Australian National University

Damages and Costs in Sexual Harassment Litigation

A Doctrinal, Qualitative and Quantitative Study

Conducted for the Respect@Work Secretariat, Attorney-General's Department, Australian Government by the ANU College of Law at The Australian National University

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Executive Summary

> *[Claimants] seem to suffer more after making a complaint than they do before. The complaint process itself is damaging … The law seems to fail people in terms of [not] providing protection for complainants for invoking their rights when they're brave enough to do it, and then they pay a social penalty in terms of being ostracised … as if they shouldn't be asserting their rights. These are all terrible disincentives for a law, a statutory scheme that is supposed to be protective of people's rights* – Discrimination Law Expert and Administrative Tribunal Member

In two years' time, the *Sex Discrimination Act 1984* (Cth) (***SDA***) will mark its 40th anniversary. The *SDA,* along with its State and Territory counterparts, make sexual harassment unlawful in Australian workplaces. Yet as has been made all too clear by successive empirical studies, sexual harassment remains rife across workplaces. The liberal promise of anti-discrimination law, that it would effect enduring positive societal change, remains elusive. This report considers two barriers to the practical efficacy of the *SDA*: damages and legal costs. In doing so it addresses two recommendations from the Sex Discrimination Commissioner's landmark *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report.

This report has three substantive parts, reflecting the different methodologies deployed by the research team. Part I utilises doctrinal research to analyse every single sex discrimination (including sexual harassment), age discrimination, disability discrimination and race discrimination case decided in Australia across federal, State and Territory jurisdictions since 1984. This dataset represents the most comprehensive mapping of discrimination litigation ever undertaken in Australia. The data shows that decided discrimination cases remain rare, with just under 2,000 cases identified. This underscores the findings of prior research about the overwhelming prevalence of settlement in discrimination complaints.

In the federal jurisdiction, half of decided sexual harassment cases saw the claimant succeed (from a sample of 193 cases). The average award for economic loss was $30,034.09 and the average award for general damages was $14,268.89. The average award of general damages has increased over time, particularly in the past decade, from $21,544 in 2004-2009 to $60,500 in 2016-2021. This increase remains salient, if less pronounced, when adjusted for inflation. Damages awarded for other forms of discrimination were considerably less, and only race discrimination has, partially, seen a comparable significant increase in general damages in recent years. In the federal jurisdiction, complainants in sexual harassment were far more likely than complainants in other areas of discrimination to receive an award of damages.

At the States and Territories level, Victoria was the most complainant-friendly jurisdiction in sexual harassment matters, with significant average awards of damages for economic and non-economic loss. Queensland had the highest success rate for sexual harassment claimants (73%). New South Wales and Tasmania both had a lower general damages average than the federal average.

To provide a contrasting perspective, Part I also includes a comparative analysis of damages in defamation litigation over the past five years. This research demonstrated that the non-economic injury caused by defamation is valued significantly more highly than that caused by sexual harassment by the Australian judiciary; the average award of general damages in defamation was nearly four times higher than the equivalent in sexual harassment over the same five-year period, from 2016-2021.

Part I also canvasses costs orders in discrimination litigation. The vast majority (70%) of federal sexual harassment cases saw no orders as to costs. However, the situation changed significantly two decades ago, when the primary jurisdiction shifted from the Human Rights and Equal Opportunity Commission to the federal courts, with an adverse costs jurisdiction. Since 2001, claimants have been ordered to pay the respondent's costs in 56% of cases where the claimant was unsuccessful. Similar trends can be observed in other discrimination claims brought under federal anti-discrimination laws. States and Territories are predominantly no-costs jurisdictions, such that a vast majority of sexual harassment and discrimination cases in these jurisdictions result in no orders as to costs. Queensland is a notable outlier, with the respondent often ordered to pay costs.

Part II explores the outcome of polling, commissioned by the research team and undertaken by Essential Research, on public perceptions of damages and costs in sexual harassment litigation and related matters. The polling was undertaken to provide an empirical basis for the community standards on which judicial decision-making in discrimination cases is based and to understand community sentiment on cognate issues. 83% of those polled agreed that sexual harassment is a serious issue that has negative consequences, with a majority saying they were more aware of the negative impact of sexual harassment in 2022 than previously. A significant majority considered that the $100,000 starting point for general damages in sexual harassment cases, following the landmark case of *Richardson v Oracle*, was about right or not enough. A majority also believed that claimants should be protected from liability for their employer's legal fees in sexual harassment litigation, whatever the outcome.

It was particularly noteworthy, given the significant imbalance between awards of general damages in defamation and sexual harassment litigation, that over two-thirds of respondents to the polling considered that sexual harassment was either worse than defamation (such that higher compensation, in relative terms, should be awarded), or equivalent (such that compensation should be about the same). Younger Australians were even more likely to say that sexual harassment was worse than defamation. Just 12% of respondents said that defamation was worse than sexual harassment.

Part III presents the findings of qualitative interviews with almost two dozen leading experts on sexual harassment litigation – barristers, lawyers (including respondent lawyers, claimant lawyers in private practice, and community legal centre and legal aid lawyers), policy makers and current and former judicial and tribunal members. Part III provides richly-textured insight on the significant limitations of sexual harassment litigation in practice. It reveals that the amounts awarded or paid at settlement for discrimination claims of all varieties (including sexual harassment) remain low, notwithstanding an increase in recent years, and that costs serve as a major disincentive to complainants in commencing or maintaining litigation. Settlement is popular for both complainants and respondents, albeit the lack of transparency has significant downsides.

Troublingly, qualitative research revealed a major social divide in the experience of harassment litigation; employees at large companies, particularly in "white collar", executive roles, are receiving significantly-increased settlement sums, sometimes upwards of half a million dollars. In contrast, employees of small and medium-sized employers, particularly in insecure or marginalised areas of the workforce, find it immensely difficult to settle a claim for even $10,000 or $20,000. If represented by private practice lawyers, such settlements often barely covers legal fees. Community legal centres, who undertake a significant proportion of such claims on a pro bono basis, describe themselves as overworked and underfunded.

The qualitative research also revealed a significant tension between the societal objectives of the *SDA* and the reality of individualistic litigation. Settlement, which typically occurs in conjunction with the execution of a non-disclosure agreement (**NDAs**), remains overwhelmingly preferable for

complainants and respondents, despite the lack of transparency this creates around the prevalence and impact of sexual harassment and the ossifying effect on *SDA* jurisprudence. The use of settlements and NDAs also enables repeat perpetrators to go unpunished. Additionally, the focus on compensatory damages for actual loss, and the increasing medicalisation of evidence in sexual harassment litigation, means that complainants are disincentivised from recovering, as doing so minimises claimable-damages. The law therefore stands in the way of a holistic approach to healing following incidents of sexual harassment.

The legal regime is also extremely complex, as a result of overlapping federal, State and Territory jurisdictions across discrimination, employment, workers' compensation and personal injury law. Because each regime has its own distinct advantages and disadvantages, complainants are required to make consequential tactical decisions at an early stage in litigation. The intersection between discrimination law and workers' compensation is poorly-understood by many practitioners, due to the siloisation of these typically-distinct segments of the profession. While clarity has been provided by a recent decision of the Federal Court, in *Friend v Comcare* [2021] FCA 837 (23 July 2021), Comcare's decision to appeal the judgment means the issue remains unresolved (the Full Court of the Federal Court had not yet heard the appeal at the time of writing). The confusion around the legal terrain for those who have been sexually harassed was such that one interviewee, perhaps Australia's foremost expert, told us: 'It [is] just crazy that someone who's harassed needs a law degree to figure out what their rights are. This is a serious barrier to accessing justice. Even I was confused by the options…'. While there can be merit in choice, this and similar observations suggest that law reform to clarify and harmonise litigious pathways warrants further consideration.

Finally, in Part IV we conclude with a range of observations to assist the Australian Government in formulating policy initiatives and legislative change. Our suggestions include that the Australian Human Rights Commission begin collecting and publishing data on settlement amounts in discrimination claims (with the Commission provided appropriate resourcing to fulfil this function) and that costs protections be implemented in federal anti-discrimination law. We also suggest a significant boost in funding for discrimination-focused community legal centres and propose the establishment of an independent regulator (or conferral of equivalent functions on the Commission).

This Executive Summary began with a quote extracted from the research team's interview with a discrimination law expert who serves on an anti-discrimination tribunal. We begin in this manner because of the stark point it makes. Anti-discrimination law was enacted with beneficial intent to address a societal scourge. As this report makes clear, through robust mixed methods research, it is largely failing. When a litigation process causes more suffering than the underlying incident of sexual harassment, something is deeply wrong. We hope our observations might aid change that goes some modest way towards fulfilling the original promise of the *SDA*.

Contributors

This report was prepared by a research team at the ANU College of Law, with the support of the Global Institute of Women's Leadership, on Ngunnawal, Wurundjeri and Yuin country. The authors acknowledge the traditional owners of these lands. Sexual harassment has an intersectional impact; Aboriginal and Torres Strait Islander Australians experience higher rates of sexual harassment than the general population.

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Margaret Thornton FASSA FAAL is an Emerita Professor at the ANU College of Law. She is a regarded as a distinguished socio-legal and feminist scholar. Her landmark 1990 book *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press) continues to influence discrimination law scholarship three decades later. Margaret has authored dozens of peer-reviewed articles and book chapters on Australia anti-discrimination law. She has held many national and international fellowships and has been involved in a range of federal and State government projects and consultancies.

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Introduction

In March 2020, Australia's Sex Discrimination Commissioner, Kate Jenkins, published *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (**Respect@Work**). Among the landmark report's recommendations were:

> Recommendation 24: The Australian Government conduct further research on damages in sexual harassment matters and whether this reflects contemporary understandings of the nature, drivers, harms and impacts of sexual harassment. This research should inform judicial education and training.
>
> Recommendation 25: Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

In April 2021, the Australian Government formally responded to the *Respect@Work* report in *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australia Workplaces* (**Roadmap for Respect**) as follows:

> Recommendation 24 – Agreed: The Government will ensure that research will be undertaken on trends in the nature, type and quantity of damages awarded in sexual harassment matters, in consultation with the Council.
>
> Recommendation 25 – Agreed-in-Principle: The Government notes that the determination of costs orders is already at the discretion of the court, but will review cost procedures in sexual harassment matters to ensure they are fit for purpose, taking into account the issues raised by the Report.

In September 2021, the Respect@Work Secretariat of the Attorney-General's Department (**the Department**) issued a Request for Quotation under the Deed of Standing Offer for Research, Evaluation and Data Panel (SON3385995). In October 2021, the present research team, from The Australian National University (**the ANU**), were notified that its response had been successful. Between October 2021 and March 2022, we have undertaken research into damages and costs in sexual harassment litigation, pursuant to recommendations 24 and 25 of the *Respect@Work* report. The research was conducted in accordance with Protocol 2021/782 approved by the ANU Humanities & Social Sciences Delegated Ethics Review Committee on 13 December 2021. We hereby furnish the Department with our research.

A Research Questions

By way of summary, we will briefly address each of the topics identified for consideration in the request for quotation.

B Damages

***The Supplier will be required to: provide clear data on the provision of damages (general, compensatory and exemplary) in Australian federal and State and Territory anti-discrimination cases concerning sexual harassment (the relevant jurisdiction)*:**

Part I(B) of this report provides data on damages in all Australian federal, State and Territory sexual harassment cases ever decided. In total, we identified 95 sexual harassment cases in the federal

jurisdiction where damages were awarded, from a total sample of 193 cases (including costs decisions). Damages were awarded in 51% of cases. In 47% of cases, the application was dismissed.

Part I(C) analyses damages awarded under the other federally protected attributes (sex, race, age and disability). In total we identified 182 sex discrimination cases (excluding sexual harassment), 313 disability discrimination cases, 143 race discrimination cases and 7 age discrimination cases. We found that damages were awarded in a far lower proportion of cases in the other federally protected attributes compared with sexual harassment; 28% of sex discrimination cases, 20% of disability discrimination and 14% of race discrimination cases resulted in an award of damages. There has only been one successful case of age discrimination federally.

Part I(D) analyses sexual harassment and discrimination at the State and Territory level. We identified 131 sexual harassment cases where damages were awarded, from a total sample of 251 cases. The proportion of cases where damages were awarded varied widely across jurisdictions. For example, Queensland had the highest success rate for complainants, with 73% of all cases resulting in an award of damages. In contrast, in the ACT there have been no awards of damages for sexual harassment and in SA there has been only one.

***Analyse any trends in damages awards in the relevant jurisdiction, such as whether there are factors in judicial decision making that go to a higher award of damages*:**

Part I(B) of this report provides data on the trends in all Australian federal, State and Territory sexual harassment cases on damages awarded. At the federal level, we identified the average award of damages for economic loss, general damages and aggravated damages since the introduction of the *SDA*. The average award for economic loss was $30,034.09, the average award for general damages was $14,268.89 and the average award for aggravated damages was $12,600. Average awards of damages have steadily increased over time, particularly in the past decade. The average award of general damages between 2004-2009 was $21,544. This increased to $47,000 between 2010-2015 and to $60,500 in the previous five years.

Part I(D) analyses trends at the State and Territory level. We identified a large disparity in average damages awarded across the different jurisdictions. Victoria was by far the most complainant-friendly jurisdiction for sexual harassment, with an average of $191,540 for economic loss, $52,944 for general damages and $20,000 for aggravated damages. In contrast, however, in the Northern Territory the average award of general damages is only $3,250, while in the Australian Capital Territory there has never been a sexual harassment case in which damages were awarded.

As in the federal jurisdiction, the quantum of damages has increased over time, particularly in the past five years. This increase is particularly pronounced in Victoria, where general damages have jumped from an average of $21,000 between 2004-2009, to $108,333 between 2010-2015 and $125,000 in the past five years. Queensland has also seen a significant increase, with damages rising from $15,569 in 2010- 2015 to $77,855 in 2016-2021. However, this trend was not seen across all jurisdictions: in Western Australia, the Australian Capital Territory and the Northern Territory there has not been a single case of sexual harassment that has resulted in an award of damages since 2001.

Part I(M) contains an analysis of judicial reasoning in some key cases across the federal and State and Territory jurisdictions. The analysis reveals that prior to the decision in *Richardson v Oracle Australia Pty Ltd* [2014] FCAFC 82 (15 July 2014), high awards for general damages were generally only available for sexual harassment that involved serious physical harm, such as sexual assault or rape, or sexual harassment that caused serious medical harm to a complainant. Damages awarded in sexual

harassment cases that were deemed 'less serious' were generally subject to the accepted 'range' of damages for hurt and humiliation of between $7,500 and $20,000.[1]

However, the decision in *Richardson v Oracle* recalibrated the assessment of general damages, with the focus on 'community expectations' leading to greater judicial focus on the hurt, humiliation, pain and suffering occasioned as a result of sexual harassment. Since that decision there have been several decisions that have awarded general damages of $100,000 or higher. That being said, this trend is not universal across all jurisdictions; a number of States and Territories' awards have not adapted post-*Richardson.*

The judicial analysis also reveals that aggravated damages may be awarded where a respondent's conduct following a complaint of sexual harassment, or during the course of litigation, exacerbates the pain and suffering of the complainant. They may also be awarded where there are other aggravating factors including an imbalance of power, an applicant's vulnerability and dependence upon the respondent. The analysis further reveals that whether damages have a punitive or deterrent element is not well understood.

Part III(D) and (E) contains analysis of the trends in damages awards in confidential settlement. Practitioners indicated that settlements often result in significantly higher damages than those awarded by a court. In particular, respondent employers are often prepared to pay large amounts in settlement to avoid a perceived reputational risk associated with sexual harassment claims. However, it is clear that a socioeconomic division exists within confidential settlement which affects the quantum of damages awarded.

Settlement amounts are often linked to the salary of the complainant and the size of the employer. As a result, damages paid following confidential settlement for the same conduct may be significantly higher if a complainant is sexually harassed in the workplace of a large, publicly listed company, compared with a complainant who is sexually harassed in a workplace that is a small business. Additionally, complainants have significantly less resources in pursuing litigation and therefore diminished bargaining power when it comes to negotiating settlement. Settlement typically takes place in the shadow of anticipated or commenced litigation; if a respondent employer believes that a complainant will be unable to afford to litigate, and they are unconcerned by reputational risk, they are likely to effect a settlement that is more favourable to them.

Review the extent to which any deterrent effect of damages is a factor of judicial decision making in the relevant jurisdiction

Part III(H) and (K) contains analysis of the factors that influence judicial decision making and whether deterrence has a role to play in motivating awards of damages. Participants were divided on whether deterrence is a factor in judicial decision making. A former judge who heard numerous harassment cases suggested that if people are aware that a 'serious penalty' is available this may motivate people, particularly employers, to prevent unlawful behaviour. However, other respondents suggested that compensation remains the primary aim of damages awarded under anti-discrimination legislation. On this approach, quantifying an award of damages should be based solely on the impact on the individual, not a nebulous idea of punishment or deterrence. Participants also questioned the extent to which the increasing reliance on 'community expectations' is resulting in deterrence being factored into judicial decision making on damages. Notwithstanding the recent increase in awards of general damages, practitioners indicated that the concept of 'community expectations' remains vague and poorly

[1] See for example *Shiels v James & Lipman* [2000] FMCA 2; *Johanson v Michael Blackledge Meats* (2001) 163 FLR 58.

understood, and does not provide a particularly helpful guide in advising clients on a claim's potential worth.

Compare awards of damages to a comparable jurisdiction (eg defamation, negligence)

Part I(I) contains data for awards of damages in defamation litigation over the past five years. Defamation was considered the most appropriate comparator, given the conceptual similarity of general damages awarded in both contexts and the frequent comparison of the two jurisdictions in academic and popular commentary. We identified 91 cases involving the award of damages across federal, State and Territory jurisdictions. In all jurisdictions, damages for non-economic loss arising from defamation was higher than comparable data for sexual harassment. At the federal level, the average award was $239,856; this sum is $179,356 more or nearly four times higher than the average award in the same five-year period for sexual harassment.

Part III(O) contains analysis of practitioner's views on defamation as it compares to sexual harassment. Practitioners agreed that defamation is a lucrative practice area, however, it is also a 'high risk' space with a correspondingly high costs risk. Practitioners suggested that defamation has a patriarchal legacy and continues to be dominated by powerful and wealthy men who are concerned about reputational damage. Defamation can also be used by powerful men to silence women who have experienced sexual harassment. Some practitioners indicated that defamation claims are an inevitable side effect of the increasing community disapprobation of sexual harassment post #MeToo; as the community finds sexual harassment increasingly unacceptable, being accused of sexual harassment become increasingly serious.

***Assess the interaction between damages (or settlement of claims) under the Sex Discrimination Act 1984 (Cth) and compensation for injury under the Safety, Rehabilitation and Compensation Act 1988 (Cth) (SRCA), including ss 44, 45 and 48 of the SRCA*;**

Part III(G) contains discussion of the intersection between sexual harassment claims and workers' compensation schemes, including the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (***SRCA***). Specific issues in relation to the *SRCA* are discussed further in Part IV. We take the view, consistent with the judgment of Rares J in *Friend v Comcare* [2021] FCA 837 (23 July 2021), that the *SDA* is distinct from the injury and loss covered by ss 44, 45 and 48 of the *SRCA*, and that the *SRCA* should be amended to clarify this restriction on its operation. Noting that the case is currently on appeal, with a decision reserved at the time of writing, our consideration of these issues is limited.

***Investigate any barriers for awarding damages in the relevant jurisdiction, including: (i) formal barriers, such as caps on damages, and; (ii) informal barriers, such as the way these types of claims are argued and the types of harm that are claimed*:**

Part III contains an extensive analysis of the barriers faced by complainants in receiving damages, either in private settlement or in a court/tribunal. For complainants, costs remain the major barrier to pursuing a sexual harassment complaint. Interview participants indicated that where a respondent knows that a complainant does not have sufficient resources to pursue a complaint, they will often be unwilling to negotiate in good faith.

Another major barrier for complainants is the stress and time involved with pursuing a complaint. Many complaints take months, if not years, to resolve. For a person who has already experienced significant trauma, it may be untenable to continue pursuing legal resolution. Interview participants noted that, for some complainants, litigation can be retraumatising or even inflict more trauma than the underlying

incident. Further, the increasing medicalisation of evidence in sexual harassment litigation has meant that complainants are disincentivised from recovering. The system is therefore not geared towards restoration or healing for complainants.

Participants indicated that caps on damages have remained a significant barrier to receiving adequate awards. This is supported by the quantitative analysis in Part I. In the jurisdictions that still have caps (Western Australian, Northern Territory and New South Wales), awards of damages were considerably below the federal average. Notably, in both Western Australia and the Northern Territory there have been only a handful of cases, and no successful cases since 2001, indicating that complainants are not utilising the local jurisdiction.

C Costs

The Supplier will be required to: consider costs orders in anti-discrimination cases concerning sexual harassment, which includes: (i) providing clear data on costs orders in Australian federal and State and Territory anti-discrimination cases concerning sexual harassment;

Part I(N) contains a detailed analysis of costs awarded in sexual harassment cases at the federal, State and Territory level. At the federal level, we analysed 159 first-instance sexual harassment cases in which costs orders were made. The majority (70%) resulted in no costs order being made. In 15.7% of decisions the applicant was ordered to pay the respondent's costs, while in 15% of decisions the respondent was ordered to pay the applicant's costs. Costs orders were nearly always made on a party and party basis, with only three costs orders being made on an indemnity basis.

In contrast, the State and Territory jurisdictions are predominantly no-costs jurisdictions. Consequently, the vast majority of sexual harassment cases resulted in no-costs orders, of note, in South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, no costs orders were made against either an applicant or respondent. Queensland was a significant outlier: in 44% of cases the respondent was ordered to pay costs and no costs orders were only made 48% of the time.

(ii) analysing any trends in pleadings and decisions;

At the federal level, there has been a significant change in costs orders over time. Prior to 2000, applicants were required to bring cases at the federal level to the Human Rights and Equal Opportunity Commission, which was a no-costs jurisdiction. Consequently, prior to 2000, there were no costs orders made against an applicant at first instance. Since the Commission ceased hearing cases in 2000, there has been a steady decline in the number of cases involving no costs orders, and a converse increase in costs orders being made against both applicants and respondents. From 2001-2021, the applicant has been ordered to pay costs on 25 occasions and the respondent on 21 occasions. Only 35% of cases resulted in a no costs order.

Since 2001, the respondent has been ordered to pay a successful applicant's costs 67% of the time, with no costs ordered in only 23% of cases. Concerningly, in 10% of all cases since 2001-2021 (three instances), a successful applicant has been ordered to pay the respondent's costs. In *Ho v Regulator Australia Pty Ltd & Anor (No 2)* [2004] FMCA 402 and *Font v Paspaley Pearls & Ors* [2002] FMCA 142, the applicants were only partially successful with their claims. As a result, they were ordered to pay a portion of the respondents' costs. Most notably, in *Richardson v Oracle Corporation Australia Pty Limited (No 2)* [2013] FCA 359 at first instance, despite being successful, Ms Richardson was ordered to pay the first and second respondents' costs on an indemnity basis from mid litigation onwards. This was because Oracle had made a calderbank offer

of settlement, rejected by Ms Richardson, that was higher than the damages award by the court. On 21 December 2011, Ms Richardson's *own* costs were estimated to have been $244,465.80. As Buchanan J emphasised:

> *[T]he final outcome of these proceedings, in financial terms at least, will probably be devastating for Ms Richardson both financially and personally. Although the findings made in the earlier judgment provide public vindication of her position, she will remain solely responsible for the payment of the bulk of her own legal costs and obliged to pay a high proportion of the legal costs of the respondents. That will be a very high price to pay for her victory* [51].

