreshers on topics like corruption, fraud, and anti-bribery – they're happy to tell us how many people lost their jobs because of that. Why can't we get the same for discrimination, sexual harassment and bullying?*
>
> - LEAP member

Recommendation 8

Consideration be given to using public registers or databases of perpetrators and non-compliant workplaces involved in workplace sexual harassment to promote proactive compliance and facilitate general deterrence.

Improved management of family violence in workplace sexual harassment matters

The Issues Paper refers to the intersection of sexual violence issues and family violence matters. In our experience, FDV matters are not managed appropriately in civil justice responses to workplace sexual harassment.

Circumstances in which these issues may arise include situations where a worker targeted by workplace sexual harassment has also experienced FDV from the perpetrator, and / or already have

[17] Enough is Enough Report, page 27

a FVRO in place before a workplace sexual harassment complaint is made. For example, in the case of family businesses, a worker's employer may also be the perpetrator of FDV against them. In these cases, safety concerns can be overlooked in civil processes when they should be standard practice.

For some applicants in workplace claims who have an FVRO in place against the respondent, there are no adjustments to the civil process to manage their safety. Through our experience assisting clients in civil proceedings, we have experienced concerning issues such as:

- a commission disclosing the applicant's home address and contact details to the respondent and perpetrator of FDV;
- applicants being required to engage in face-to-face dispute resolution processes in the same room as the respondent and perpetrator; and
- a commission requiring applicants to strictly adhere to procedural deadlines but granting respondents significant flexibility, allowing them to use the civil process to exert further control over the applicant.

Our position is that it should be standard practice for any court or commission to have safety mechanisms in place for people who have experienced FDV, or have FVROs in place against a respondent, even if it is not a family violence or family law proceeding. For example, separate rooms should be provided for the parties to wait before mediations or hearings, and court/commission staff should proactively ensure that parties do not run the risk of coming across the other on the court/commission premises before any proceedings. If family violence is disclosed the court or commission should proactively check in with the applicant rather than expect an already vulnerable and disadvantaged applicant to advocate for their own safety measures as well as their right to resolution of the workplace sexual harassment matter.

Recommendation 9

All Courts and tribunals be required to proactively consider the safety of people targeted by FDV in any legal proceedings involving the perpetrator, not just family law or family violence proceedings.

3.3 Issues Paper Question 49: Apart from those listed above, are there other recent reforms and developments which the ALRC should consider? Are there further reforms that should be considered?

Use of confidentiality and non-disparagement clauses

Many of our clients are concerned by the lack of accountability on the part of their employer and the perpetrator of the sexual harassment, and have struggled to forgo the public nature of having the behaviour examined by a court in exchange for a settlement agreement. While the realities of pursuing a matter through a court process can be extremely difficult, it can be equally distressing to manage the prospect that the harassment and outcome could be kept quiet.

In our experience, the vast majority of employers want to insert blanket confidentiality clauses into settlement agreements, with the impact often being that the person targeted by workplace sexual harassment is not able to talk at all about what happened to them at work. Bargon and Featherstone's *Let's talk about confidentiality* report considers this common occurrence in depth, with thoughtful analysis and recommendations. The report notes:

> *Confidentiality provisions can assist to protect the complainant's privacy surrounding the matter and may help to provide closure but they can also make complainants feel silenced. In the short term, settlement agreements can be used to resolve matters confidentially, protect the complainant, the business, its reputation and/or the perpetrator but, in the long term, may increase the risk of further sexual harassment by perpetrators and contribute to a culture of silence and inaction around sexual harassment. Confidentiality clauses should not automatically be included as a standard term of a settlement agreement and should instead be used on a case-by-case basis, in line with adopting a trauma-informed and complainant-centric approach to the resolution of sexual harassment complaints.*[18]

It also notes the work of the Victorian Government on progressing limitations on the use of non-disclosure agreements.[19]

In our view, nation-wide legislative limits on the use of non-disclosure and non-disparagement agreements should be considered as a priority to shift the culture of silence that exists in relation to experiences of sexual violence in the workplace. The empowerment and choices of persons targeted by workplace sexual violence should be paramount in any such reforms. From a LEAP member:

> *When you come from a perspective from getting an ADHD and Autism diagnosis, you've had a negative input. You always have a lot more self-doubt, especially as a woman or someone who looks like a woman. We're conditioned to not believe our own experience. When you look at trauma healing, when you go to the medical model in terms of psychology, you get different information, so you're battling a lot of different systems, that peer support thing is really important but there isn't a lot of it because no one's able to speak out. Trauma makes it difficult for me to do things like type - when I can't even type, it is a huge barrier when I can't write down my timeline of experiences to report it...Time would have influenced me going through a much more public process, it definitely depends on your phase in life - there's a knock-on effect on your family if your name is uncommon and easily searchable.*

Recommendation 10

Consideration be given to placing legislative limits of on the use of non-disclosure and non-disparagement agreements in relation to workplace sexual harassment matters to empower people targeted by workplace sexual violence to make choices about speaking about their experience.

There are helpful model confidentiality clauses annexed to the Bargon and Featherstone's report. However, we understand that, as of the time of writing these submissions, commissions like the AHRC have not yet adopted the model clauses as part of their educational resources and guides for parties to workplace sexual harassment complaints. This is a significant concern, particularly for self-represented applicants who may not have access to legal advice about their confidentiality obligations and the ability to negotiate the clauses. It is also critical for shifting the norms and practices of legal practitioners in this space.

[18] Ibid page 84
[19] Ibid, page 55.

Recommendation 11

The model confidentiality and non-disparagement clauses in Bargon and Featherstone's *Let's talk about confidentiality* report be included in any relevant court or tribunal education resources for parties to workplace sexual harassment complaints.

Amendments to the EO Act

In 2021, the WA Law Reform Commission (**WALRC**) undertook a review of the EO Act,[20] and Circle Green engaged in the consultation process by making a submission to the WALRC with recommendations to amend the EO Act. The WALRC published its Final Report[21] in May 2022, which included 163 recommendations to amend the EO Act. The Final Report was tabled in WA Parliament on 16 August 2022.

One of the recommendations in the Final Report relates to an additional requirement to establishing workplace sexual harassment under section 24(3) of the EO Act. If a WA worker was to make a workplace sexual harassment to the EOC under this section, they would need to prove they have experienced disadvantage in connection with their employment as a result of workplaces sexual harassment. This is more than what is required under the SD Act or the FW Act.

Recently, Circle Green acted for a client in the SAT where it was indicated that the interpretation of this section could be quite narrow: rather than the threat being reasonably anticipated by the relationship between the perpetrator and the person targeted (e.g. their manager is the perpetrator of the harassment), a written or verbal threat of disadvantage in employment might be required for this element to be met. This would significantly narrow the scope for successful claims for workplaces sexual harassment under the EO Act. It is an outdated and unnecessary barrier for those making a claim under WA legislation. Contemporary understandings of workplaces sexual harassment do not require an applicant to prove disadvantage as a result of the conduct

It is vital that a State and Federal governments take a strong and consistent legislative approach to workplace sexual violence. To this end, we note the pressing need for the WA Government to implement all of the recommendations made by the WALRC in their Final Report, including an amendment to section 24, to bring the EO Act up to date with federal legislation.

Recommendation 12

The *Equal Opportunity Act 1984* (WA) be reformed to align with federal anti-discrimination legislation.

3.4 Issues Paper Question 50: If you are a victim survivor who experienced sexual violence in connection with a workplace, which factors led you to take legal action, or not take legal action, regarding the violence?

The AHRC's *Time for Respect (2022)* report found that only 18% of people who experienced workplace sexual harassment in the last 5 years made a formal complaint.

[20] WALRC, Project 111 – Review of the *Equal Opportunity Act 1984* (WA): https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa.
[21] WALRC, Project 111 Final Report: Review of the *Equal Opportunity Act 1984* (WA).

In *Understanding workplace sexual harassment: Trends, barriers to legal assistance, consequences, and legal need (2023)*[22], the Centre for Social Impact identifies barriers to reporting which can help explain the high attrition rate between the prevalence of workplace sexual harassment and reporting behaviours associated with workplace sexual harassment. In interviews conducted with people who have lived experience of workplace sexual harassment, the Centre for Social Impact found common themes which often prevent workers from reporting their experiences of sexual harassment. Among these barriers were feelings of distrust and fear towards reporting systems, concerns around reputation and downplaying of experiences, impacted self-esteem and mental health, and concerns around judgement, loss of employment or other forms of backlash in the workplace.