In the same period (since 2001), the unsuccessful applicant has been ordered to pay the respondent's costs 56% of the time. A respondent has never been ordered to pay an unsuccessful applicant's costs.

In Part III, we analyse practitioners' perspectives on the role of costs. Practitioners indicated that costs for sexual harassment matters have been increasing, particularly since the 2014 decision of *Richardson v Oracle*. Participants indicated that costs can be millions of dollars, and often eclipse any award of damages or settlement. In this sense, practitioners indicated that often the only winners in discrimination matters are lawyers.

(iii) assessing the issues involved in applications for costs orders and the making of costs orders (eg whether it is a lack of awareness or advocacy for more flexible costs orders on the part of the legal profession);

Part III(N) contains an analysis of approaches to costs. Alternatives to the current federal costs model are canvassed in Part IV.

(iv) examining the extent to which costs liabilities are a factor in case abandonment or settlement,

Part III explores in detail the role costs play in influencing settlement and case abandonment. Almost universally, participants confirmed that costs risk is the principal motivator for an applicant to settle. This was particularly true for applicants represented by community legal centre or legal aid lawyers. The enormous cost of litigation, coupled with the risk of being ordered to pay the respondent's costs, is a major barrier to applicants pursuing meritorious claims. Respondents confirmed that costs are also a motivating factor for respondents. However, respondents indicated that reputational risk, particularly for large, sophisticated entities, can often be a bigger motivator for settlement than costs.

(v) considering any other relevant issues related to costs, such as offers to compromise and other rules or processes involved that may relate to a costs order.

Part III(N) analyses the role of *Calderbank* offers in influencing the conduct of cases. Practitioners indicated that Calderbank offers are used strategically, primarily by respondents, to force settlement. A complainant who refuses a *Calderbank* offer risks an adverse costs order for indemnity costs if they proceed to litigation and ultimately receive less than the amount of the *Calderbank*.

Compare costs order model(s) in anti-discrimination jurisdictions with the operation of costs order models in other Australian jurisdictions (eg defamation, negligence), to inform an understanding of: (i) any other types of proceedings in which judicial discretion is applied and why; (ii) the extent to which different costs order models may act as a deterrent to commencing proceedings, and (iii) the operation and effectiveness of cost protection provisions.

Parts III and IV contain discussions of alternative costs regimes contained in the *Fair Work Act 2009*

(Cth) (no costs) and under whistleblowing law (asymmetric costs). Some practitioners were reluctant to endorse a move to a *Fair Work*-style no costs jurisdiction. While costs remain a significant disincentive for complainants, practitioners indicated there are also benefits associated with the costs regime, including to prevent unmeritorious claims from clogging up the system. Practitioners also expressed concern that if costs are not available, it will not be financially viable for no-win, no-fee legal practices to act for sexual harassment complainants, given the high-risk of costs exceeding damages.

D Intersection

The Supplier will be required to consider the intersection between costs and damages issues, where relevant. This could include, for example, where costs represent a component of damages awarded and where the combined probability of receiving damages and costs impact on the likelihood of a complaint or legal action.

The report has shown that damages and costs are inherently linked. It remains the case that pursuing a sexual harassment claim requires significant time, resources and money. Damages awarded by courts remain low, and costs will frequently exceed any award. If a complainant is unsuccessful, they face the risk of having to pay the respondent's often very significant costs. As such, in order to justify the significant costs involved in commencing and maintaining a sexual harassment claim, a settlement or award of damages must be large enough to sufficiently compensate the complainant and cover their legal costs; or costs must be paid by an unsuccessful respondent. In the absence of a sufficiently-large quantum or a costs-order, even a 'successful' complainant can end up significantly out of pocket. For sexual harassment complainants, pursuing justice through the anti-discrimination system often comes with a high price tag.

Methodology

Our research had three primary components: doctrinal, quantitative and qualitative. We will outline the methodology adopted for each in more detail in the respective part. However, by way of provisional overview, we include the following research outline.

Doctrinal Research – Damages

1. Data Collection (Harassment): Review all reported and unreported sexual harassment cases in all Australian jurisdictions, dating back to the enactment of each law. Identify all cases where damages – for economic loss, general non-economic loss or exemplary damages – were awarded. Collate and tabulate data, including costs orders.

2. Data Collection (Discrimination): Considering the anticipated small sample of sexual harassment cases, and the similarities with non-harassment discrimination claims, the same exercise will be undertaken for cases involving race, sex, disability, or age discrimination (ie, the four attributes in which discrimination is proscribed by federal anti-discrimination law).

3. Case Review: In undertaking the data collection, identify cases and passages within indicating: (a) factors influencing the award of higher quantum of damages; (b) the relevance of the deterrent effect of damages in judicial decision-making; and (c) barriers to the award of damages evident on the face of the decision, whether formal (relating to damage caps etc) or informal (arising from the nature of the harm or the way the claim was argued).

4. Analysis: Consider and synthesise data and cases to identify and explore trends, factors and barriers in judicial decision-making.

5. Comparison: Undertake similar data collection exercise in defamation cases (all Australian jurisdictions 2016-2021); compare respective data and analyse similarities and differences.

6. Intersection: Consider the interaction between damages (or settlement of claims) under the *Sex Discrimination Act 1984* (Cth) and compensation for injury under the *Safety, Rehabilitation and Compensation Act 1988* (Cth), with reference to cases identified and ongoing litigation (*Friend v Comcare* [2021] FCA 837 (23 July 2021) and current appeal).

Doctrinal Research – Costs

7. Data Collection and Case Review: Extract costs order data from initial sample, from both sexual harassment and non-harassment discrimination claims. Review relevant cases.

8. Analysis: Analyse and consider trends emerging from data and case law, including identifying issues arising from the face of decisions in relation to pleadings or failure of plaintiffs' legal representation seeking non-orthodox costs order.

9. Intersection: Analyse and consider issues arising in relation to non-orthodox costs orders and other costs practices, including *Calderbank v Calderbank* [1975] 3 All ER 333 settlement offers and offers of compromise.

10. Comparison: Compare costs order models in anti-discrimination jurisdictions with operation of costs in three distinct but comparable contexts: (a) defamation, drawing on comparison exercise

undertaken in relation to damages: (b) employment claims under the *Fair Work Act 2009* (Cth) and (c) whistleblowing claims under the *Public Interest Disclosure Act 2013* (Cth) and the *Corporations Act 2001* (Cth).

11. Intersection: Drawing on prior data and consideration, consider intersection between costs and damages issues.

Quantitative Research

12. Polling: In light of relevance of community standards and expectations to ranges of damages (see *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 (15 July 2014), ascertain public perceptions via polling methodologies. Analyse results.

Qualitative Research

13. Interviews: Interview relevant representatives from the Respect@Work Council and a sample of practising stakeholders from the legal profession, across the solicitor and barrister profession, representing both claimants and respondents in harassment litigation. Interviews will focus on:

    a. Perceptions of trends in judicial decision-making in relation to sexual harassment claims;

    b. The intersection between damages under the *Sex Discrimination Act 1984* (Cth) and compensation for injury under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and how this intersection influences settlement negotiation and litigation decision-making;

    c. Informal barriers to awards of damages, including through the nature of the claim and the type of harm;

    d. Perceptions of the anti-discrimination costs regime and how it influences their advice and representation in practice;

    e. Awareness of costs protections and potential to make non-orthodox costs applications;

    f. The extent to which costs liabilities influence settlement or case abandonment;

    g. The extent to which alternative costs models, such as those found in the *Fair Work Act 2009* (Cth) or the *Public Interest Disclosure Act 2013* (Cth), may act as a deterrent to claimants' commencing proceedings; and

    h. The intersection between damages and costs in practice, both in relation to litigation strategy and settlement negotiations.

Findings

14. Analysis: Consider, analyse and synthesis doctrinal, qualitative and quantitative research.

15. Observations: Formulate law reform and policy observations in light of research findings.

Part I: Doctrinal Research

E Methodology

The authors have identified and analysed **1,979 cases**. This includes all sexual harassment cases ever brought in Australia under federal, State and Territory law and all discrimination cases under federal, State and Territory law in relation to age, sex, disabilityand race discrimination (federally protected attributes) in the period since 1984 when the *Sex Discrimination Act 1984* was enacted, to the end of 2021. A full list of cases is provided at **Annexure A.**

The Australasian Legal Information Institute (*AustLII), Westlaw* and *CCH IntelliConnect* online legal databases were used to source the cases. The legal databases used are imperfect and are not complete collections of all court and tribunal decisions. However, given the scale of the data collected, any missing cases do not undermine the efficacy of the research.

Only judgments resulting in a final decision were considered. Data was collected concerning any awards of economic loss, general damages and aggravated damages and any costs orders made. For the purposes of considering damages only, judgments concerned solely with costs were excluded. Similarly, for the purposes of calculating costs, where there was a dedicated costs judgment, this replaced the primary judgment.

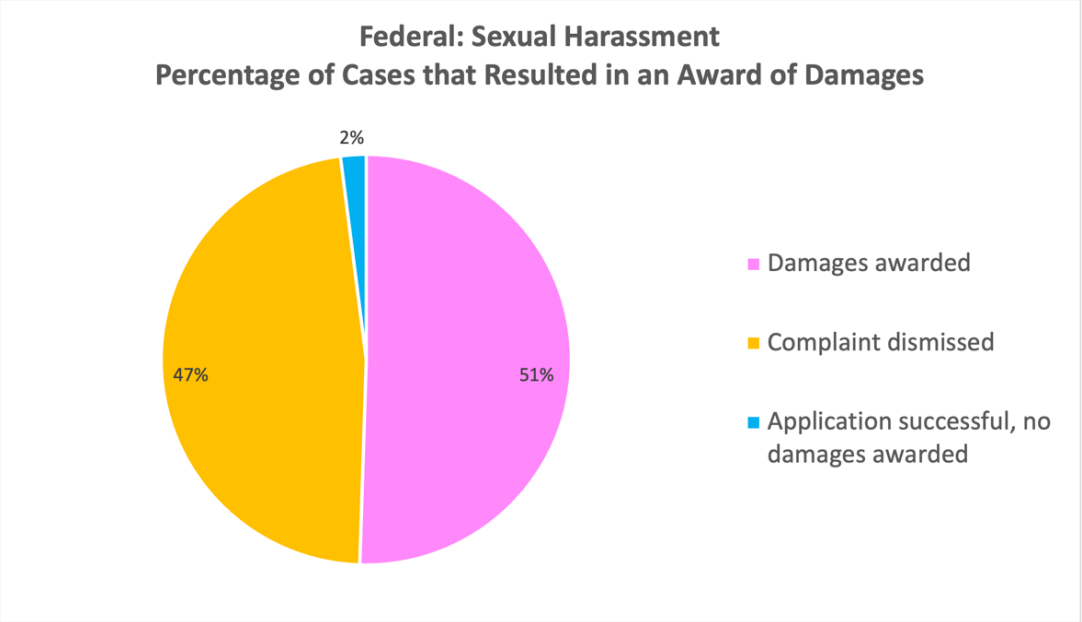
Amounts for economic loss include any amounts for medical expenses. In certain cases, awards could not be quantified; for example, an award of 'one week's salary' where the amount of the salary was not given. In these few cases, the award has been excluded. In some cases, a 'global award' was given, encompassing both general damages and economic loss. In these cases, the global award has been included under general damages.

For the purposes of quantifying damages, both first instance and appeal decisions have been included. This means that awards in some cases have been counted twice, that is the award at first instance and then the award (or overturning of that award) on appeal. This choice has been made because the object of the research is to assess how courts quantify damage, the amounts they deem suitable to award and their justification for so doing.

F Sexual Harassment (Federal)

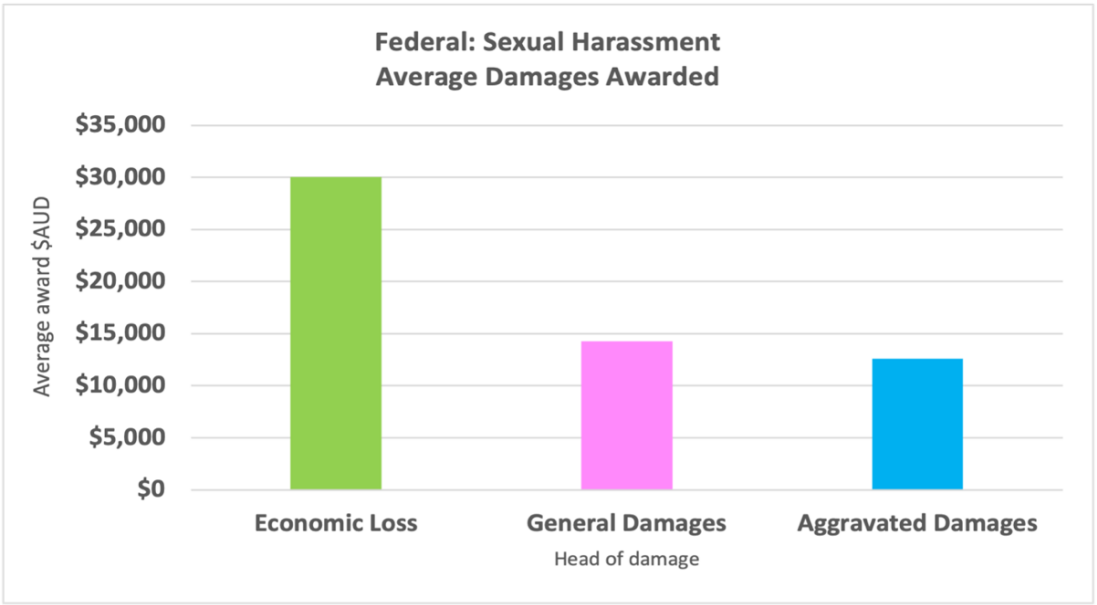
A total of 193 cases concerning sexual harassment were identified at the federal level (including costs decisions). The earliest case is from 1986 and the most recent case is from November 2021. In 51% of cases, some form of damages were awarded. In 47% of cases, the application was dismissed. In 2% of cases, the application was successful, but no damages were awarded (see Graph 1). This is not necessarily indicative of the success rate of sexual harassment cases. As will be explored in the doctrinal section of this paper, the vast majority of sexual harassment cases settle before they reach a final hearing. As a result, the extent to which final court or tribunal decisions reflect the number of meritorious cases resulting in an outcome for complainants should be queried.

Graph 1

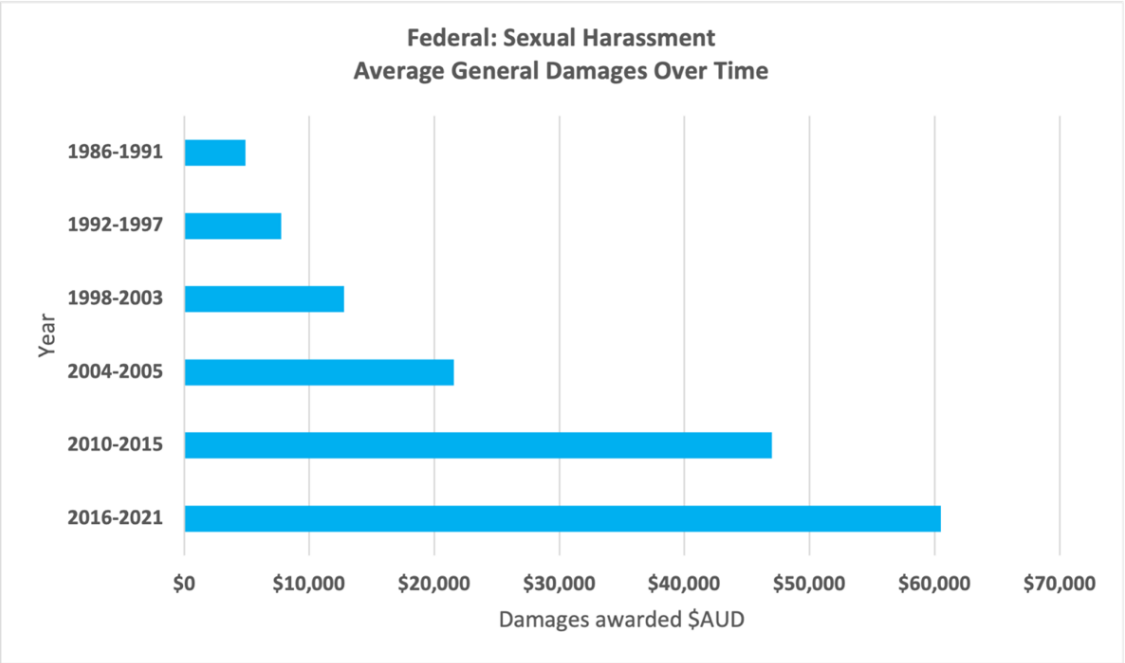


The average award for economic loss was $30,034.09, The average award for general damages was $14,268.89 and the average award for aggravated damages was $12,600 (see Graph 2). The average quantum of general damages has increased over time (see Graph 3). In particular, there has been an increase in damages in the past decade. The average award of general damages between 2004-2009 was $21,544. This increased to $47,000 between 2010-2015 and to $60,500 in the previous five years. The increase in general damages is still apparent when adjusted for inflation (see Graph 4) however, it is less significant.

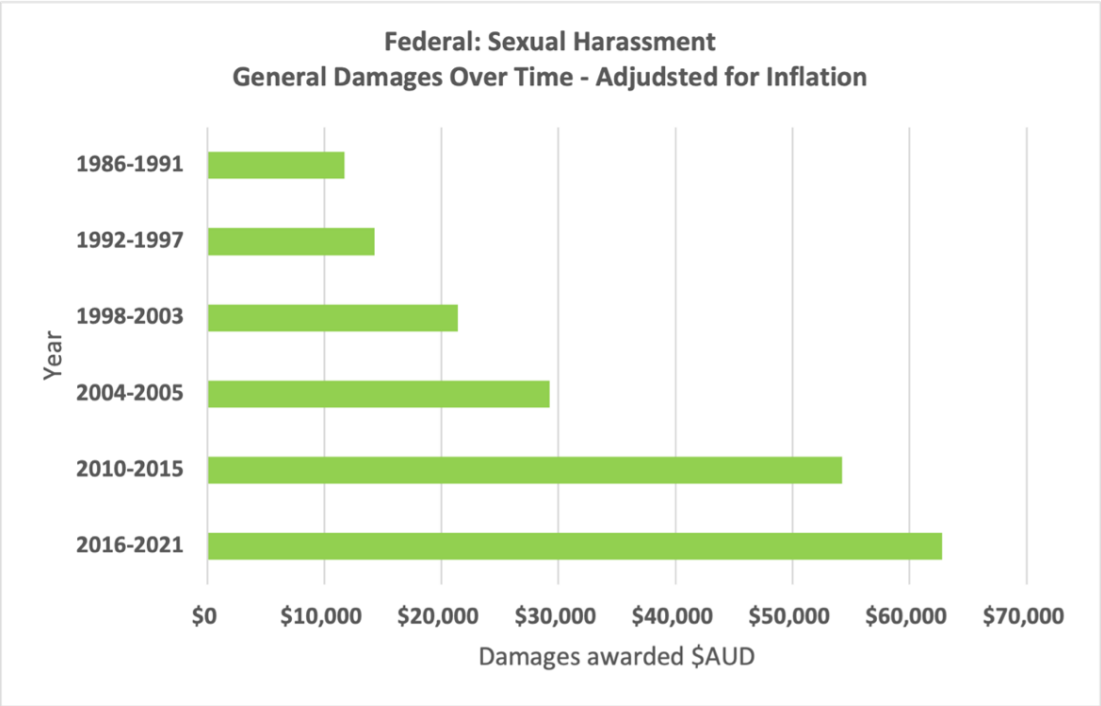
Graph 2



Graph 3

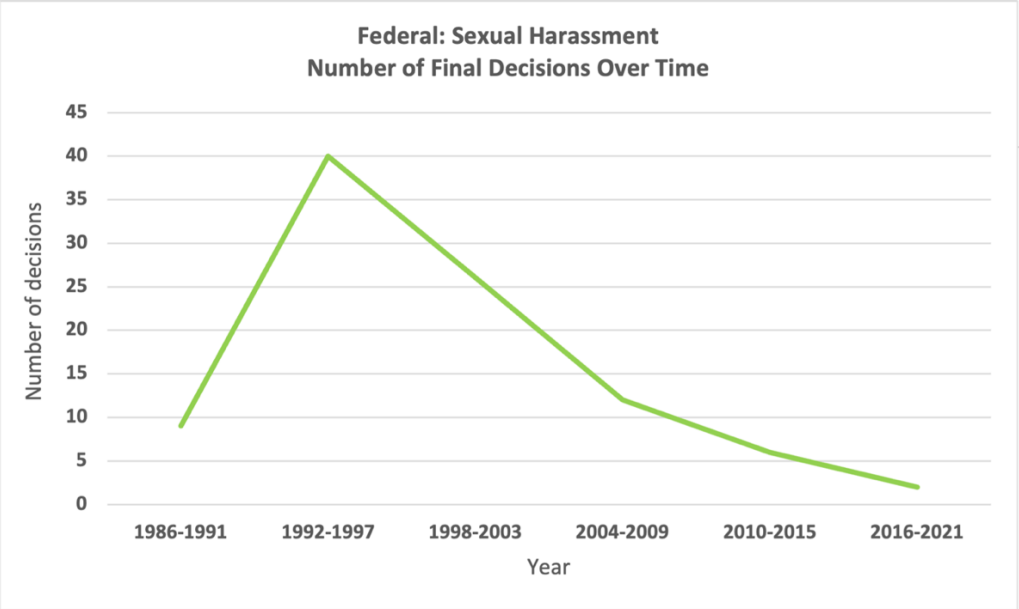


Graph 4

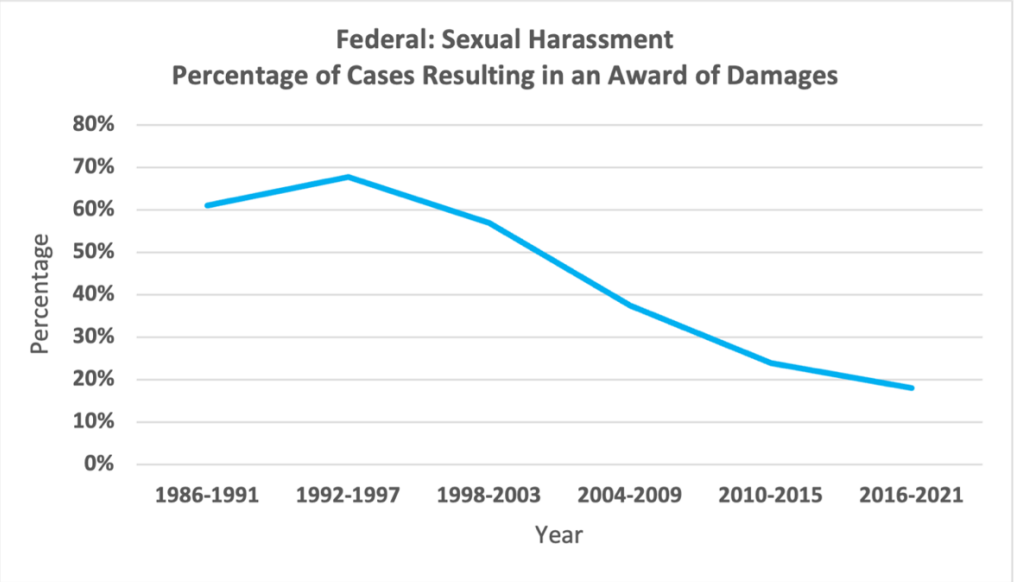


While there has been an increase in quantum of damages awarded, this has not resulted in an increase in the number of cases. In fact, the number of cases resulting in a final decision has steadily decreased since 1986 (see Graph 5). In addition, the percentage of cases resulting in an award of damages has also decreased (see Graph 6). While there has been a significant increase in quantum of general damages in the past 5 years, there have only been two cases that resulted in an award of damages one of which concerned a nominal amount (Morton). Consequently only 18% of cases in the past 5 years resulted in an award. This is in contrast to 61% of cases between 1986 - 1991, 67.8% of cases between 1992-1997 and 57% of cases between 1998-2003 resulting in an award.

Graph 5



Graph 6



G Discrimination (Federal)

Sex Discrimination

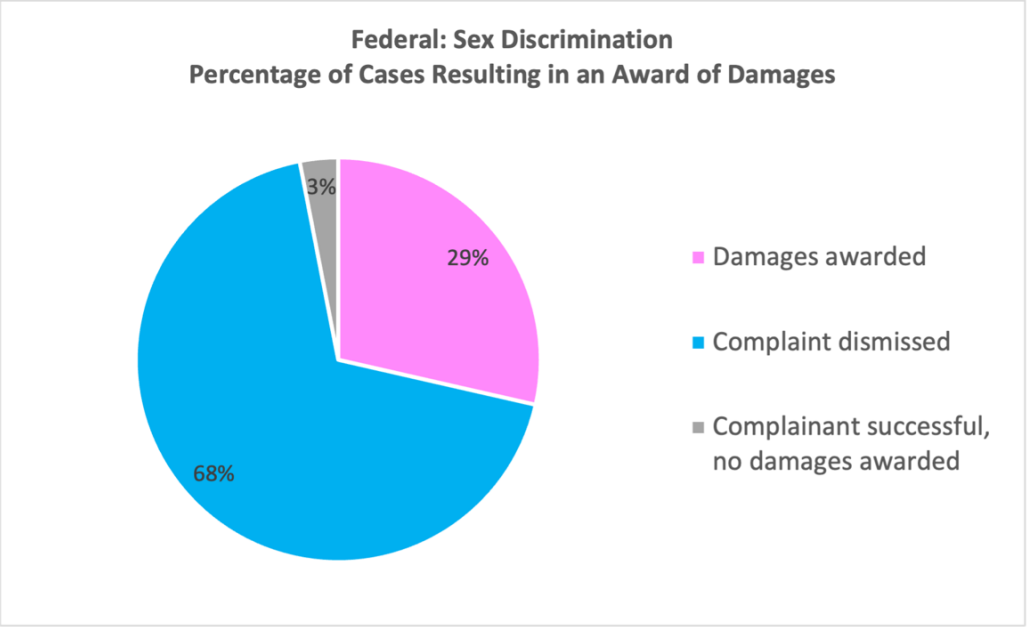
A total of 182 sex discrimination cases (excluding sexual harassment) were identified at the federal level. The earliest case was from 1985 and the most recent case was from February 2021. Of the decisions analysed, 28% resulted in an award of damages, 67% of applications were dismissed and in 3% of cases, the application was successful, but no damages were awarded (see Graph 7). The success rate for complainants in sex discrimination was lower thanin sexual harassment, where 50% of cases resulted in an award of damages.

Similarly, the quantum of damages awarded for sex discrimination was lower than for sexual harassment. The average award of economic loss was $24,861.44. The average award of general damages was $7,825.09 (compared with $14,268.89 for sexual harassment) and the average award of

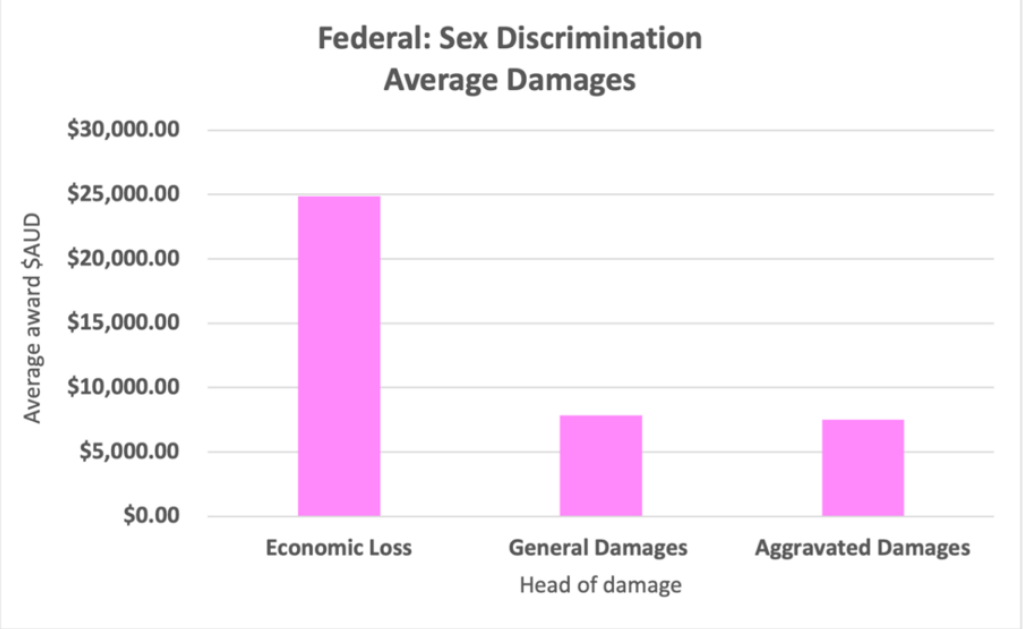
aggravated damages was $7,500 (see Graph 8).

Further, while average general damages for sex discrimination did increase from $2,125 between 2004-2009 to $23,454 between 2010-2015, this increase is not as pronounced as thatfor sexual harassment (which saw an increase to $47,000 during the same time period). Additionally, in the past five years, the authors have not identified a single sex discriminationcase at the federal level that resulted in an award of damages (see Graph 9).

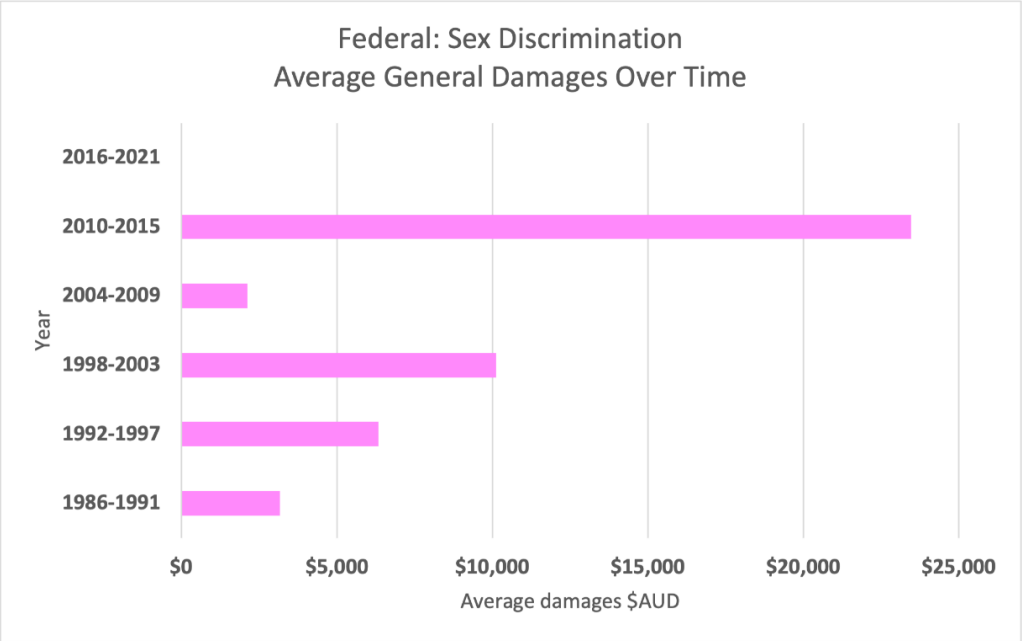
Graph 7



Graph 8



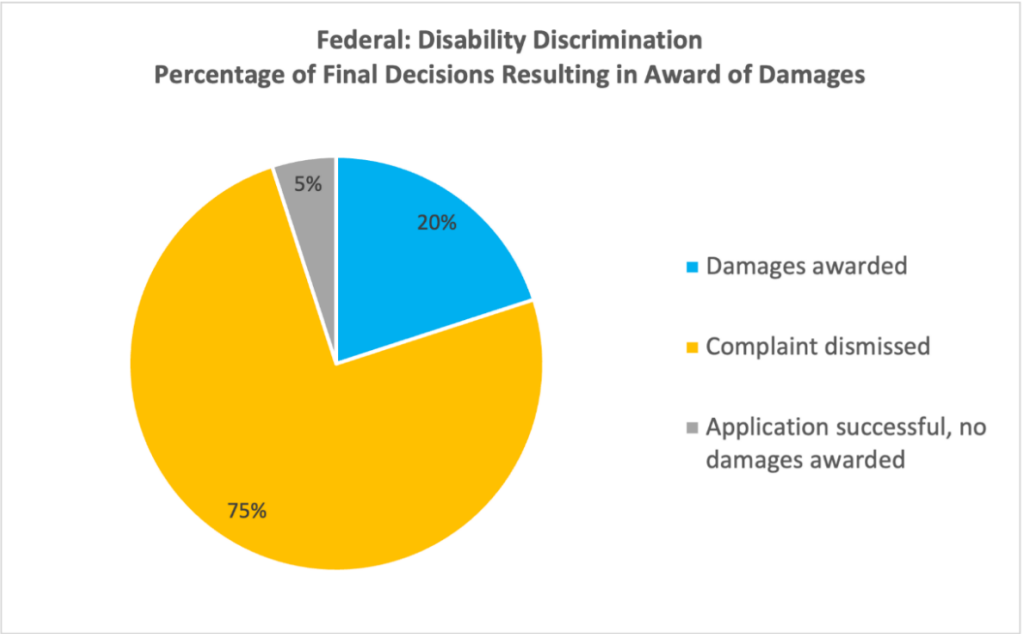
Graph 9



Disability Discrimination

A total of 313 disability discrimination cases were identified at the federal level, the largest number of cases of any of the federally protected attributes. The earliest case was in 1994 andthe most recent case was in October 2021. Only 20% of disability discrimination cases resultedin damages being awarded (in comparison to 50% of sexual harassment cases). 75% of all disability discrimination applications were dismissed (see Graph 10).

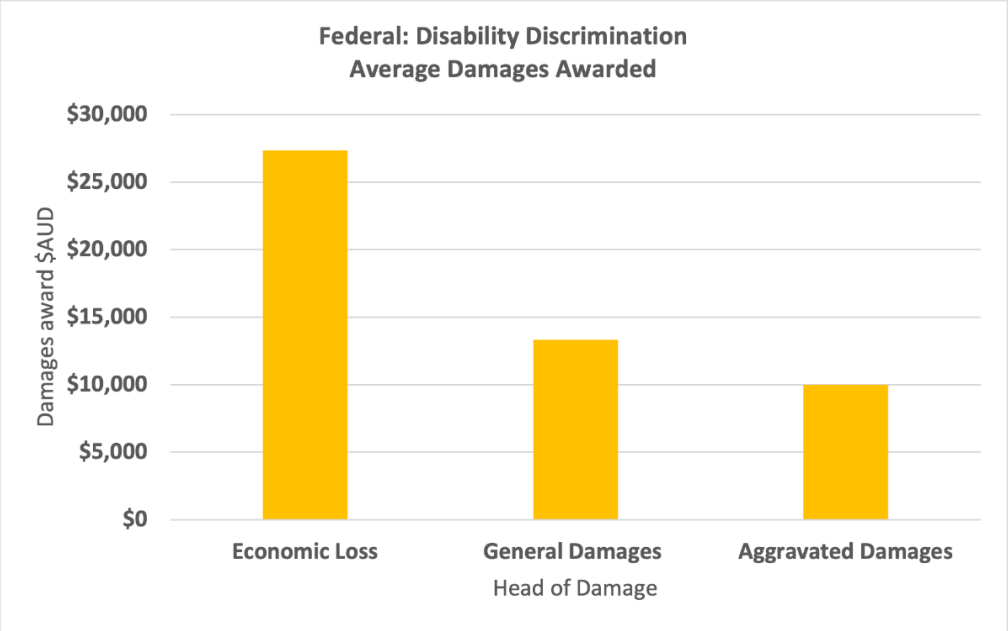
Graph 10



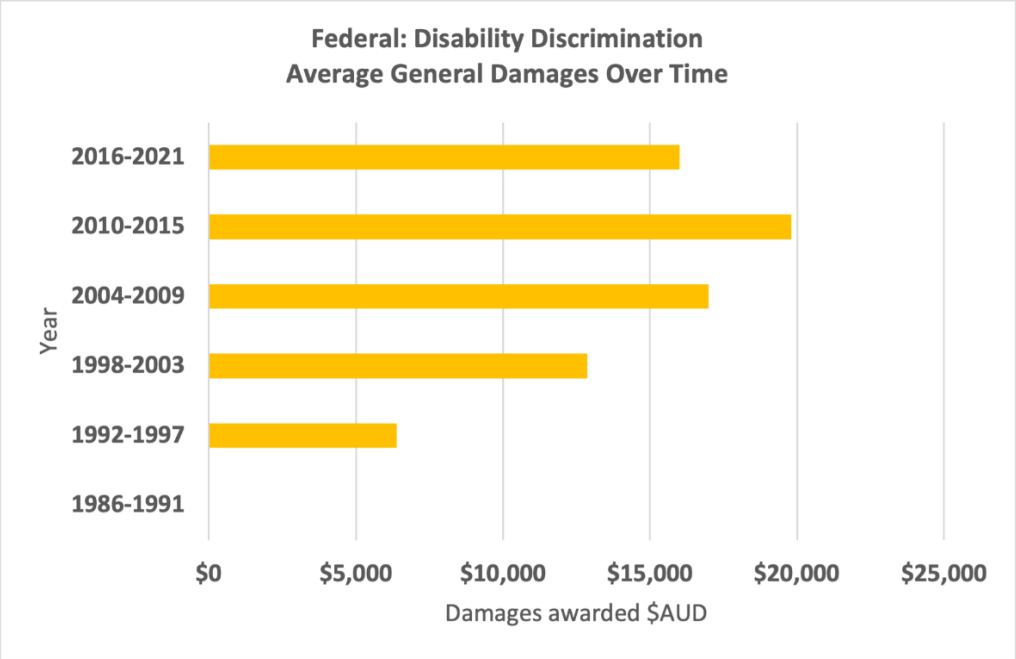
The average awards of damages for disability discrimination were slightly lower than those forsexual harassment (although higher than those for sex discrimination). The average award of economic loss

was $27,359.13. The average award of general damages was $13,323.38 and theaverage award of aggravated damages was $10,000 (see Graph 11). Unlike sexual harassment,there has not been a significant increase in general damages awards over time. In particular, damages have remained largely the same for the past decade. Between 2004-2009 the averagewas $16,987. This went up to $19,814 between 2010-2015 however dropped back down to $16,000 in the past five years (see Graph 12).

Graph 11



Graph 12

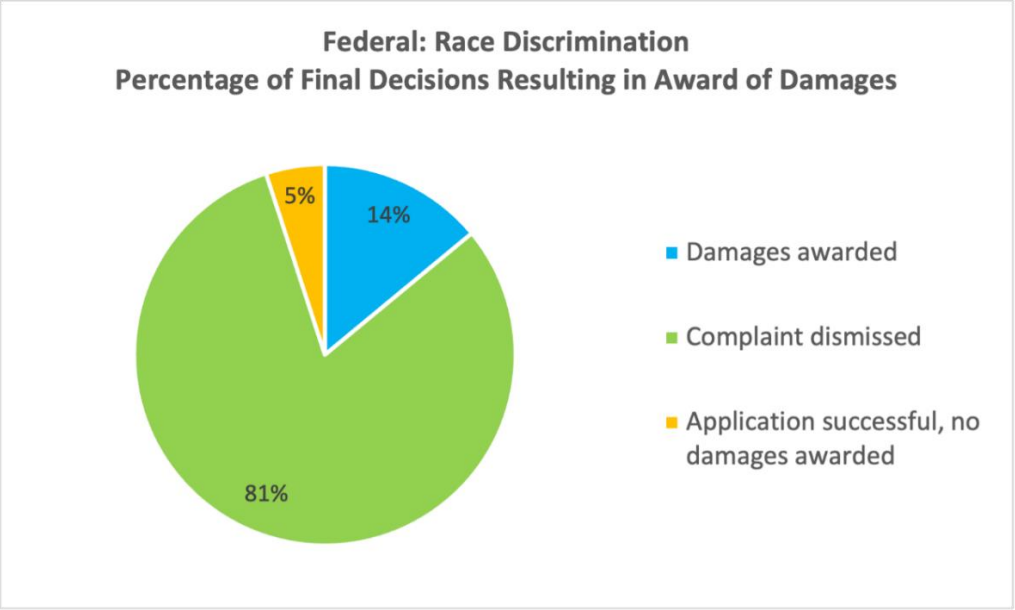


Race Discrimination

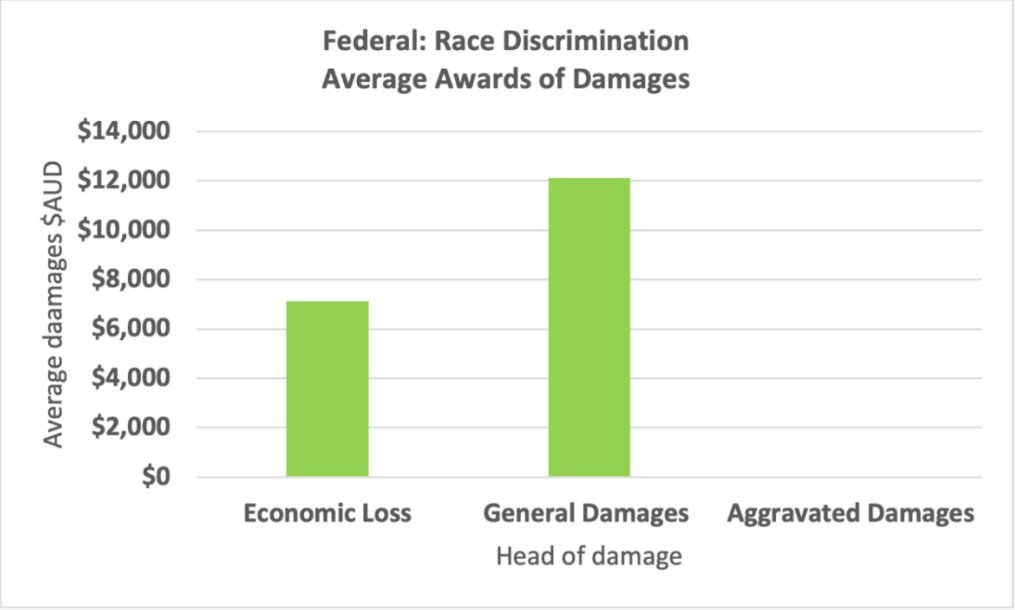
A total of 143 race discrimination cases were identified at the federal level. The earliest decision was in 1988 and the most recent decision was in November 2021. Just 14% of race discrimination cases

resulted in an award of damages. 81% of all race discrimination applications were dismissed (see Graph 13). Average awards of damages were lower than thosein sex discrimination. The average award of economic loss was just $7,129.05 (compared with $30,034.09 for sexual harassment). The average award of general damages was $12,132, whilethere have been no awards of aggravated damages for race discrimination (see Graph 14). However, there has been a dramatic increase in general damages awarded in race discrimination in the past five years (see Graph 15). The average award has jumped from $8,167 between 2010-2015 to $45,000 between 2016-2021. However, it is worth noting that, as with sexual harassment, there have only been *two* decisions in the past five years that resulted in damages being awarded.