A review of the existing literature also found systemic factors which contribute to the gross underreporting of workplace sexual harassment. Namely, the application or complaint forms required to lodge a formal report of sexual harassment are often burdensome and challenging, there is a general lack of clarity around the reporting processes, and different pieces of legislation in Western Australia make it difficult for workers to navigate the legal systems. Additionally, CSI found that reporting often does not address the root cause or impact of the workplace sexual harassment, and often there is an absence of perpetrator responsibility, which can reduce incentive to report workplace sexual harassment.

In preparing this submission, we also asked our LEAP members what factors led them to take legal action, or not take legal action in response to workplace sexual harassment. The factors they identified as *barriers* to taking legal action included:

- age, lack of education, stigma and shame which compound and result in a fear of not being believed;
- negative interactions with police and a lack of understanding of the legal system;
- a lack of faith in the justice system created by repeatedly hearing about cases with poor outcomes;
- trauma and potential re-traumatisation as part of the legal process;
- cost barriers faced disproportionately by young workers, particularly those in casual jobs who are more likely to lose their employment if they make a complaint;
- barriers for neurodivergent workers who experience higher rates of sexual harassment and may find it more difficult to take legal action;
- different and sometimes conflicting information provided by psychological support services and lack of peer support services;
- lack of understanding in the legal system in terms of language and concepts around different forms of sexual violence; and
- workplace cultural issues e.g. expectations of how women from different cultural backgrounds will behave.

This quote from a LEAP member conveys the complex and intersecting factors that may lead to an individual's inability or reluctance to pursue legal action:

[22] https://circlegreen.org.au/wp-content/uploads/2023/08/CSI_UWA_WSH-Final-report.pdf.

> *I didn't really consider it a possibility. The shame and stigma of what I had experienced was a lot. With that shame, it was compounded with the lack of education. I didn't know if I'd be believed. There was an unspoken ranking with victim-survivor experiences...I felt like what had happened to me wasn't worth the time and attention of the courts based on the severity of the offence. If you go to the police, they'll usually say this will be successful or not based on the evidence you can give, which is a major deterrent to pursuing a legal case. I was 16 at the time, I didn't have any knowledge of the legal system. I had a lack of faith in the justice system, even moreso now the more cases that are coming out and being repeatedly shut down. As a victim-survivor, it's scary to be vulnerable and willing to essentially re-traumatise yourself to potentially not get the outcome you need. Then there's the cost barriers – it's hard to go through the legal system if you're young, you don't have the job behind you to support you going through with your case.*

The factors that LEAP identified as key *enablers* to taking legal action included:

- broader understanding of the impact of trauma and what it may look like to be in survival mode; and
- access to case worker support or lived experience consultants (the key here is that the support comes from a safe person who is a source of guidance).

This quote from a LEAP member conveys the importance of understanding the impacts of trauma and how it can present:

> *When you've been through something that makes you feel powerless, it's really hard to have the energy to believe you have that worth, or that someone will care to hear your story. I didn't realise there were other options.*

3.5 Issues Paper Question 51: What provisions or processes would best facilitate the use of civil proceedings in this context?

Trauma-informed legal processes

In light of barriers and enabler outlined above, we make some recommendations that address the key barriers and enablers of taking legal action in relation to workplace sexual harassment.

A common factor that was raised by the LEAP around barriers and enablers of taking legal action involved trauma-informed legal processes, and understanding of trauma. Trauma, and negative interactions with the legal system, compounded by other factors such as cultural expectations, stigma, shame, and lack of education, were identified as significant barriers to accessing justice. Further, broader understanding of the impact of trauma was identified as an enabler to taking legal action.

As with other forms of sexual violence, sexual harassment involves an abuse of power, and can be experienced as a traumatic event.[23] The mental health consequences of experiencing workplace

[23] Australian Institute of Health and Welfare, 'Sexual Violence', *Family, domestic and sexual violence,* https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/sexual-violence; Respect@Work, 'What causes workplace sexual harassment?',

sexual harassment may include depressive symptoms, anxiety, and suicidal thoughts, and some people may also develop post-traumatic stress disorder.[24] Engaging with legal processes can be re-traumatising, because the way trauma is stored in the brain can make recalling the events produce feelings of fear, anxiety, and stress, similar to the first experience of the trauma.[25] Trauma-informed legal processes allow for adjustments in how services are delivered to acknowledge an individual's experience of trauma, focusing on safety, trustworthiness, choice, collaboration, and empowerment.[26]

We make the following recommendations for trauma-informed legal processes:

a. Training for court / commission staff and members

We are of the firm view that extensive and ongoing trauma-informed response and cultural sensitivity training should be offered to all court and commission staff and members. Criminal court judges undertake this type of training, but it is unclear the extent or existence of such training for staff and members of civil courts or commission.