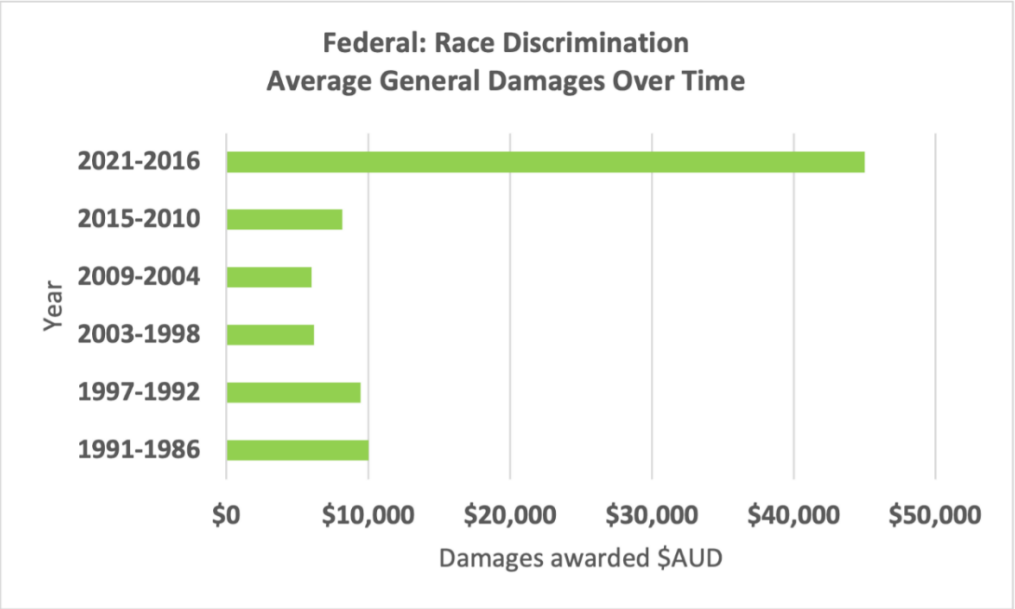
Graph 13



Graph 14



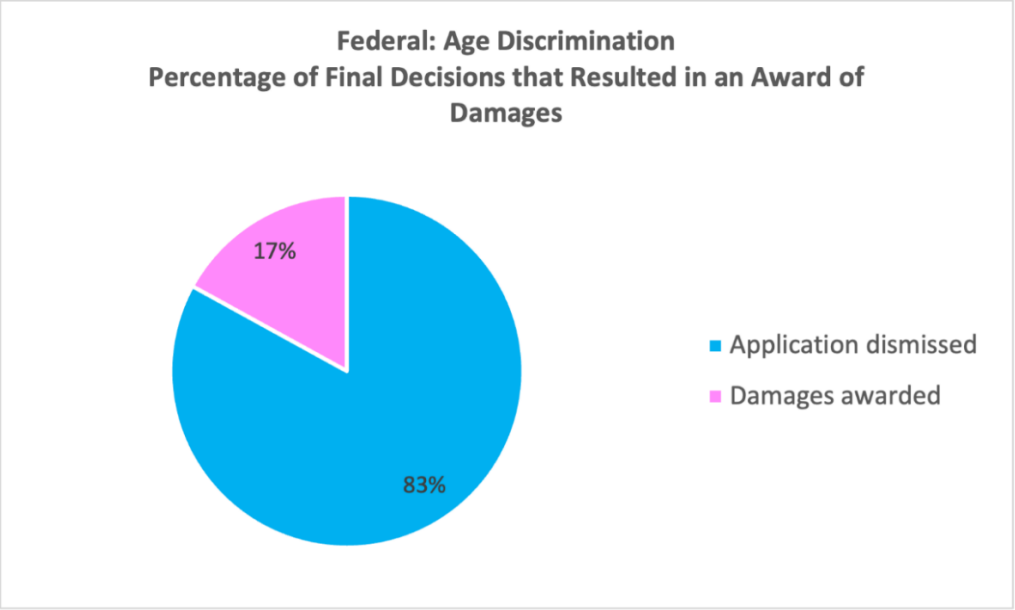
Graph 15



Age Discrimination

A total of 7 age discrimination cases have been identified at the federal level. Only one of those cases resulted in an award of damages ($20,000 in general damages), which was handed downin December 2021 (see Graph 16).

Graph 16

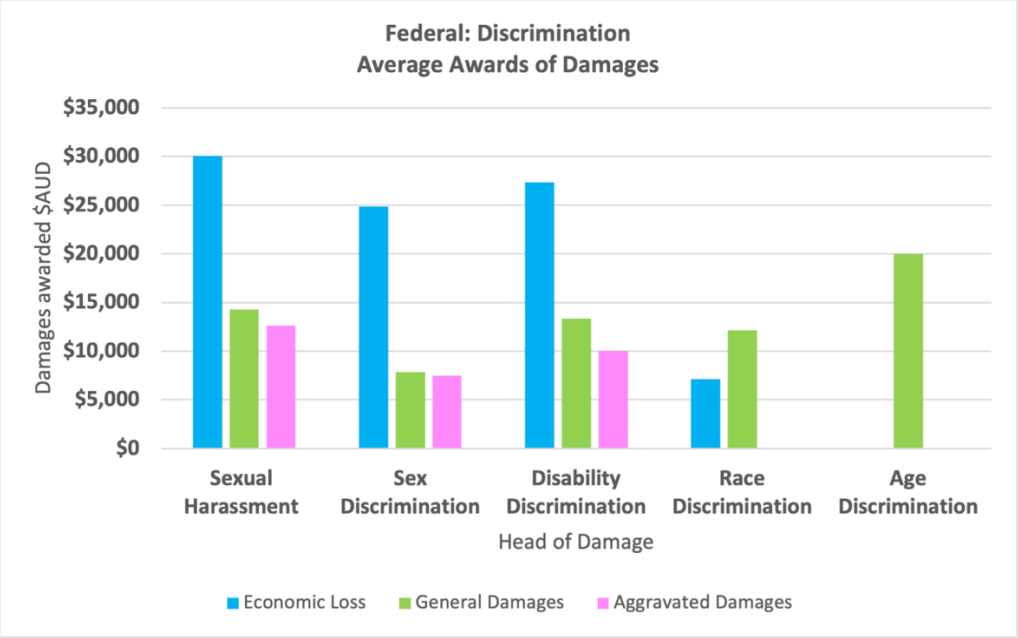


Overview

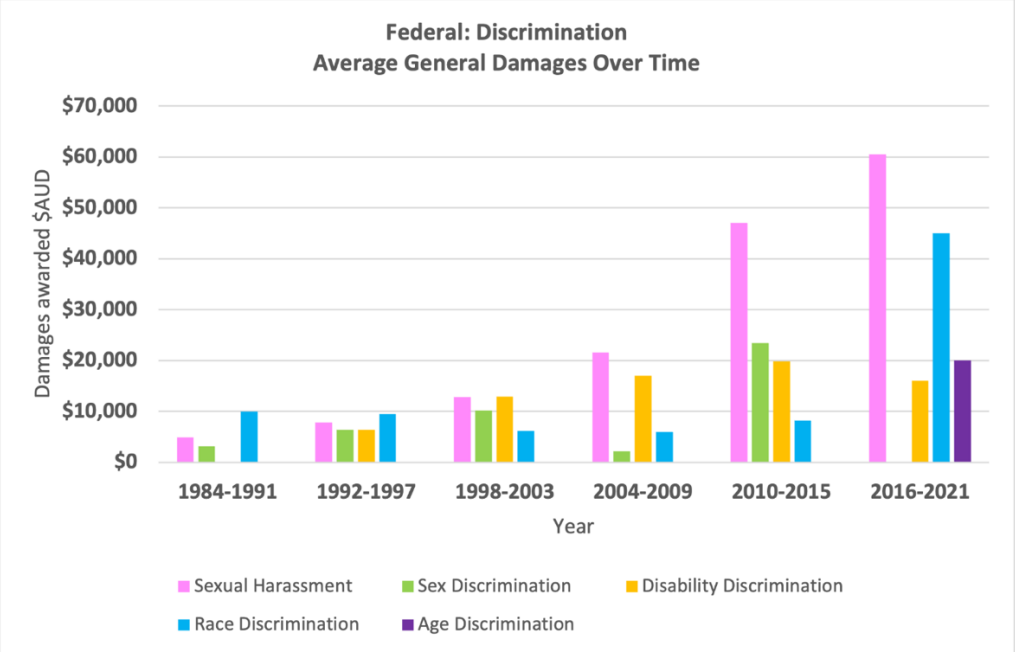
Damages awarded for sexual harassment across all three heads of damage are higher than damages awarded for the other federally protected attributes (see Graph 17). In particular, there has been a significant increase in general damages awarded for sexual harassment since 2010 (see Graph 18). This has not been reflected in the other federally protected attributes (except to an extent in race discrimination). Further, complainants in sexual harassment were far more likely than complainants in

other areas of discrimination to receive an award of damages. The number of cases across all areas of discrimination are decreasing over time, as are the number of cases resulting in an award of damages.

Graph 17



Graph 18



H Sexual Harassment and Discrimination (States and Territories)

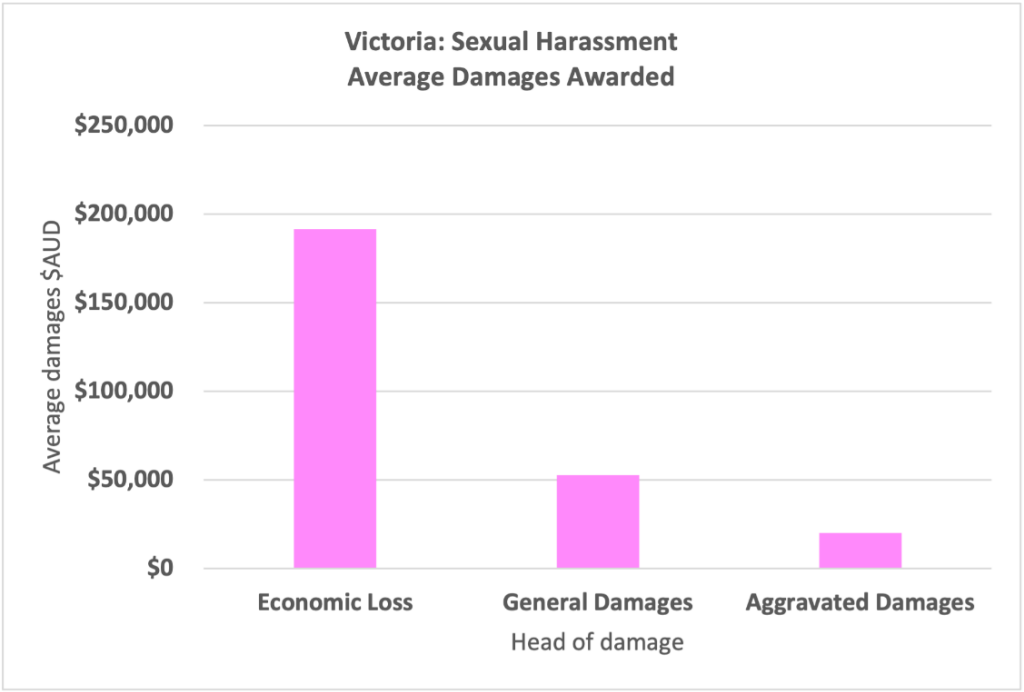
In total, 1,141 discrimination cases have been analysed across the State and Territory jurisdictions dating from 1984. This includes 251 sexual harassment decisions.

Jurisdiction	Sexual Harassment	Sex Discrimination	Race Discrimination	Disability Discrimination	Age Discrimination
VIC	82	49	48	111	26
NSW	61	44	102	79	17
QLD	60	33	37	86	23
SA	11	10	7	21	3
WA	8	20	24	32	7
TAS	23	11	11	6	0
ACT	3	6	29	41	3
NT	3	1	2	1	0
Total	**251**	**174**	**260**	**377**	**79**

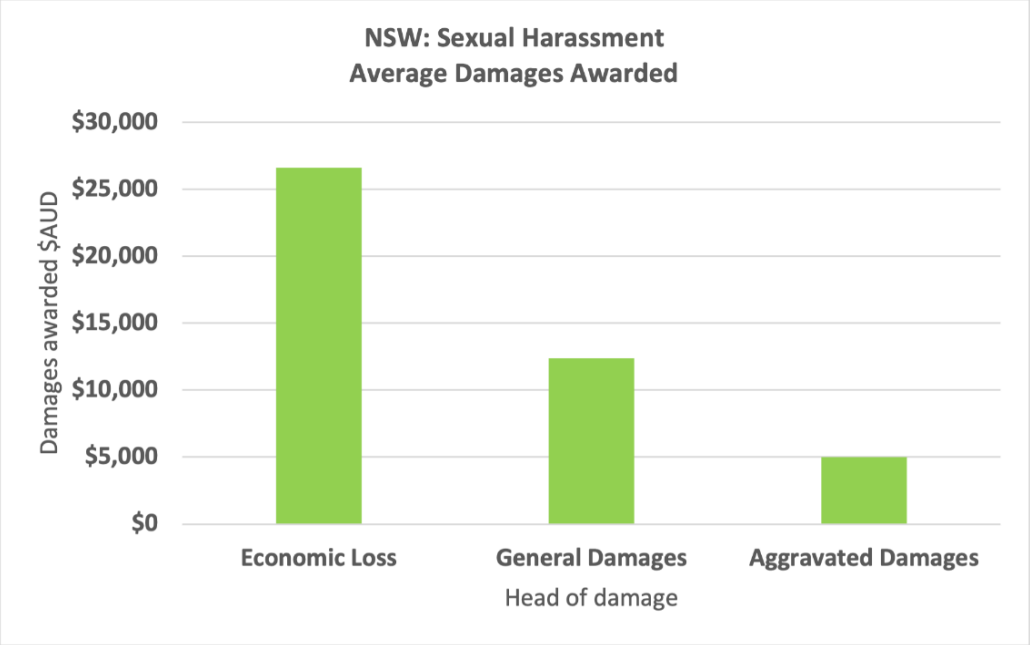
Sexual Harassment

At the State and Territory level, Victoria was by far the most complainant-friendly jurisdictionfor sexual harassment, with an average of $191,540 for economic loss, $52,944 for general damages and $20,000 for aggravated damages (see Graph 19). This is far higher than the federaljurisdiction, which has an average general damages award of just over $14,000. Queensland, South Australia and Western Australia also had higher average awards of general damages for sexual harassment, being $17,124, $30,000 and $16,333 respectively (see Graphs 21, 22 & 23).However, it is worth noting that there is only one decision awarding general damages in SA. NSW and Tasmania had slightly *lower* average awards of general damages, being $12,385 and $11,170 respectively (see Graphs 20 & 24). Only six cases were identified in the ACT and NT,with nominal damages being awarded in the NT and no damages being awarded in the ACT (see Graph 25). Aside from Victoria, all jurisdictions had *lower* awards of economic loss than thefederal jurisdiction.