Recommendation 13

Compulsory trauma-informed practice training be provided to all members and staff of courts and tribunals that deal with sexual violence, including sexual harassment matters.

b. Acknowledgement of applicant's experiences and trauma

From our experience with representing applicants at conciliation conferences in the AHRC, we have seen conciliators start a conference by acknowledging the applicant's experiences and their trauma. This may appear to be a simple statement, but it is a powerful acknowledgement of the applicant's mental and emotional state. We consider that a statement to this effect should be written into guidelines around conciliation conferences or mediations involving workplace sexual harassment.

Recommendation 14

A trauma-informed practice manual be published for conciliators and mediators who deal with workplace sexual violence matters in courts and tribunals.

c. Best practice use of interpreters to minimise re-traumatisation

For persons targeted by workplace sexual harassment who are from a CaLD background, legal processes are made more challenging if appropriate and accessible interpreting services are not provided. It is crucial that interpreters are also well-versed in trauma-sensitive practices so as

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https://www.respectatwork.gov.au/individual/understanding-workplace-sexual-harassment/what-causes-workplace-sexual-harassment; Fred Lunenburg, 'Sexual harassment: An abuse of power' (2010) 13(1) *International Journal of Management, Business, and Administration* 1, 1.

[24] Paul Flatau et. al., *Understanding workplace sexual harassment: Trends, barriers to legal assistance, consequences and legal need* (2023) 28.

[25] Sarah Katz and Deeya Haldar, 'The pedagogy of trauma-informed lawyering' (2016) 22 *Clinical Law Review* 359, 366.

[26] Sarah Katz and Deeya Haldar, 'The pedagogy of trauma-informed lawyering' (2016) 22 *Clinical Law Review* 359, 361-363; Cathy Kezelman and Pam Stavropoulos, 'Trauma and the law: Applying trauma-informed practice to legal and judicial contexts' (2016), 5.

not to cause re-traumatisation for applicants through the use of interpreters, which should be making the process easier for them.

Additionally, organisations obtaining interpreters should be understanding that people from a CaLD background and particularly asylum seekers and refugees may not wish to speak to an interpreter from the local community. The wishes of the person targeted by sexual violence about how they communicate their experiences should be listened to and respected above any inconvenience in facilitating them may cause. The reasons may be due to the sensitivity involved in speaking about sexual violence. For people from CaLD backgrounds there may be cultural factors which increase the difficulty in discussing assaults as they may be heavily affected by concepts of honour and shame. Often CaLD communities are tightknit therefore the victim may know the interpreter personally, be related to them or the alleged perpetrator, or be likely to see them in the community or at social events.

Best practice use of interpreters should be the only acceptable standard provided to persons targeted by sexual violence. From our experience, when it is difficult to obtain an appropriate interpreter, particularly for languages with few interpreters or when there are pressures on certain language groups, there is a general default to use non-accredited interpreters such as family members, support people, or attempt to communicate in English.

Disregard of an individual's language needs is likely to significantly impact their trust of the person, organisation or authority they are dealing with, and reduce the engagement in the justice process. This is specifically important for asylum seekers and refugees who commonly come from environments where may have experienced harm from the authorities in their home country, and the enforcement of legal rights and access to justice has not been available to them.

Recommendation 15

Court or tribunal interpreters with appropriate training in trauma-informed practices be used in workplace matters involving sexual violence.

d. Access to social workers and lived experience consultants

In addition to providing legal assistance services to individuals targeted by workplace sexual violence, community legal centres, legal aid commission and Aboriginal and Torres Strait Islander Legal Services should be funded to provide wraparound, holistic support to these individuals.

There is now a growing body of evidence and policy that suggest that multidisciplinary models that integrate legal assistance and social works services, provide more holistic responses for people experiencing complex and intersecting needs. Clients who face discrimination and disadvantage often have intersecting or co-occurring legal issues as well other non-legal issues (i.e. financial, social, health, mental health, etc) that intersect and compound their experience of disadvantage.