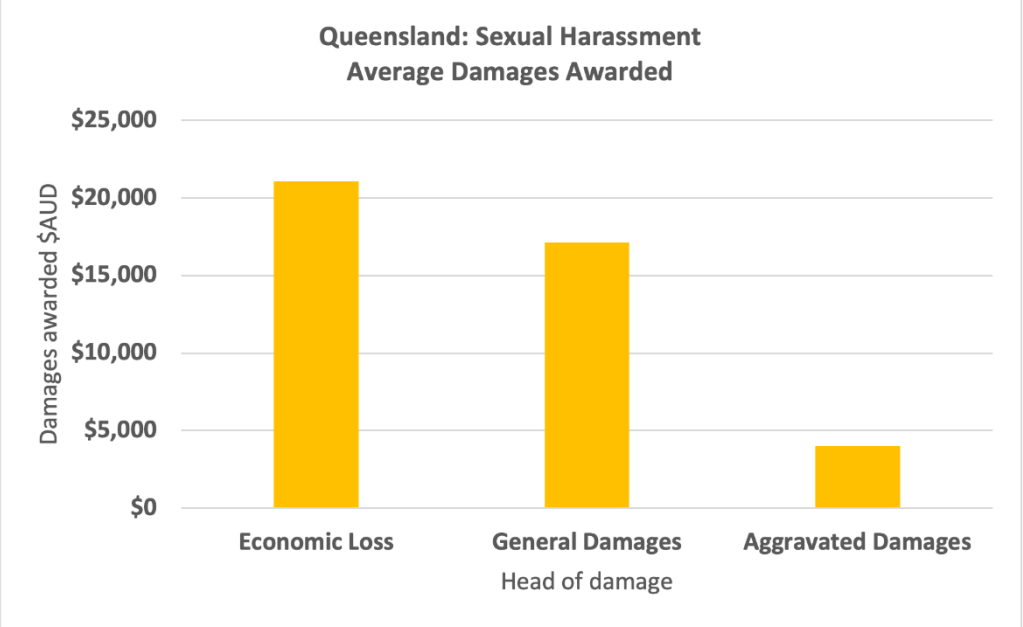
Graph 19



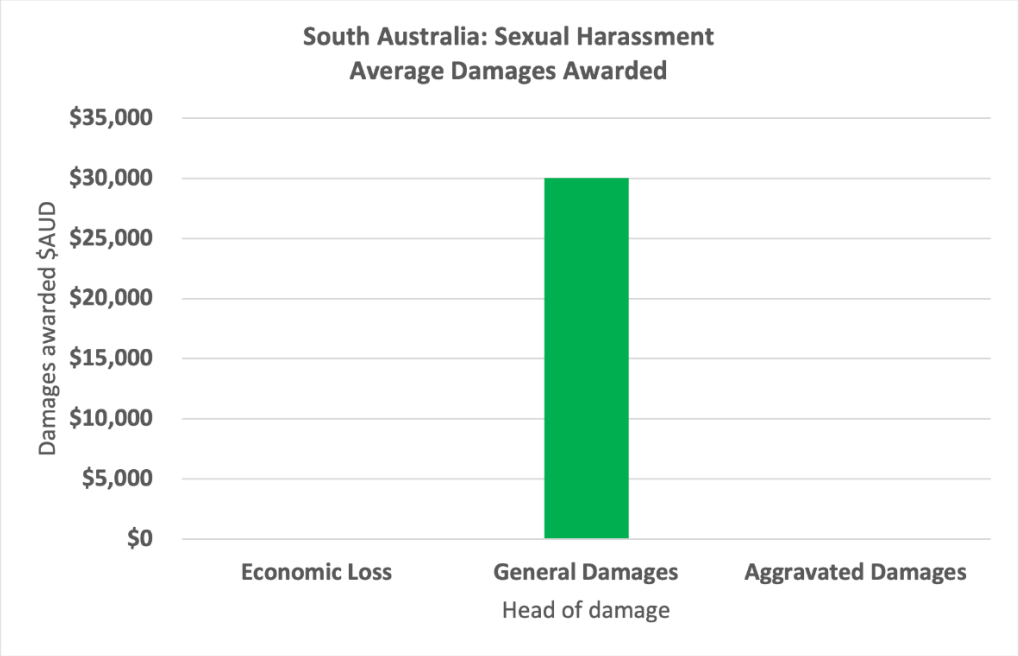
Graph 20



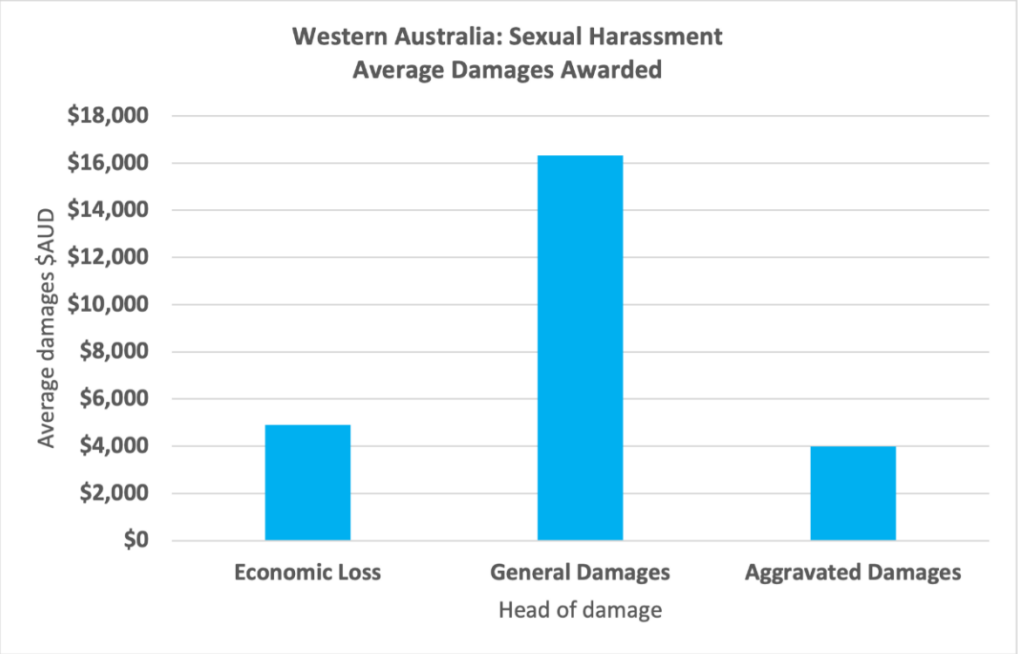
Graph 21



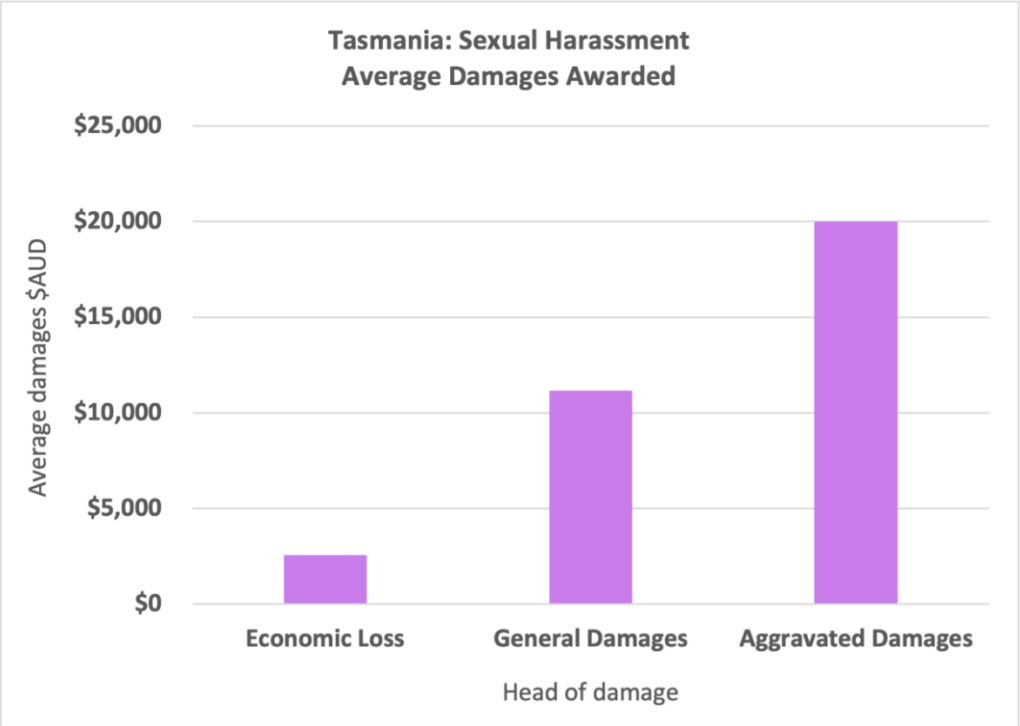
Graph 22



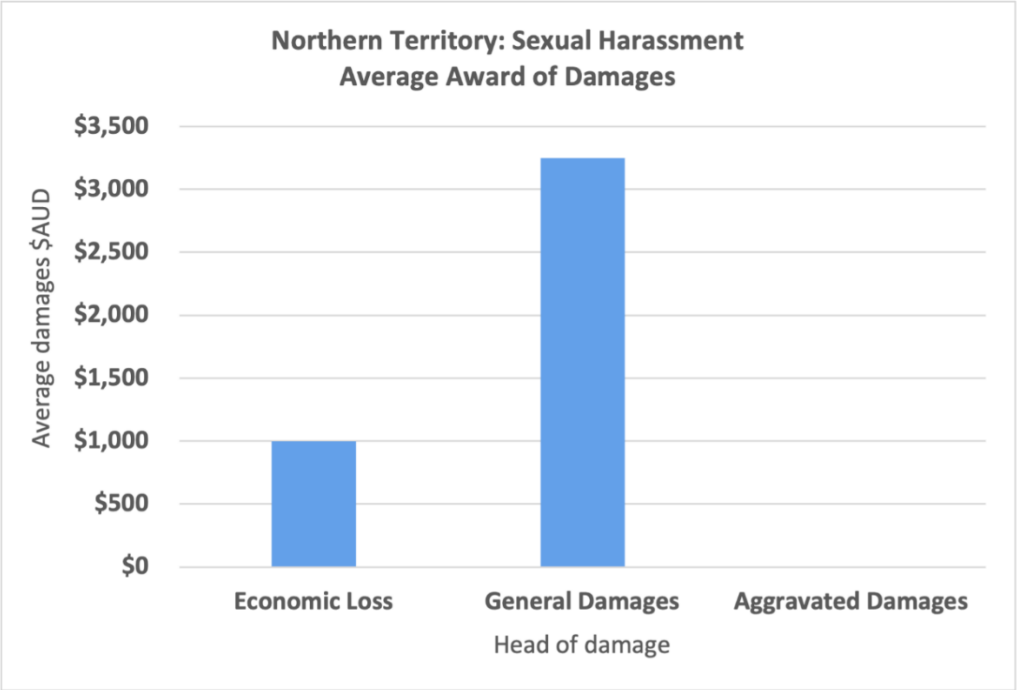
Graph 23



Graph 24



Graph 25

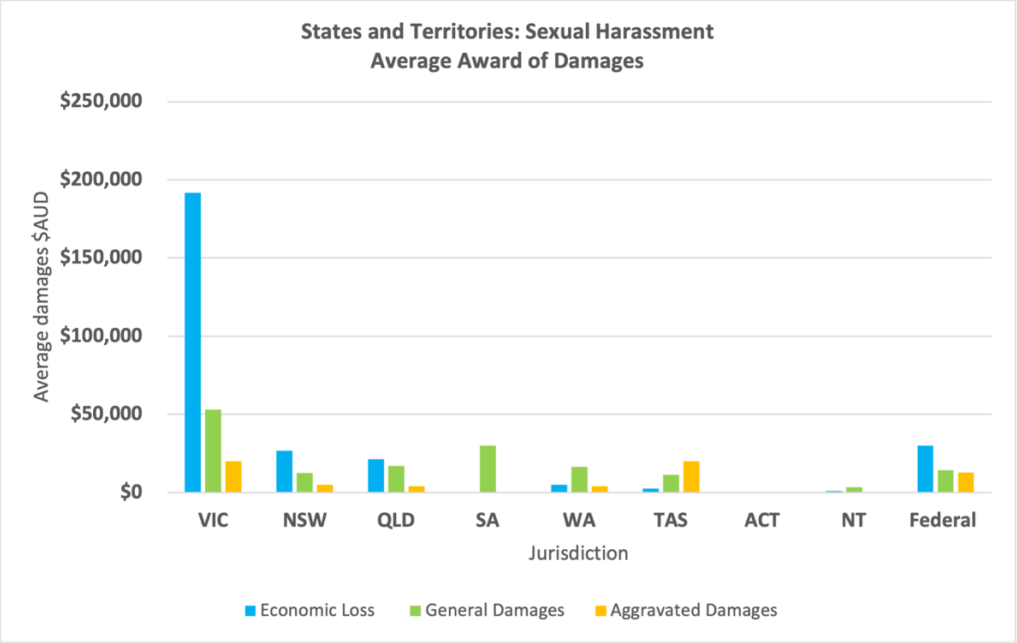


In general, similarly to the federal jurisdiction, quantum of general damages has increased across the State and Territory jurisdictions, particularly in the past 5 years (see Graph 27). This is particularly pronounced in Victoria, which jumped from an average of $21,000 between 2004-2009, to $108,333 between 2010-2015 and $125,000 in the past five years. Queensland has also seen a significant increase, with damages rising from $15,569 in 2010- 2015 to $77,855 in 2016-2021. While there has been an increase in NSW, Tasmania and SA, it is not as significant as at the Federal level. Further, in WA, the ACT and the NT there has not been a single case of sexual harassment that has resulted in an

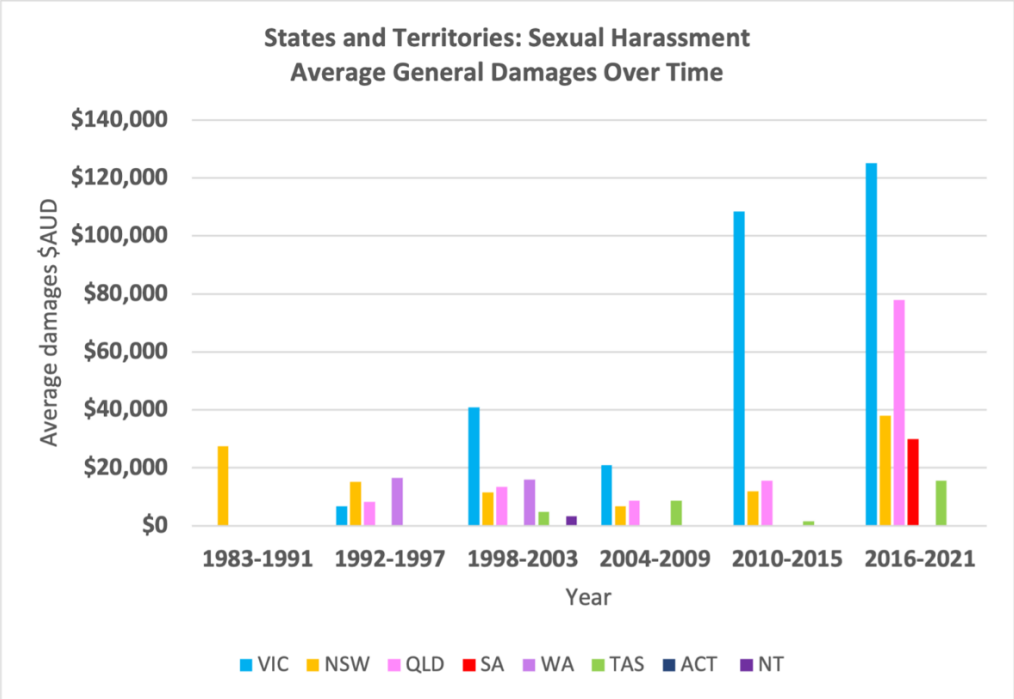
award of damages since 2003.

Queensland had the highest success rate for complainants: 73% of all cases resulted in an awardof damages (see Graph 28). While Victoria had the highest levels of compensation, the successrate was a lot lower: just 36% of all cases resulted in an award of damages (this is in comparisonto 50% at the federal level). The lowest success rate was in the ACT, where there have been no awards of damages and SA where there has only been one award.

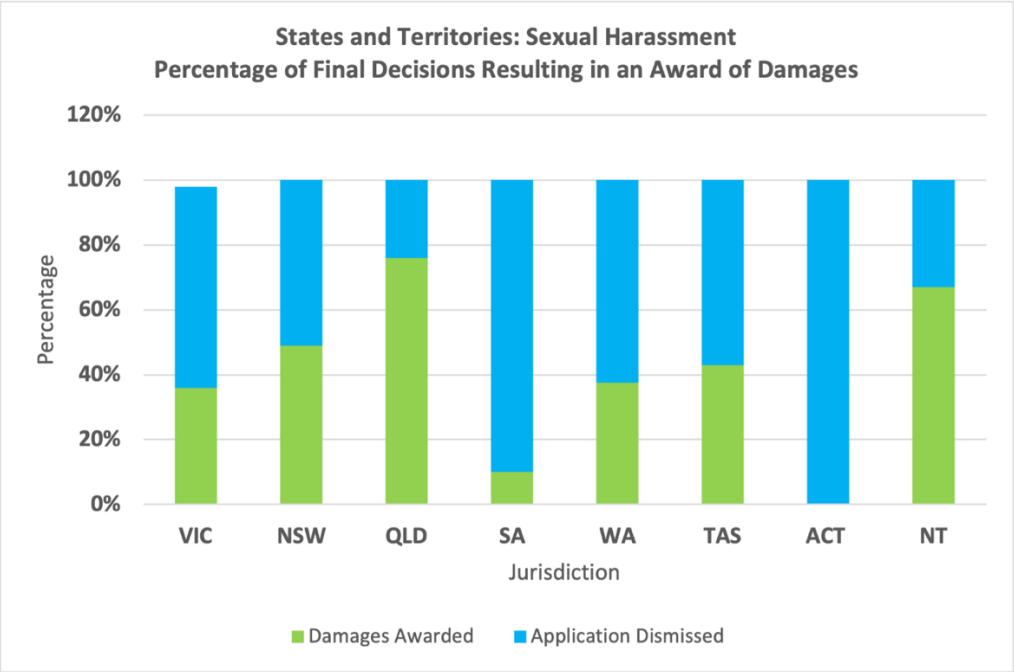
Graph 26



Graph 27



Graph 28

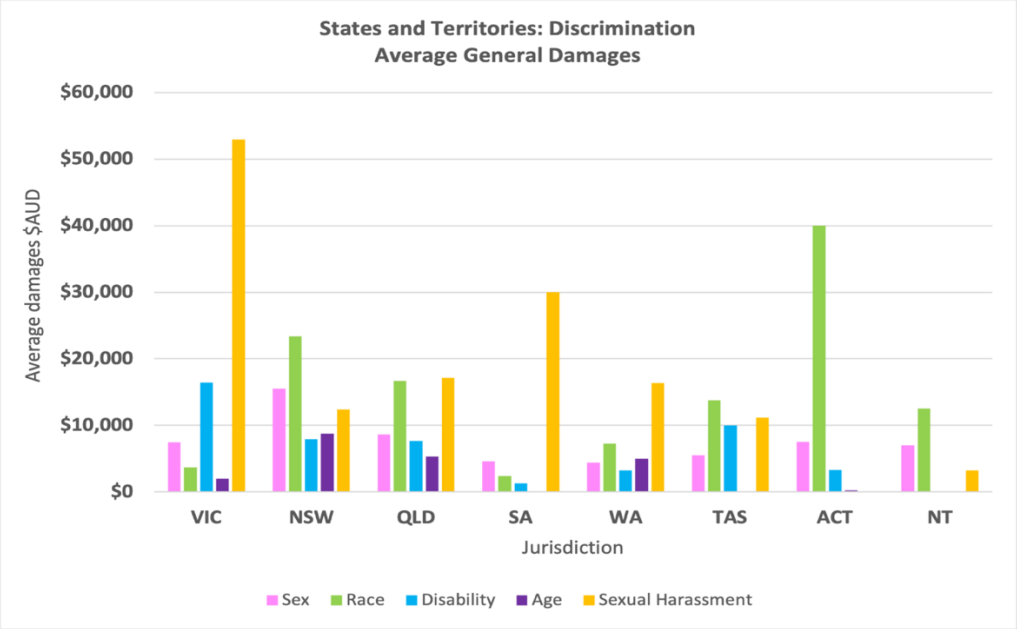


Discrimination

Generally, average awards for general damages across the federally protected attributes were lower (often significantly) at the State and Territory jurisdictions in comparison to the federal jurisdiction (Graph 29). Notably, while Victoria had a very high average award for sexual harassment, this was not reflected in the other areas of discrimination, with the average for sex, race and age all *below* $10,000.

	Sex	Race	Disability	Age	Sexual Harassment
VIC	$7,475	$3,666	$16,452	$2,000	$52,944
NSW	$15,522	$23,386	$7,884	$8,750	$12,385
QLD	$8,639	$16,677	$7,628	$5,318	$17,124
SA	$4,575	$2,400	$1,291	$0	$30,000
WA	$4,428	$7,250	$3,250	$5,000	$16,333
TAS	$5,500	$13,750	$10,000	$0	$11,170
ACT	$7,500	$40,000	$3,312	$250	$0
NT	$7,500	$12,500	$0	$0	$3,250

Graph 29



I Costs

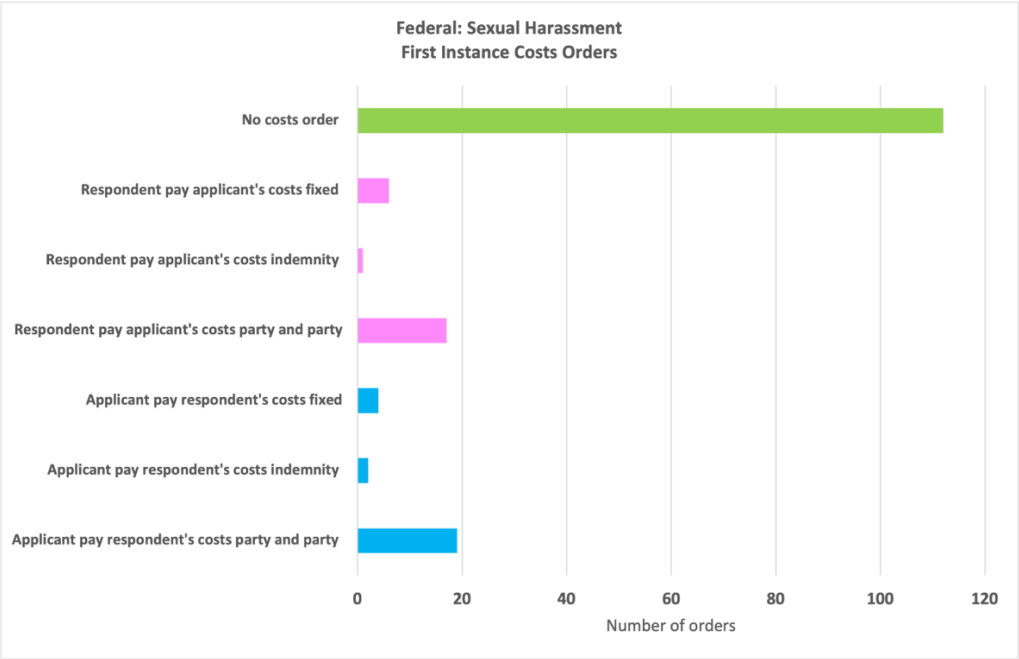
Sexual Harassment

The majority of first instance sexual harassment decisions resulted in no costs order being made (70%). In 15.7% of decisions the applicant was ordered to pay the respondent's costs, while in 15% of decisions the respondent was ordered to pay the applicant's costs (see Graph 30). Most costs orders were made on a party and party basis, with only 3 costs order being made on an indemnity basis.

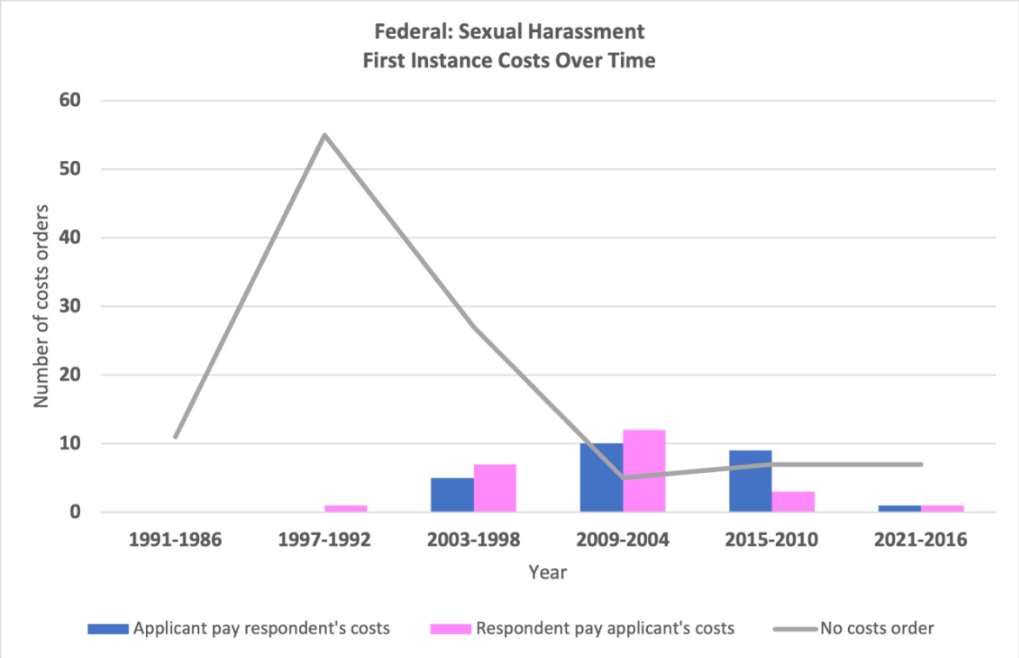
Applicant pay respondent's costs on party and party basis	19
Applicant pay respondent's costs on an indemnity basis	2
Applicant pay respondent's costs on a fixed basis	4
Respondent pay applicant's costs on a party and party basis	17
Respondent pay applicant's costs on an indemnity basis	1
Respondent pay applicant's costs on a fixed basis	6
No costs order	112

There has been a significant change in costs orders over time (see Graph 31). Since 2000, there has been a steady decline in the number of no costs orders and an increase in costs orders being made against both applicants and respondents. Prior to 2000, there were no costs orders made against an applicant at first instance. There were 3 instances where a respondent was ordered to pay costs. 97% of cases resulted in a no costs order. In comparison, from 2001-2021, the applicant has been ordered to pay costs on 25 occasions and the respondent on 21 occasions. Only 35% of cases resulted in a no costs order.

Graph 30

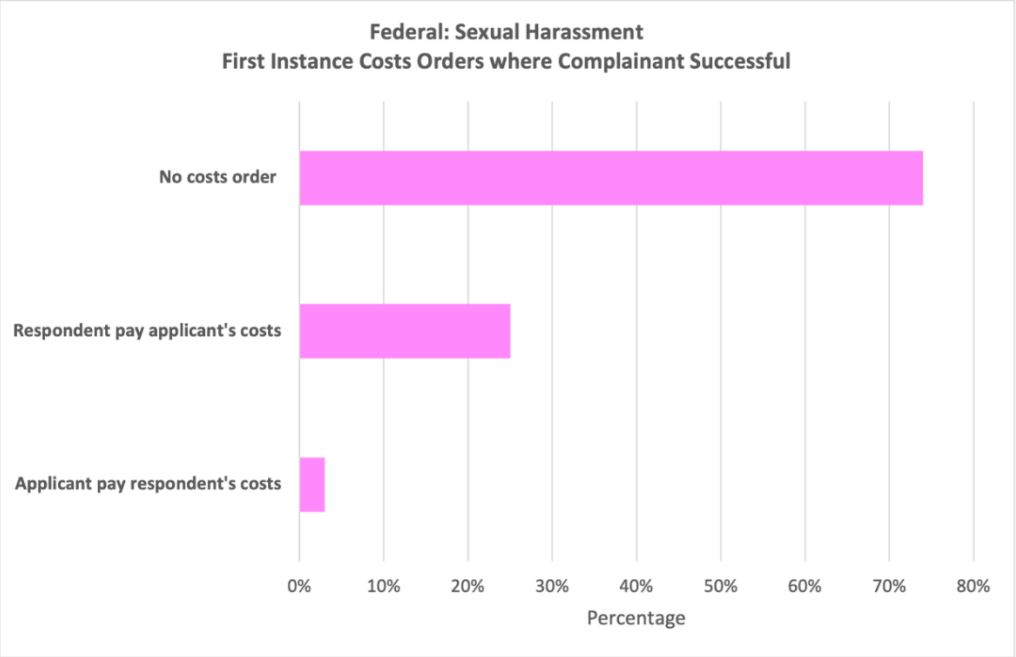


Graph 31

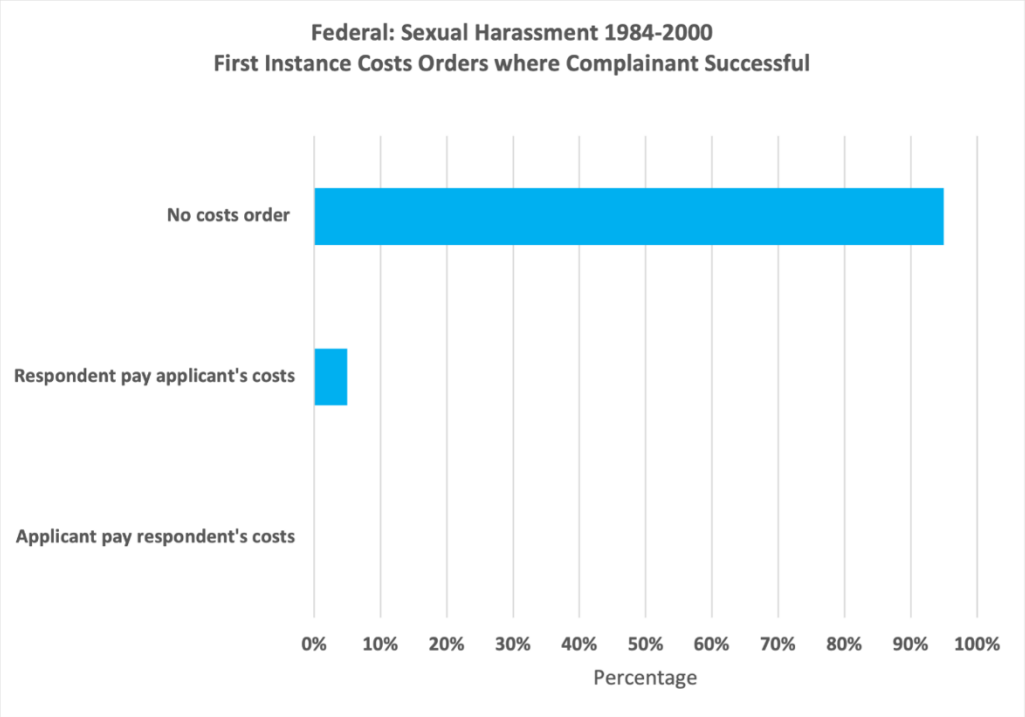


Where an applicant is successful, the most common costs order is a no costs order (74% of the time). 25% of the time the respondent was ordered to pay a successful complainant's costs. 3% of the time a successful complainant had to pay the respondent's costs (see Graph 32). However, there is again a big difference over time. Prior to 2000, the respondent was ordered to pay a successful applicant's costs only 5% of the time. 95% of the time no costs were ordered (see Graph 33). In contrast, from 2001-2021, the respondent has been ordered to pay a successful applicant's costs 67% of the time, with no costs ordered in only 23% of cases (see Graph 34). Concerningly, in 10% of all cases since 2001-2021, a successful applicant has been ordered to pay the respondent's costs.

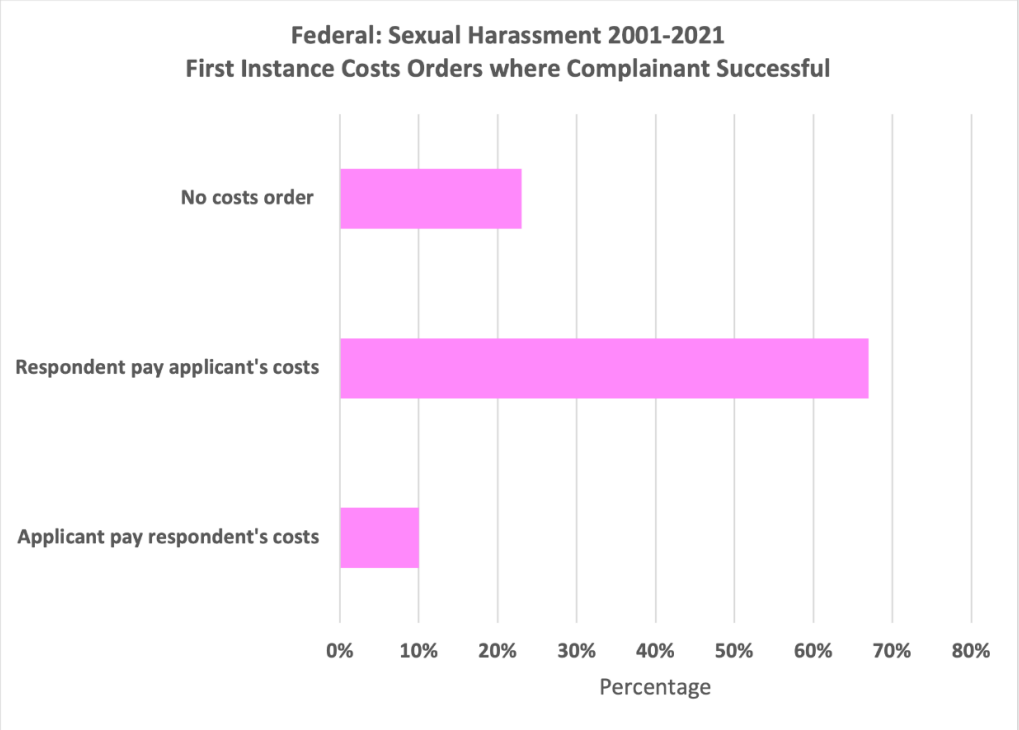
Graph 32



Graph 33

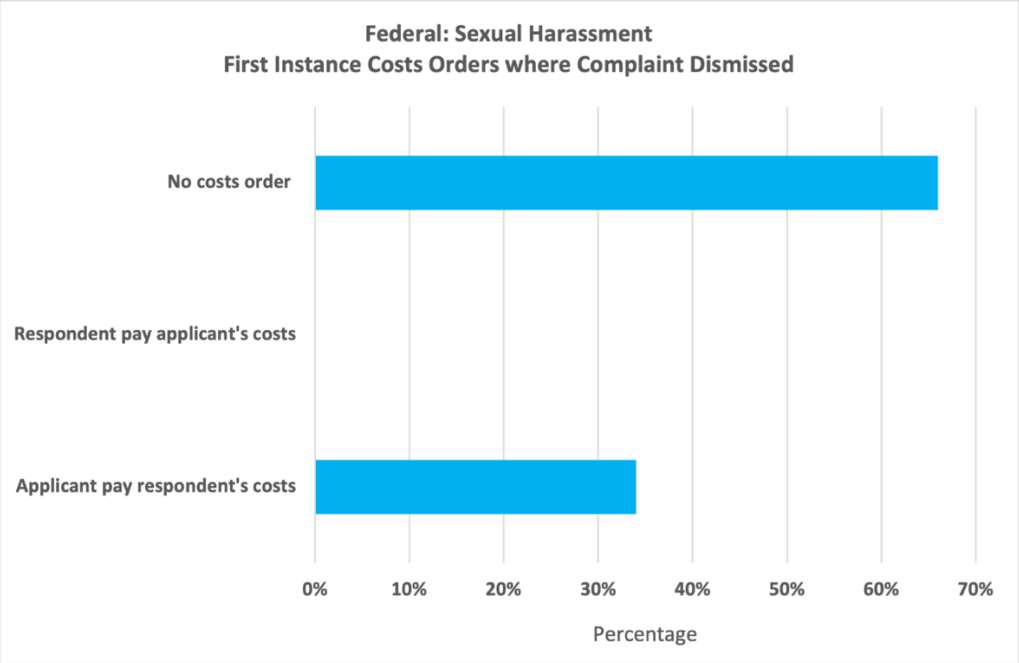


Graph 34

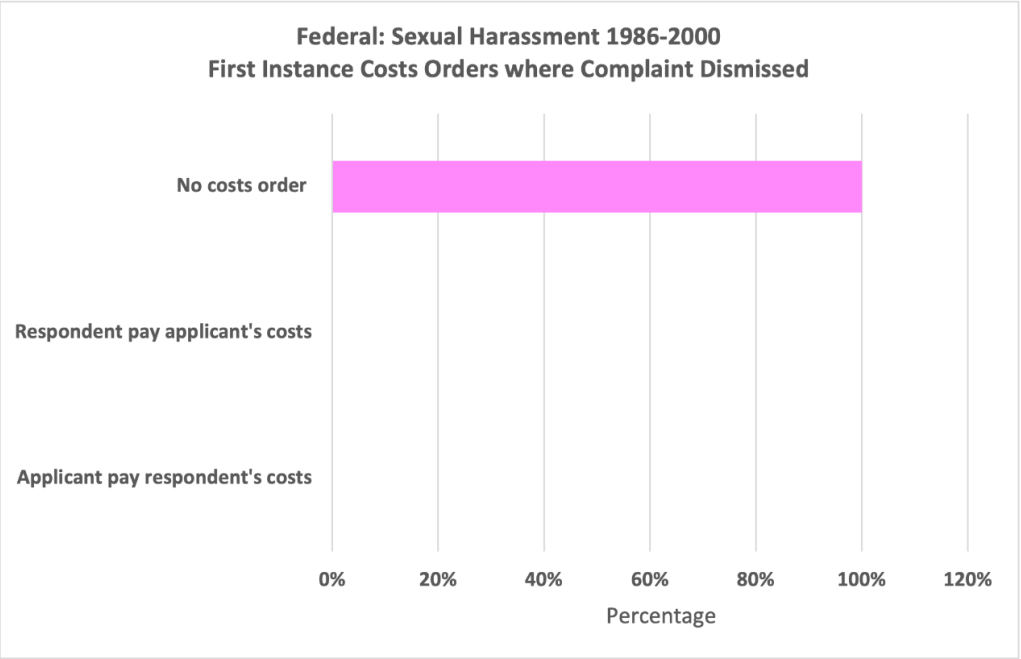


Where an application is dismissed (a complainant is unsuccessful), no costs orders are the most common order (66% of the time). 34% of the time the complainant was ordered to pay the respondent's costs (see Graph 35). This ratio increases over time. Prior to 2000, in 100% of all unsuccessful cases, there was no costs order at first instance (see Graph 36). Since 2001, the unsuccessful applicant has been ordered to pay the respondent's costs 56% of the time. A respondent has never been ordered to pay an unsuccessful applicant's costs (see Graph 37).

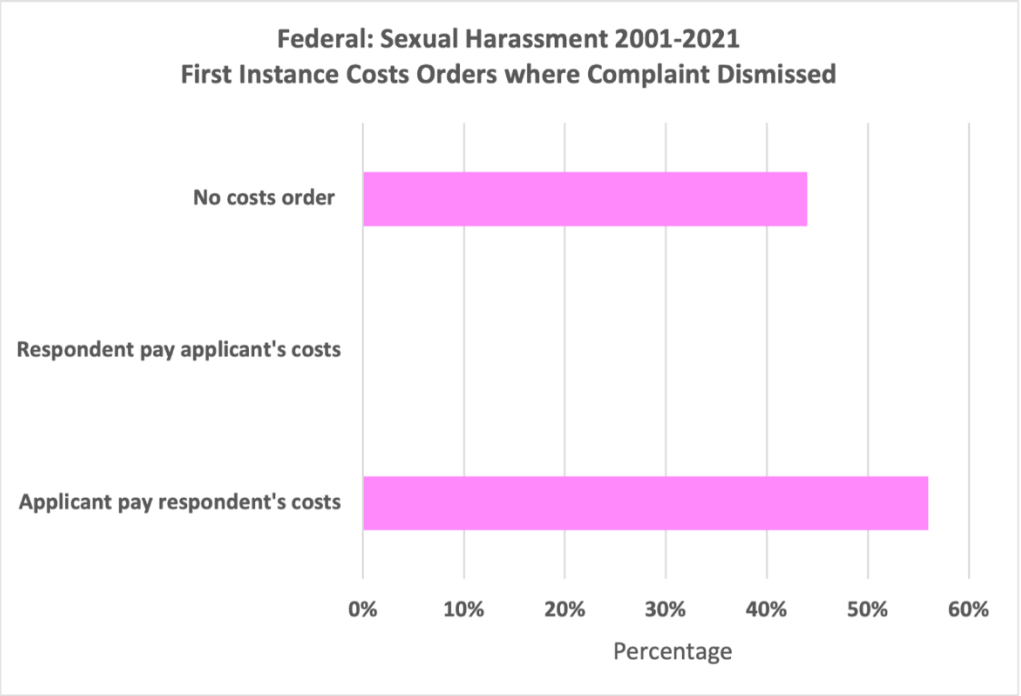
Graph 35



Graph 36



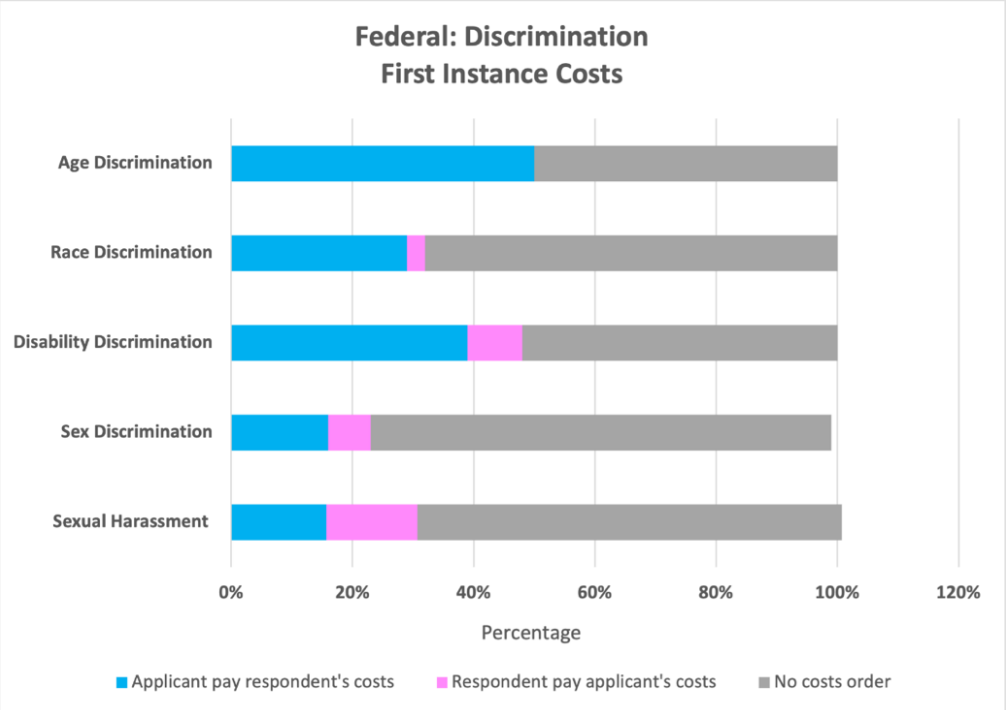
Graph 37



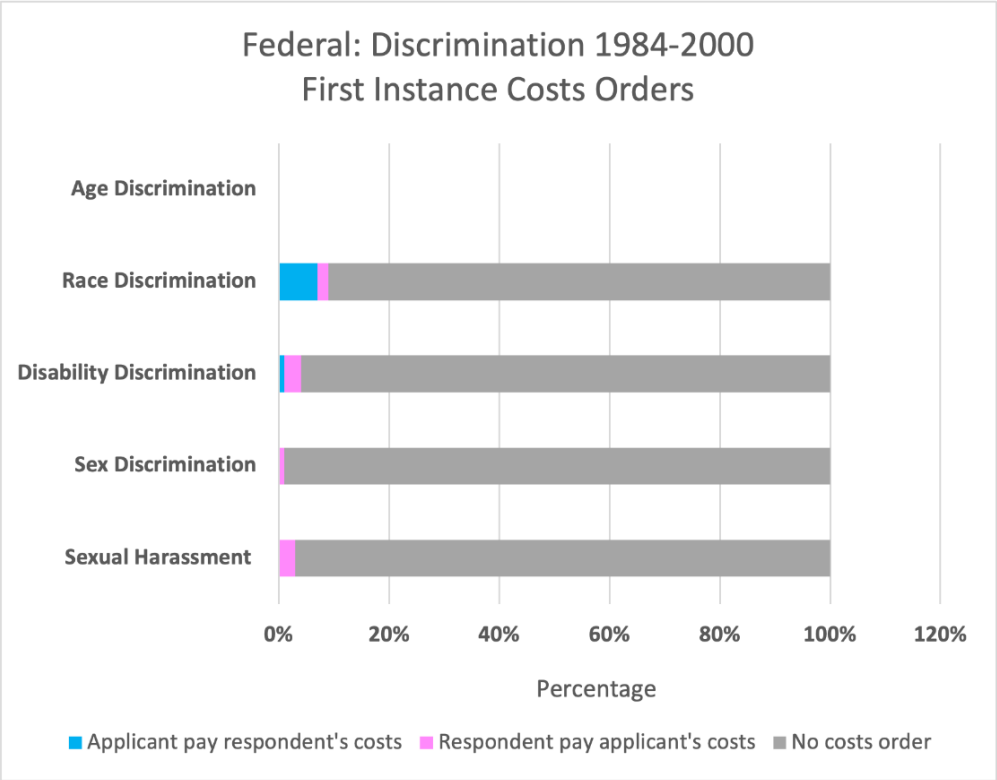
J Costs – Discrimination (Federal)

The same trends can be seen across the other federally protected attributes. Overall, no costs orders are the most common order. However, in disability discrimination and age discrimination, no costs orders are made only 52% and 50% of the time respectively. In disability discrimination, the applicant was ordered to pay costs 39% of the time, while in age discrimination the applicant was ordered to pay costs 50% of the time (noting that there is a very small sample of cases for age discrimination) (see Graph 38). The number of costs orders made against an applicant has increased over time. Prior to 2000, no costs orders were made in over 90% of all cases, with applicants only ordered to pay costs in race (7%) and disability (1%) (see Graph 39). In contrast, since 2001, the applicant has been ordered to pay costs in 52% of sex discrimination cases, 55% of disability discrimination cases, 47% of race discrimination cases and 50% of age discrimination cases (see Graph 40). While costs orders are made against a respondent, they are made less frequently: in 21% of sex discrimination cases, 11% of disability discrimination and just 5% of race discrimination cases. There have been no costs orders made against a respondent in age discrimination to date.

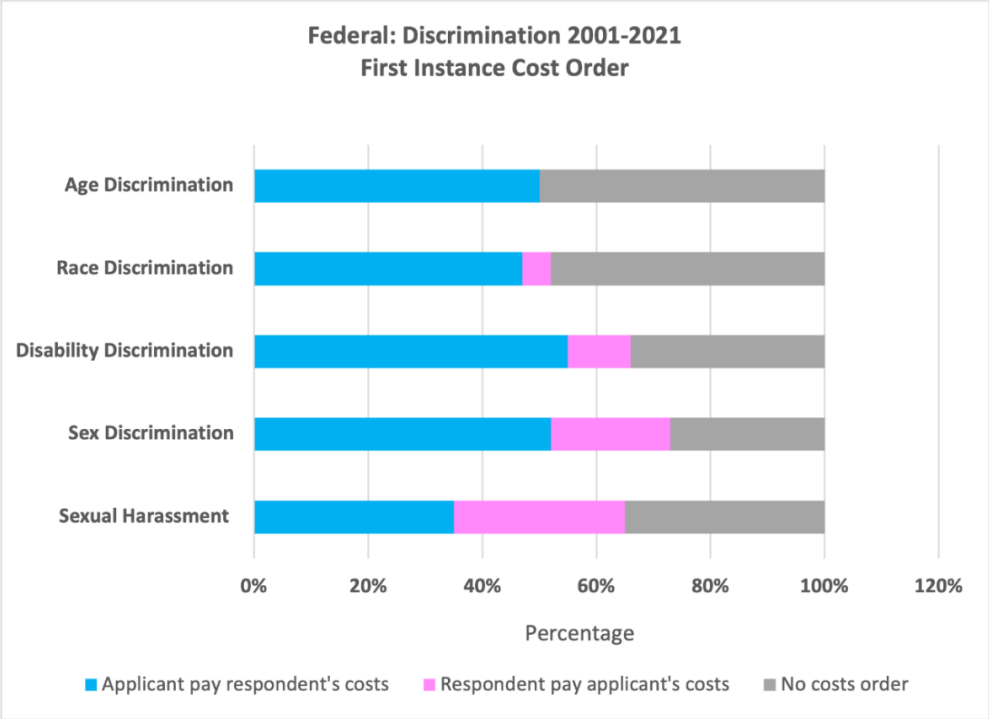
Graph 38



Graph 39



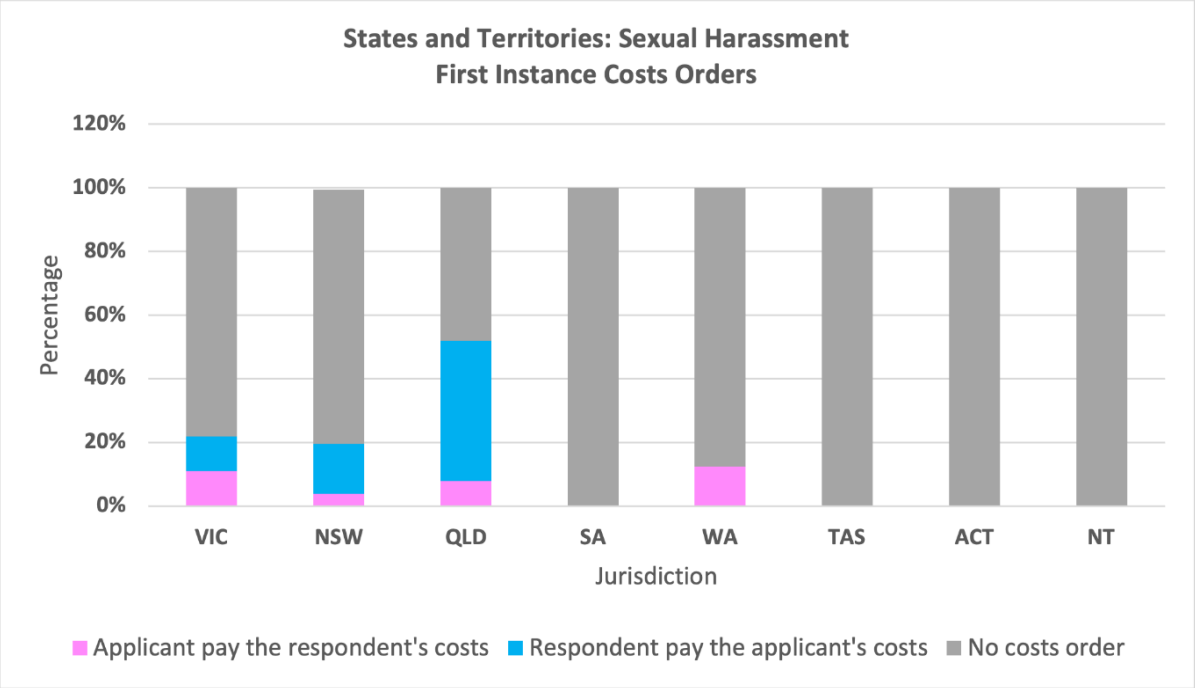
Graph 40



K Costs – Discrimination (States and Territories)

The State and Territory jurisdictions are predominantly no-costs jurisdictions. Consequently, the vast majority of sexual harassment cases resulted in no-costs orders (see Graph 41). In Victoria, 11% of cases the applicant was ordered to pay costs and in 11% of cases the respondent was ordered to pay costs. In NSW, the applicant was ordered to pay costs in 4% of cases, while the respondent was ordered to pay costs in 15% of cases. Queensland was a significant outlier. In 44% of cases the respondent was ordered to pay costs and no costs orders were only made 48% of the time. In contrast, in SA, Tasmania, the ACT and the NT, no costs orders were made against an applicant or a respondent.

Graph 41



L Preliminary Conclusions

As a large proportion of sexual harassment cases do not make it to final hearing, there are some limitations on the conclusions to be drawn from the data. Nonetheless, we offer the following preliminary conclusion – which are then supplement with the qualitative research in Part III.

Damages

At the federal level, damages for sexual harassment have steadily increased, particularly in the last decade. This trend has also been observed in some States, with average damages in Victoria and Queensland significantly higher than those available at the federal level. However, looking at the period from 2016-2021, average damages in all other States and Territories remain below that available at the federal level.

The increase in damages available in sexual harassment has not been reflected in the other federally protected attributes. Damages awards for sex, race, age and disability are far lower than those available for sexual harassment and have not seen large increases over time. This is also reflected at the State and Territory level, where damages for the other federally protected attributes are far lower than those available at the federal level.

While the quantum of damages available for sexual harassment has increased at the federal level, this has not resulted in an increase in the number of cases. In fact, the number of cases is *decreasing* steadily. In turn, the percentage of cases resulting in an award of damages is also decreasing. As a result, while it is now more likely that a complainant will receive a higher award of damages, it is also more likely (statistically) that a complainant will be unsuccessful. It is worth noting at this point that data cannot tell the full story. It may well be the case that the vast majority of meritorious claims settle prior to a final hearing, given that cases can be protracted and complainants prefer to avoid lengthy, public and costly litigation. This is particularly the case given the requirement for complainants to engage in conciliation through the AHRC prior to litigation, and the jurisdiction's emphasis on alternative dispute resolution.

Costs

Prior to 2000, complainants could bring sexual harassment complaints to the Human Rights and Equal Opportunity Commission, which was a no-costs jurisdiction. The hearing of complaints by HREOC ceased at the end of 2000 following a High Court challenge to its constitutionality. Since 2000, complainants have had to bring sexual harassment complaints through the federal courts. As a result, costs orders at the federal level have increased considerably. In the past decade, costs orders have been made against 56% of unsuccessful complainants. Concerningly, 10% of *successful* complainants were also ordered to pay the respondent's costs. As a result, at the federal level, despite the increase in damages available, it remains the case that a complainantbears a significant risk in commencing litigation.

The States and Territories were largely more complainant friendly, with no costs order predominant. However, it is worth noting that while no costs orders might assist a complainant, they still have to bear their own (potentially significant) costs of bringing a claim.If the damages available are limited, this may well not be enough to compensate a complainant,not only for the harm caused but also for their own costs. As a result, despite the benefit of a no-costs jurisdiction, a complainant (other than potentially in Victoria and Queensland) has to consider the prospect that it may cost them more to enforce their rights than they will receive in damages.

M Analysis of Judicial Reasoning

The most recent decision to substantively consider the quantification of damages at the Federal level was *Hill v Hughes* and the subsequent appeal.[2] On appeal, Perram J asked the question 'What is the ruin of a person's quality of life worth?'[3] This section will briefly canvass some of the attempts by courts and tribunals to 'put a price' on a person's hurt, humiliation, pain and suffering as a result of sexual harassment, with reference to general damages and aggravated damages.