The availability of frontline social support is critical in a legal service since, for many clients who face discrimination and disadvantage, their approach will be their first to the community sector because it is their legal issue that is driving the help-seeking behaviour. It is therefore imperative that we leverage the chance to engage and promote future help-seeking behaviour by providing a positive experience with wrap-around support to address the range of issues the person is experiencing, rather than only helping with a specific legal issue that is tangled up with other compounding non-legal or separate legal issues.

Integrated service delivery means a better client experience as lawyers don't have to try to be social workers or vice-versa. Each professional can focus on what they're good at and the client does not have to attend multiple services. Having a social worker available for social and emotional wellbeing support prior to a legal proceeding such as a conciliation conference, can make the world of difference to a client's feeling of safety and confidence during the negotiation. Working with a client to address non-legal issues such as housing and financial counselling, makes the prospect of dealing with other issues less overwhelming and can help a client to feel the "pieces are coming together".

In addition to an integrated approach being person-centred and dealing with the whole person instead of just their "legal issue", it also has an impact on reducing future costs and system burden, by addressing the range of issues at the point in time, instead of when they have further compounded and produced additional issues that will put further strain on the system.

Recommendation 16

There be funding for legal assistance service providers (such as community legal centres) to deliver integrated, wraparound, holistic non-legal support services to people seeking help with workplace sexual violence.

e. Providing adequate notice of court / commission dates and deadlines

Attending a court / commission hearing or mediation is a stressful situation for anyone, but can be especially confronting when the applicant is faced with the prospect of having to listen to, or face, their employer or perpetrator of sexual harassment. Providing adequate notice of these dates will assist the applicant to access appropriate psychological and social support and mentally prepare for the day.

Recommendation 17

Courts and tribunals implement practice directions or other guidance to ensure adequate notice and timeframes are provided to parties to workplace matters involving sexual violence.

Facilitate access to legal assistance service providers

Circle Green sometimes receives warm referrals from the AHRC in relation to workplace sexual harassment matters, so that we can provide legal advice to an applicant in proceeding with their complaint in that forum. Similar referral pathways between commissions and legal service providers, such as Circle Green, should be implemented so that if someone makes a complaint and they haven't had legal advice, they will be referred to relevant legal assistance service providers in their jurisdiction.

In light of this, and as discussed at **page 13** above, there is a crucial need for ongoing and sustained funding for legal assistance service providers, like Circle Green, to be able to meet demand for legal advice and assistance in relation to workplace sexual harassment matters that may be referred from courts / commissions.

Recommendation 18

Courts and tribunals provide facilitated referrals to legal assistance service providers for unrepresented applicants in workplace sexual violence matters.

Another specific factor raised by the LEAP as a barrier to taking legal action was financial concerns and whether they would be able to bear the cost of commencing, and continuing with, legal proceedings.

Reduce application fees and improve access to fee waivers

An applicant is not required to pay a fee to lodge a workplace sexual harassment complaint in the AHRC, EOC, or FWC. However, if the matter is not resolved by the AHRC or FWC, and the applicant wants to pursue their matter further, the applicant must lodge an application to the Federal Circuit and Family Court or the Federal Court. Applications fees for these courts is $55.00. For low-income or disadvantaged workers, this may present as a barrier to pursuing their matter further.

For individuals who have received legal assistance from a community legal service, a fee waiver applies. However, we consider that the fee waiver should be more readily accessible and available in a wider range of situations, such as applying to all workplace sexual harassment and sex discrimination applications.

Recommendation 19

Fee waivers be extended to all workplace sexual harassment and sex discrimination matters to remove this cost barrier to pursuing legal claims.

More responsive dispute resolution pathways

A trauma-informed legal framework to address workplace sexual harassment should not require an applicant to wait for years to resolve a serious and traumatic matter such as sexual harassment or assault.

In April 2024, the AHRC notified Circle Green that applicants could expect to wait 8 to 10 months for their complaint to be processed and allocated to a staff member for conciliation, due to a large backlog of complaints. The AHRC is encouraging complainants to make attempts to resolve their complaint informally, directly with the alleged perpetrator, during the wait time. Direct negotiations are not always appropriate. Applicants have usually already approached their employer regarding the unlawful behaviour, and the employer continues to fail to engage in any discussion to resolve the matter.