General damages

Prior to the decision in *Richardson v Oracle,* high awards of damages were generally only available for sexual harassment that involved serious physical harm, such as sexual assault or rape, or sexual harassment that caused serious medical harm to a complainant. Damages awarded in sexual harassment cases that were deemed 'less serious' were generally subject to the accepted 'range' of damages for hurt and humiliation of between $7,500 and $20,000.[4]

In *Lee v Smith,* the applicant experienced serious physical sexual harassment, including rape. Federal Magistrate Connolly found that the applicant had suffered 'very significant pain, suffering, hurt and humiliation' for the preceding five or six years as a result of the sexual harassment. This included being unable to work, unable to maintain a relationship, impaired social functioning with her son and other members of her family, fear and suicidal thoughts. Ms Lee was awarded $100,000 in general damages.

In *Ewin v Vergara*, the sexual harassment experienced by Ms Ewin was similarly severe: the court found that Mr Vergara engaged in unwelcome sexual conduct with Ms Ewin including sexual intercourse and kissing, touching and stroking her naked body.[5] Justice Bromberg considered that the conduct alleged was 'very serious' and as a result 'a high degree of moral opprobrium' should attach to it.[6] Additionally, Ms Ewin had suffered 'severe' psychological injuries, that had endured over three years and were likely to continue.[7] Ms Ewin was awarded $110,000 in general damages.

In *Poniatowska v Hickinbotham,* the applicant was subject to numerous incidents of sexual harassment including receiving multiple emails and text messages from a colleague asking her to begin a sexual relationship with him and being sent a graphic text message depicting a woman giving a man oral sex. The Federal Court found that as a result of the sexual harassment, Ms Poniatowska had developed severe depression, anxiety and an adjustment disorder.[8] Citing the 'years of quite considerable personal distress and unhappiness' caused by Ms Poniatowska's underlying psychiatric condition, the Federal Court considered it was appropriate to award a 'not insignificant award of damages.' Ms Poniatowska was awarded

[2] *Hill v Hughes t/as Beesley and Hughes Lawyers* [2019] FCCA 1267; *Hughes t/as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126.
[3] *Hughes t/as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126, [47].
[4] See for example *Shiels v James & Lipman* [2000] FMCA 2; *Johanson v Michael Blackledge Meats* (2001) 163 FLR 58.
[5] *Ewin v Vergara (No 3)* [2013] FCA 1311, [445].
[6] Ibid [460].
[7] Ibid [652].
[8] *Poniatowska v Hickinbotham* [2009] FCA 680, [349]-[350].

$90,000 in general damages.[9]

Where sexual harassment did not involve impliedly more 'serious' physical conduct, general damages were far lower. For example, in *Noble v Baldwin,* the applicant experienced sexual harassment over a period of five years including the respondent frequently looking at her breasts, brushing past her breasts on multiple occasions and remarking that he 'enjoyed females based on the size of their breasts.'[10] However, Barnes FM found that this conduct was at the 'lower end of the range' for sexual harassment and 'except for the regular looking at Ms Noble's breasts, [the sexual harassment was] relatively few and isolated instances.'[11] Ms Noble was awarded $2,000 in general damages.

The case of *Richardson v Oracle* in 2014 substantially changed the approach to quantifying general damages. An employee at Oracle, Rebecca Richardson was subject to a 'constant barrage of sexual harassment', including a series of slurs and sexual advances.[12] Importantly, for the purposes of this discussion, the conduct *did not* include any physical harassment.

At first instance, Buchanan J found that the sexual harassment had caused Ms Richardson significant physical and psychological harm, including a change in demeanour and physical condition, stress and anxiety.[13] However, Buchanan J assessed damages with reference to the 'range' of general damages available in sexual harassment cases.[14] He distinguished the harassment experienced by Ms Richardson to that in *Ponitowska* and *Lee* because while 'cruel and calculated' it did not have the requisite physical element for the higher range of damages to apply and the psychological damage experienced by Ms Richardson was not 'debilitating' as it did not prevent her from working or pursuing her career.[15] Richardson was awarded $18,000 in general damages at first instance.[16]

Richardson successfully appealed.[17] In a leading judgment, Justice Kenny rejected the court's reliance on the previous 'range' of general damages available in sexual harassment cases. Conducting an analysis of awards for personal injury and workplace bullying, Kenny J found that the 'Court has in the past apparently placed a greater value on the loss of enjoyment of life outside the anti-discrimination legislation field than in it.'[18] As a result, Kenny J concluded that the 'range' was now out of step with prevailing community standards which now had a 'deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct.'[19] Justice Kenny found that the award of $18,000 was manifestly inadequate and instead awarded Ms Richardson $100,000 in general damages.

The decision in *Hill v Hughes* endorsed the 'community expectations' approach in *Richardson.*[20] Ms Hill had been subject to "relentless" sexual harassment by Hughes that was

[9] Ibid [353].
[10] *Noble v Baldwin & Anor* [2011] FMCA 283, [320].
[11] Ibid [343]-[344].
[12] *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102, [13].
[13] Ibid [209].
[14] Ibid [242]-[243].
[15] Ibid [244].
[16] Ibid [246]; [243].
[17] *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.
[18] Ibid [104].
[19] Ibid.
[20] *Hill v Hughes* [2019] FCCA 1267.

'unwarranted, persistent and threatening' including coerced hugs, being bombarded with emails proposing she have a sexual relationship with him, entering her bedroom wearing only his underwear and the making of threats against her employment if she did not commence a relationship with him.[21]

Judge Vasta held that that community expectations of the monetary value of the loss occasioned by sexual harassment had changed over time and that '[t]here is an acceptance and an understanding of the pernicious nature of sexual harassment.'[22] Judge Vasta went further to say that he was of the view that 'any authority prior to *Oracle* is not going to be of assistance' and that the case had 'recalibrated the assessment of damages in sexual harassment cases.'[23] However, his Honour rejected the idea that assessing damages should be done by way of a 'serious of comparisons' with the facts in *Richardson.* Judge Vasta affirmed that the approach to quantifying general damages is not a 'formulaic mathematical formula'.[24]

Judge Vasta found that Ms Hill suffered a psychiatric injury of an adjustment disorder with mixed anxiety and depressive mood and that the injury had 'significantly and adversely impacted' on the applicant's general enjoyment of life.[25] Ms Hill was awarded $120,000 in general damages. Judge Vasta's treatment of *Richardson* was endorsed by the Full Federal Court on appeal. For a discussion on that decision, see below under 'Aggravated Damages'.

Community expectations have also been endorsed in the State and Territory jurisdictions. In particular, Victoria has had a number of cases with significant awards for general damages. In *Collins v Smith,* the applicant was subject to 'persistent and unwelcome' sexual harassment over a four-month period including physical conduct, being propositioned for sex and threatening comments.[26] The applicant developed PTSD, major depressive disorder and an anxiety disorder as a result of the harassment.[27] She was unable to work.[28] Jenkins J endorsed *Richardson v Oracle,* describing that case as 'a significant milestone in the articulation of the proper approach to the assessment of damages in the context of sexual harassment cases'.[29] Collins was awarded $180,000 in general damages.[30]

Similarly, in the decision of *Kerkofs v Abdallah,* the 20-year-old complainant developed PTSD, anxiety and impairment of her capacity to function in daily life as a result of sexual harassment, which included the respondent massaging, kissing and touching her breasts.[31] Judge Harbison emphasised that the legislation was 'designed to enforce community standards' and that general damages 'must reflect the need to eliminate sexual harassment to the greatest extent possible in the workplace and encourage the identification and elimination of sexual harassment generally.'[32] Kerkofs was awarded $130,000 in general damages.

The most recent decision in the Victorian jurisdiction is *ZBL v Olivo.* In that case, the applicant

[21] Ibid [241]-[244].
[22] Ibid [234].
[23] Ibid.
[24] Ibid [238].
[25] Ibid [229]-[230].
[26] *Collins v Smith (Human Rights)* [2015] VCAT 1029 [3]-[4].
[27] Ibid [176].
[28] Ibid.
[29] Ibid [133].
[30] Ibid [181].
[31] *Kerkofs v Abdullah (Human Rights)* [2019] VCAT 259.
[32] Ibid [256]; [262].

was drugged and then sexually penetrated without her consent while semi-conscious. The VCAT emphasised that damages under the *Equal Opportunity Act* are 'entirely compensatory' and are designed to 'measure, in monetary terms, the loss, damage and injury' caused by the sexual harassment.[33] *ZBL* endorsed the approach in *Richardson* that 'prevailing community standards should result in a significant award of damages.'[34] The VCAT summarised the importance of *Richardson* as follows:

> *(a) It recognises that community attitudes regarding the impact of sexual harassment has changed, in particular, that the adverse consequences of sexual harassment can extend to loss of employment and career; severe psychological illness; and relationship breakdown;*
>
> *(b) When determining compensation there is no basis for treating differently the consequences of sexual harassment on the one hand and workplace bullying on the other;*
>
> *(c) Substantial compensation for sexual harassment is not dependent upon demonstrable incapacity where the evidence otherwise demonstrates a substantial impact upon enjoyment of life;*
>
> *(d) Provided there is a sufficient connection between an employee's departure from a particular employer and the unlawful conduct, including how the employer deals with that conduct, a court is likely to award compensation for any resulting economic loss; and*
>
> *(e) The principles applied to sexual discrimination may be equally extended to other forms of discrimination.*[35]

The VCAT considered that in comparison to the facts in *Richardson*, this case was 'far more egregious' and the damages awarded 'must reflect the consequent adverse impact upon the Applicant.'[36] The Applicant was awarded $120,000 in general damages.

Prior to 2021, Queensland had largely refused to follow the decision in *Richardson* on the basis that as a jurisdiction it should maintain consistency with its own decisions, rather than be guided by the Federal jurisdiction.[37] However, the recent decision of the Industrial Court of Queensland in *Golding v Sippel Laundry Chute* saw an endorsement of the higher awards of damages available for sexual harassment following *Richardson.*

The applicant, Ms Golding, was particularly vulnerable. Notably, she was a single mother of 4 school-aged children and bore the sole financial responsibility for providing for them, she had experienced domestic violence in her marriage and she spoke English as a second language.[38] Ms Golding was subject to escalating sexual harassment, including inappropriate touching of her bottom, genitals and inside leg, repeated demands for sex in exchange for her job, and

[33] *ZBL v Olivo* (Human Rights) (Corrected) [2021] VCAT 850 at [51].
[34] Ibid [54].
[35] Ibid [55].
[36] Ibid [60].
[37] See for example *STU v JKL (Qld) Pty Ltd* [2016] QCAT 505; *Green v Queensland* [2017] QCAT 8.
[38] *Golding v Sippel and The Laundry Chute Pty Ltd* [2021] QIRC 74, [1]-[4].

circumstances where Ms Golding was denied work for refusing the respondent's advances.[39]

At first instance, the Queensland Industrial Relations Commission (**QIRC**) considered that *Richardson* and *Hughes* were 'valuable touchstones for assessing prevailing community standards' with respect to the value of damages for sexual harassment.[40] However, McClennan IC considered that the while Ms Golding had suffered a psychological injury and was humiliated and intimidated by the conduct, her losses were not of the 'highest levels of severity' and her 'personal resilience seems to have aided her in avoiding or resisting many of the harsher effects' of the conduct.[41] McClennan IC awarded Ms Golding general damages of $30,000.

Ms Golding appealed. The Industrial Court of Queensland found that the sexual harassment experienced by Ms Golding was "extremely serious".[42] The Industrial Court emphasised that Ms Golding was "tormented" over a period of 14 months and the significant power imbalance between the Appellant and the Respondent meant that Ms Golding had little choice but to put up with the behaviour because of her financial circumstances.[43] As Davis J pointed out, 'on every day she appeared for work, she knew the prospect was that she would be humiliated and demeaned sexually' by the respondent.[44] The Industrial Court substituted the original award for an award of $130,000 constituting general and aggravated damages.[45]

The higher quantum of damages post-*Richardson* has not been endorsed in all jurisdictions. In South Australia we identified just one successful sexual harassment case, *Evans v Ikkos Holdings.* In that case, the complainant was subject to non-consensual physical touching.[46] She developed depression, anxiety and trauma as a result of the sexual harassment.[47] However, Farrel J rejected a claim for $150,000 general damages as 'excessive' and found that the sexual harassment was 'not of the most serious kind'.[48] Evans was awarded $30,000 in general damages.

Further, it is clear that higher damages as a result of 'community expectations' remain tied to being able to establish significant physical or psychological harm. For example, in *McGuire v Reyes t/as The Entrance Lakehouse*, the NSWCATAD said that the lack of any specialist or medical reports provided by the complainant meant it was unable to conclude that the sexual harassment had led to a relapse of her mental illness.[49] Ms McGuire was awarded $6,000 in general damages.

<u>Aggravated damages</u>

Aggravated damages may be awarded where a respondent's conduct following a complaint of sexual harassment, or during the course of litigation, exacerbates the pain and suffering of the complainant.

[39] Ibid [155].
[40] Ibid [261].
[41] Ibid [288].
[42] *Golding v Sippel and The Laundry Chute Pty Ltd* [2021] ICQ 14, [52].
[43] Ibid.
[44] Ibid.
[45] Ibid [53].
[46] *Evans v Ikkos Holdings Pty Ltd* [2019] SAET 222 at [139]-[140].
[47] Ibid.
[48] Ibid [159].
[49] *McGuire v Reyes t/as The Entrance Lakehouse* [2017] NSWCATAD 50, [58]-[59].

In the *Hughes v Hill* appeal, the Full Court of the Federal Court considered extensively the role of aggravated damages. At first instance, Judge Vasta had awarded $30,000 in aggravated damages for the respondent's 'outrageous' behaviour during the course of the trial, including using confidential information against Hill in cross examination, attempting to silence, bully and blacken her name, and attempt to blame the complainant for 'encouraging' the sexual harassment by behaving 'coquettishly'.[50] As Judge Vasta emphatically stated, 'it is the mark of a bygone era where women, by their mere presence, were responsible for the reprehensible behaviour of men. The *Sex Discrimination Act* was enacted to help eliminate this sort of thinking.'[51]

On appeal, the Full Federal Court considered that whether aggravated damages should be awarded was determined by whether the complainant's injury has been 'heightened' by the ways in which the Respondent attempted to dissuade her from complaining and the way he subsequently conducted his defence. As Perram J stated, "to say that his conduct during the trial is reprehensible would be an understatement.'[52] The Full Court of the Federal Court upheld the trial judge's assessment of aggravated damages:

> *To have suffered the Appellant's sexual harassment in the first instance was psychologically damaging to the Respondent. To deal thereafter with his menacing behaviour, as her employer, must have been a terrible experience for a woman in her position. To have suffered the final indignity of watching the Appellant divulge her confidential information in his own defence, in gross dereliction of his professional duty, can only have made her realise that she was in the ring with a disturbed, self-centred and venomous man. He had threatened that he knew how to 'fight the good fight' and he carried that threat out even to the extent of conduct which must surely soon end, if it has not already ended, his career as a lawyer.*[53]

Similarly, in *Kerkofs v Abduallah*, the complainant was awarded $20,000 in aggravated damages due to the second respondent engaging in lines of cross examination that were inappropriate.[54]

In *ZBL*, the VCAT considered that there were other aggravating features other than the respondent's conduct during the proceedings that warranted a further award.[55] These included the respondent telling the applicant not to tell anyone what had happened, that the respondent was in a position of authority over the applicant as head waiter, that the applicant was dependent on the respondent for her employment income and 'most seriously' that the respondent spiked the applicant's drink which rendered her 'incapable of making a conscious and voluntary decision and made her vulnerable to sexual assault.'[56] The VCAT awarded a sum of $12,000 in aggravated damages.

Aggravated damages are not meant to be punitive. In *Wotton v Queensland (No 5),*[57] the Federal Court held that it did not have the power to award exemplary damages as the *AHRCA* was 'not a regime designed to punish, or confer any deterrent or punitive functions on a court by its

[50] *Hill v Hughes t/as Beesley and Hughes Lawyers* [2019] FCCA 1267 [254]-[272].
[51] Ibid [270].
[52] Hughes t/as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, [47].
[53] Ibid [63].
[54] *Kerkofs v Abdullah (Human Rights)* [2019] VCAT 259, [275].
[55] ZBL v Olivo (Human Rights) (Corrected) [2021] VCAT 850 [75]-[79].
[56] Ibid [78].
[57] [2016] FCA 1457.

orders.'[58] Notably, though, in *Ewin v Vergara*, which preceded *Wotton*, and in which exemplary damages were not awarded, Bromberg J held that compensatory damages awarded to Ms Ewin were nonetheless adequate to 'punish Mr Vergara for the entirety of his unlawful conduct and to *deter him and others from engaging in similar conduct*.'[59]

N Defamation

Methodology

The researchers undertook a comparative analysis of damages for non-economic loss in defamation. The researchers decided to confine this analysis to cases where damages were awarded in the previous five years (2016-2021). This is because our interest in this regard is not the development of defamation damages over time, but the current practice,and how this compares to current awards in sexual harassment. A total of 91 cases were analysed across the federal and State jurisdictions. The researchers did not find any cases in the previous five years in the ACT or NT that resulted in damages being awarded. Only judgments resulting in an award of damages for non-economic loss were considered.

The Australasian Legal Information Institute (*AustLII)* was used to source the cases. AustLII is imperfect and is not a complete collection of all court and tribunal decisions. However, this does not undermine the efficacy of the data collected.

Results

Average awards of damages for non-economic loss were exponentially higher across all jurisdictions than those awarded for sexual harassment (see Graph 42). Federally, the average award for non-economic loss for defamation was **$239,856.** This is, $179,356 more or nearly four times higher than the average award in the same five-year period for sexual harassment.

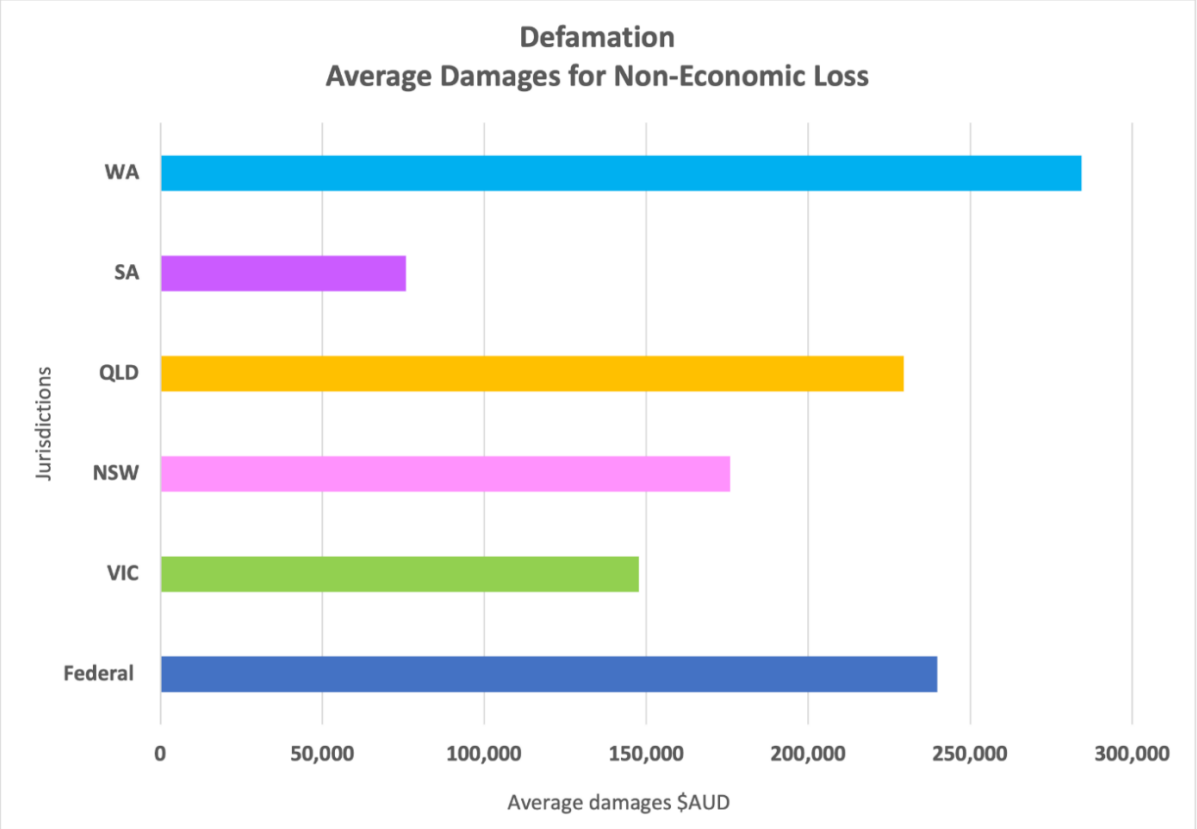
In the State jurisdictions, damages were the highest in WA, where the average award was $284,417. In the past five years in WA, there has not been a successful sexual harassment case. It is also worth noting that in WA, damages for discrimination remain capped at $40,000. SA was the only jurisdiction with average damages *below* $100,000, with the average award being $75,725. Both NSW and QLD had average awards above $150,000. Victoria was the only jurisdiction where average awards for sexual harassment and defamation were comparable. The average award for non-economic loss for defamation in Victoria was $147,718, while the average award for non-economic loss for sexual harassment in the same period was $125,000.

Jurisdiction	Number of cases	Average Non-Economic Loss
Federal	13	$239,856
NSW	27	$175,827
VIC	22	$147,718

[58] Ibid [1788].
[59] *Ewin v Vergara (No 3)* [2013] FCA 1311, [684].

QLD	4	$229,423
WA	4	$284,417
SA	11	$75,725

Graph 42



Part II: Polling

The 2014 leading Full Federal Court decision of *Richa*rdson v Oracle Corporation [2014] FCAFC 82 (15 July 2014) saw the range of general damages available for sexual harassment raised from $12,000-$20,000 to $100,000 and above. Justice Kenny, in the primary judgment, held that the prior range of general damages was out of step with prevailing community standards. The Full Court held that damages awarded in sexual harassment cases should instead reflect the community's "deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct."[60] The decision in Richardson has had an ongoing impact on the assessment of damages in both sexual harassment and broader discrimination cases. In addition, the #MeToo movement, beginning in October 2017, sparked a global recognition of the endemic and pervasive nature of sexual harassment.

Since the advent of #MeToo there has been a growing awareness in the community of the need to address sexual harassment. #MeToo emphatically demonstrated that sexual harassment is not simply a legal issue but rather is endemic, culturally and socially. The challenges posed by sexual harassment go beyond individual complainants, lawyers and the courts. However, conversely, this means finding the solutions to current issues within our legal system must necessarily be informed by social and cultural expectations and understandings of sexual harassment.

However, there is a lack of robust evidence available to understand community expectations around sexual harassment and how this might inform judicial decision-making in this area. As a result, we decided to conduct a poll to gain insight into what community standards and attitudes towards sexual harassment, damages and costs might in fact mean for members of the Australian public.