For WA workers, the alternative forums for making a workplace sexual harassment complaint are the EOC and the FWC. While they are similar in some respects, each of these avenues comes with downsides.

The time frame for making a complaint to the EOC is shorter than that in the AHRC, and the EOC can only award a maximum of $40,000 in compensation, comparing to the AHRC which does not have a cap on compensation. Applicants the EOC also experience delays, and must sometimes participate in additional processes prior to conciliation such as providing additional information onto the respondent. Therefore, for more serious instances of sexual harassment, our clients face the difficult choice of accepting a lower compensation figure in the EOC or facing significant delays in the resolution of their matter in the AHRC. The shorter limitation period at the EOC also often means clients have no choice but to proceed to the AHRC.

The FWC can now also deal with disputes involving workplace sexual harassment, and has a 24-month timeframe to make an application. However, there are some factors that clients need to consider when making a decision, including:

- the FWC sexual harassment disputes is new, and it is difficult for Circe Green and other legal service providers to assess the viability of the process and provide comprehensive guidance;

- the FWC is a workplace tribunal, not a discrimination tribunal, and it is not yet clear how well-trained and experienced the Commission staff are in dealing with sensitive matters such as sexual harassment and assault; and

- the FW Act does not include a provision for victimisation, which means that a complaint of victimisation would need to be made as separate general protections claim. These cannot be combined into one application.

Circle Green calls for increased funding to the AHRC to minimise wait times for workplace sexual harassment claims to be processed, so that persons targeted by workplace sexual harassment are empowered with more choice, and able to access the benefits of the AHRC process, such as those discussed above, without having to forego the timely processing and resolution of their complaint, particularly where the delays are so significant that any benefits of the AHRC process may be negated.

Recommendation 20

There be increased funding to the Australian Human Rights Commission to facilitate the handling of workplace sexual harassment complaints in a timely, trauma-informed and culturally sensitive manner.

With increased funding to support the quicker processing of complaints, target timeframes should then be adopted for the AHRC to allocate complaints to a conciliator.

Recommendation 21

Workplace sexual harassment complaints to the Australian Human Rights Commission be allocated to a conciliator within 60 days of an applicant filing a complaint.

Increase timeframes for making a workplace sexual harassment complaint

Persons targeted by workplace sexual harassment have just 12 months to make a workplace sexual harassment complaint to the EOC, and 24 months to make a claim to the AHRC or FWC.

Consistent feedback from our clients and our LEAP members is that it often takes longer than 24 months for a person targeted by workplace sexual harassment to deal with the impacts of their experience, especially if they come from a marginalised or disadvantaged background. We have observed that a person who has been targeted by workplace sexual harassment is generally primarily concerned about their physical, emotional, and economic safety and security rather than the possibility of taking legal action. The psychological impact of workplace sexual harassment can vary significantly between individuals, and those impacts can continue for extended periods of time.

In our experience, the AHRC has been more receptive to arguments about complaints concerning conduct that occurred more than 24 months prior, when exercising its discretion to not terminate a complaint filed out of time. AHRC members have in our experience been willing to acknowledge:

- that workplace sexual harassment is often a pattern of conduct targeting an individual over an extended period of time; and

- people who have experienced sexual violence, including sexual harassment, may need more time to process their experience before feeling ready to take any legal action.

However, the time legislated limitations remain a significant barrier for persons targeted by workplace sexual harassment who want to make a claim. They do not accurately reflect the impacts of serious trauma on an individual's ability to consider pursuing legal action and it can be difficult to predict whether an out-of-time claim will be accepted.

One LEAP member noted the following:

> *To grow yourself back post-trauma can take more than 12 months… then to be in a position to even speak about it? Even when I left that company, the VP of HR said to me "if this had happened more recently, he would have been fired". But he wasn't, and he still worked there. This 12 or 24-month period is not enough. You need longer, particularly for those whose experiences were prior to this cultural (#MeToo) movement, because only then do workers have the empowerment of feeling like maybe they deserved better.*

We recommend that applicants have liberty to make a sexual harassment or victimisation complaint to the EOC, AHRC or FWC for 6 years after the alleged sexual harassment occurs. This is consistent with the general limitation period that applies to many other civil law actions and is more appropriate considering the nature of psychological impacts of sexual harassment.

Recommendation 22

The time limit for making all types of workplace sexual harassment complaints be increased to 6 years.