A Methodology

Polling was conducted by Australian Polling Council Accredited Agency Essential Research, with data provided by Qualtrics. The polling formed part of Essential's fortnightly omnibus survey, which asks participants a series of questions on topical issues. The target population is all Australian residents aged 18+. Participants were invited to participate and completed the survey online without an interviewerpresent and incentives were offered for participation. The survey was conducted online from 20th to 24th of January 2022. There were 1,062 respondents.

Quotas are applied to be representative of the target population by age, gender and location. RIM weighting is applied to the data using information sourced from the Australian Bureau of Statistics (ABS) and the Australian Electoral Commission (AEC). The factors used in the weighting are age, gender and location. The weighting efficiency applied to the results at a national level is 94%, which gives an effective sample size of 1,001. The maximal marginof error at this effective sample size is ±3.1% (95% confidence level). Note that due to rounding, not all tables necessarily total 100% and subtotals may also vary.

Participants were asked 7 questions about sexual harassment and litigation. Participants were asked about perceptions of severity, quantum of damages and the role of costs in litigation. Prior to being asked the first question, respondents were given the following description of

[60] *Richardson v Oracle Corporation* [2014] FCAFC 82, [104].

sexual harassment:

> *Sexual harassment in the workplace includes unwelcome sexual advances, unwelcome requests for sexual favours or other unwelcome conduct of a sexual nature made against an employee. Employers have an obligation to ensure that a workplace is safeand free from harassment.*

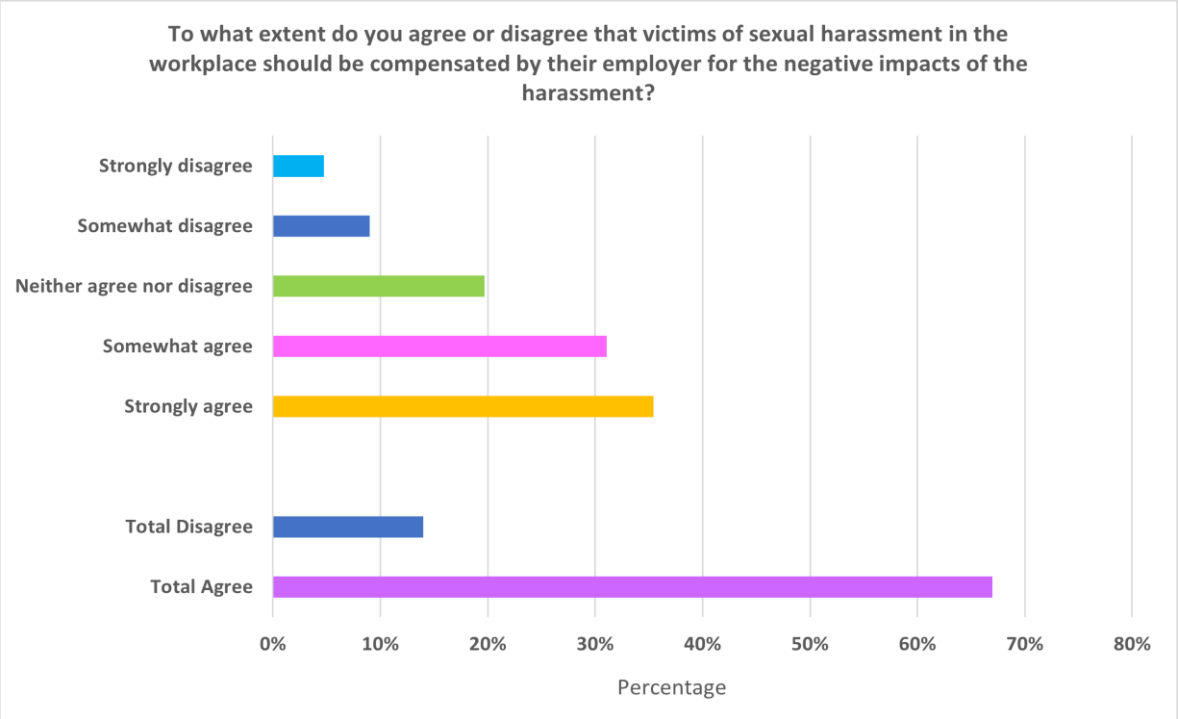
Results

B Question One: Compensation for Sexual Harassment Complaints

To what extent do you agree or disagree that victims of sexual harassment in the workplace should be compensated by their employer for the negative impacts of the harassment?

67% of participants agreed that targets of sexual harassment should be compensated by their employer. 35% strongly agreed while 31% somewhat agreed. 14% of participants disagreed that employers should compensate targets of sexual harassment (Graph 43).

Graph 43

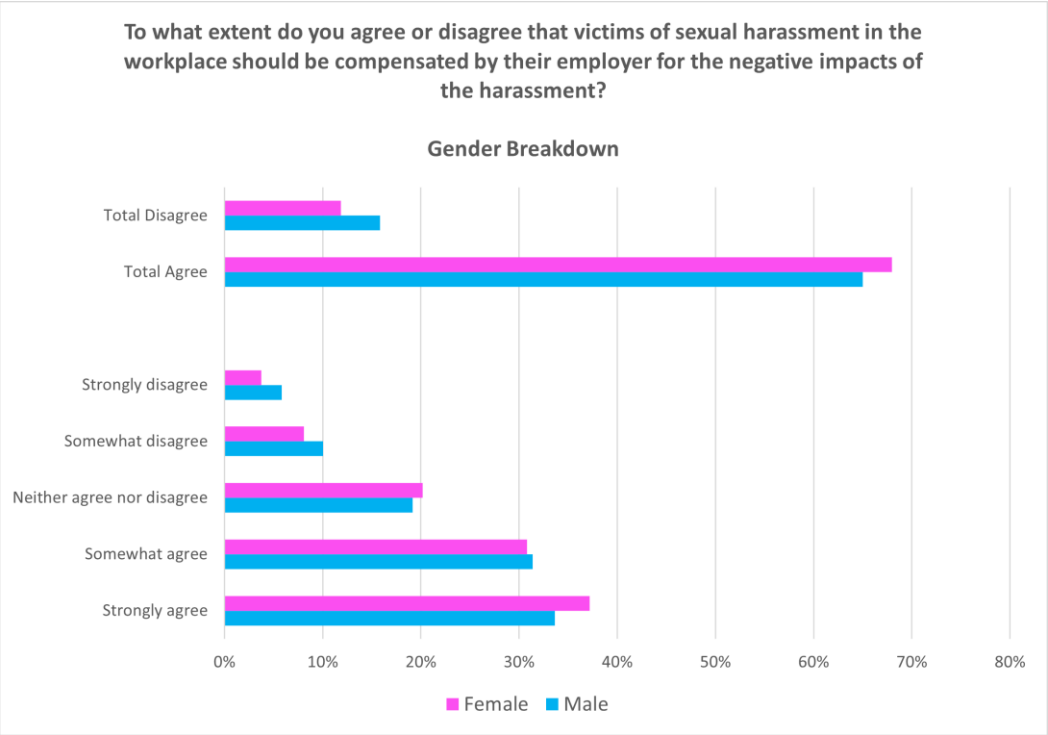


Men were more likely than women to disagree with the statement: 16% recorded for males versus 12% recorded for females. However, age played an important role in the gender breakdown. Only 13% of men aged 18-34 disagreed with the statement, with only 3% strongly disagreeing. In comparison, 22% of men aged 55+ disagreed with 9% strongly disagreeing (see Graph 44).

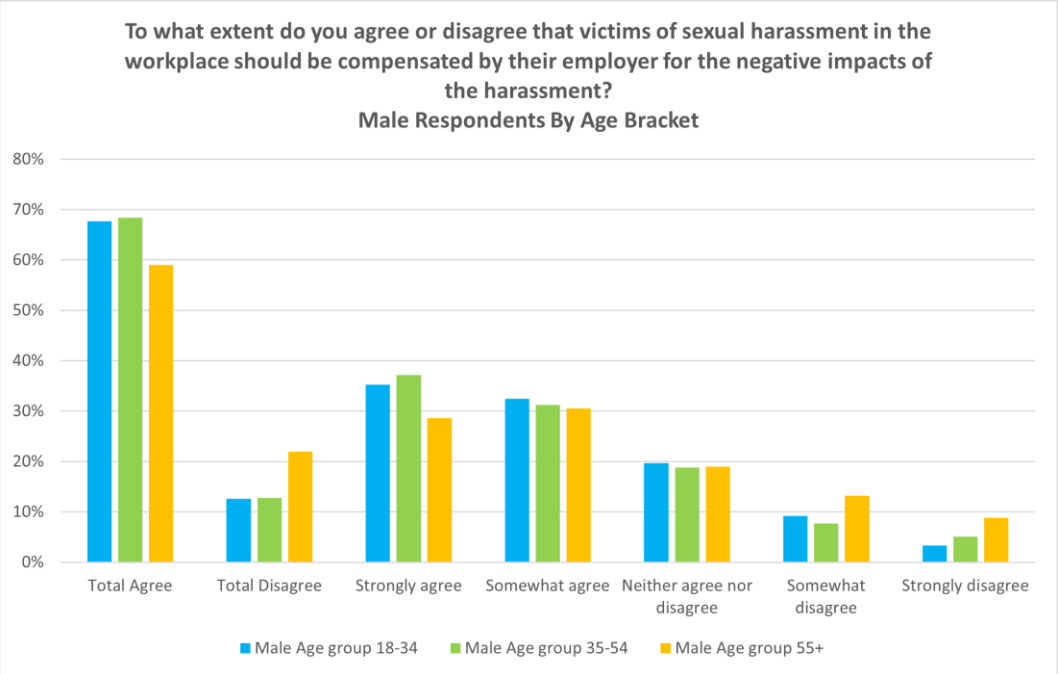
Women aged 18-34 were most likely to agree with the statement (72% of respondents in this age bracket), with 43% strongly agreeing. Women aged over 55+ were slightly less likely to agree (65% agree, 33% strongly agree) (see Graph 46). Men aged 18-34 were more likely to

agree with the statement than men aged 55+ (68% male respondents aged 18-34 versus 59% male respondents 55+). In particular, 35% of men aged 18-34 strongly agreed with the statement compared with 29% of men aged 55+ (see Graph 45).

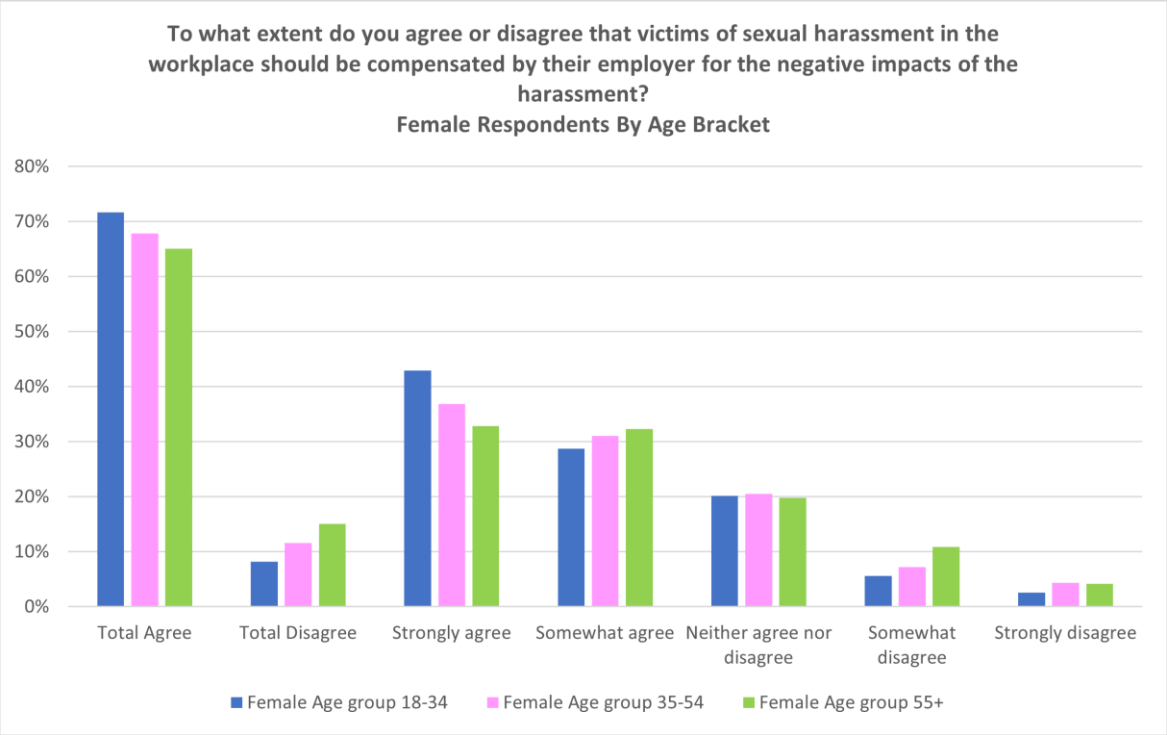
Graph 44



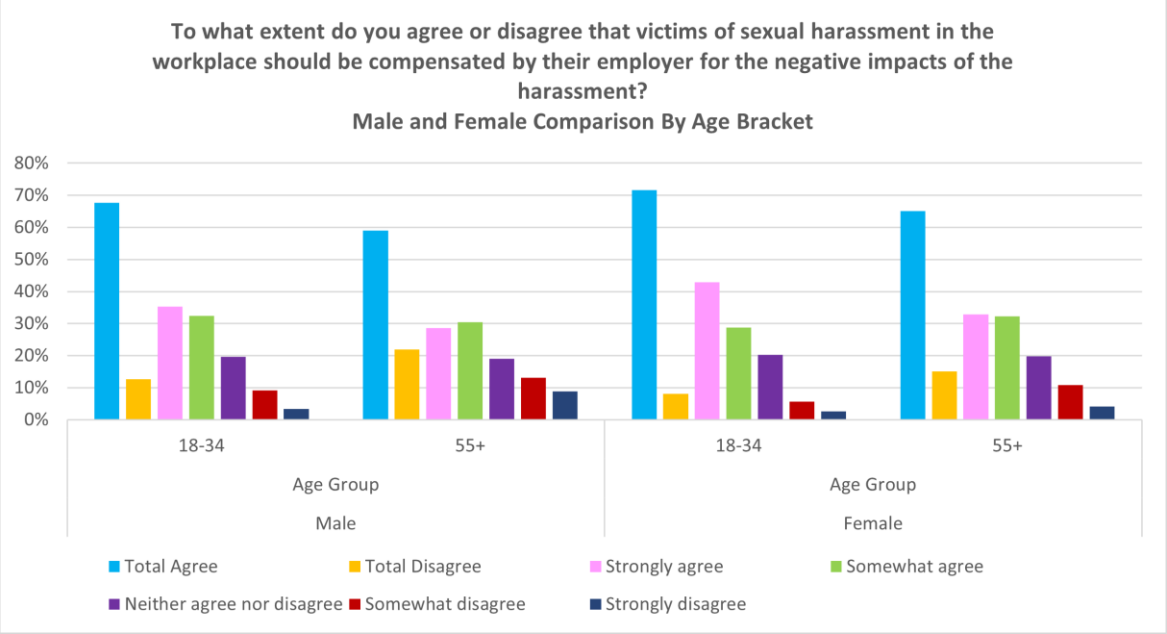
Graph 45



Graph 46

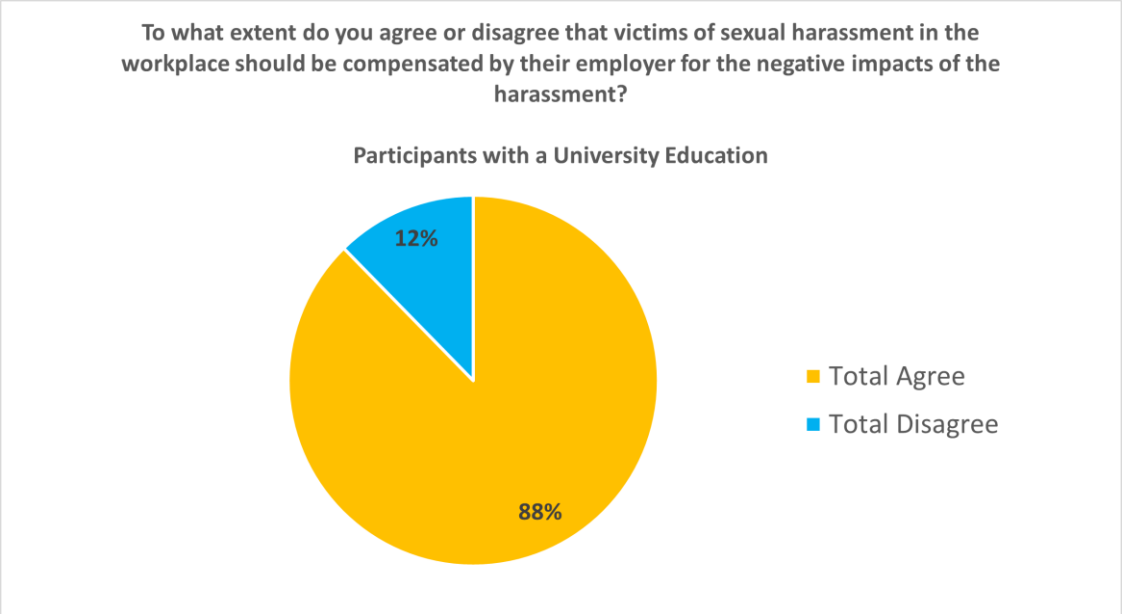


Graph 47



Participants who had a university education were more likely to agree than disagree: 73% of participants with a university education agreed that targets of sexual harassment should be compensated compared with 10% of people with a university education who disagreed (see Graph 48).

Graph 48



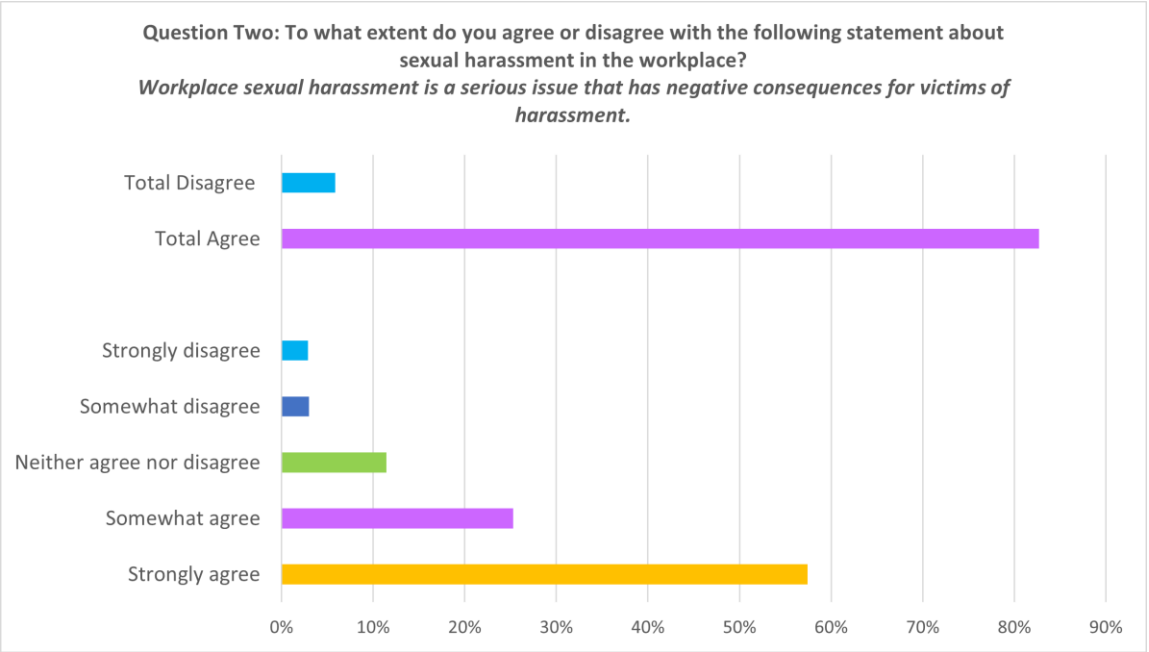
C Question Two: Perceptions of Severity and Impact of Sexual Harassment

To what extent do you agree or disagree with the following statement about sexual harassment in the workplace?

> **Workplace sexual harassment is a serious issue that has negative consequences for victims of harassment.**

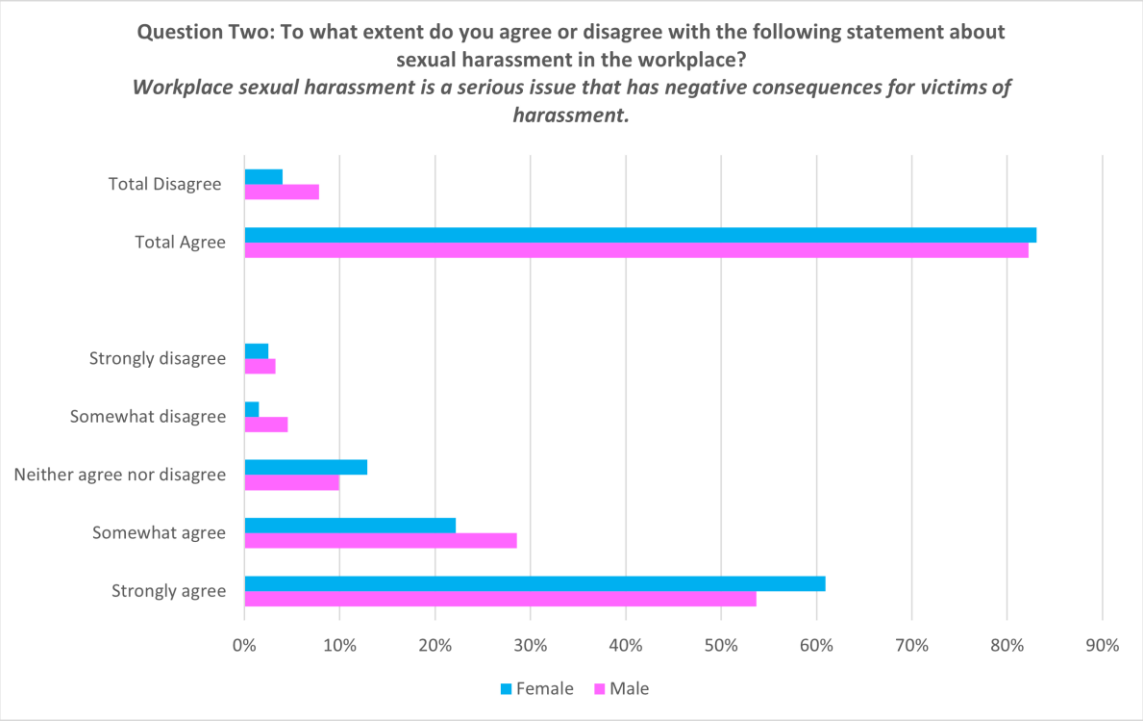
83% of participants agreed that sexual harassment is a serious issue that has negative consequences. 57% strongly agreed while 25% somewhat agreed. Only 6% of participants disagreed with the statement (see Graph 49).

Graph 49

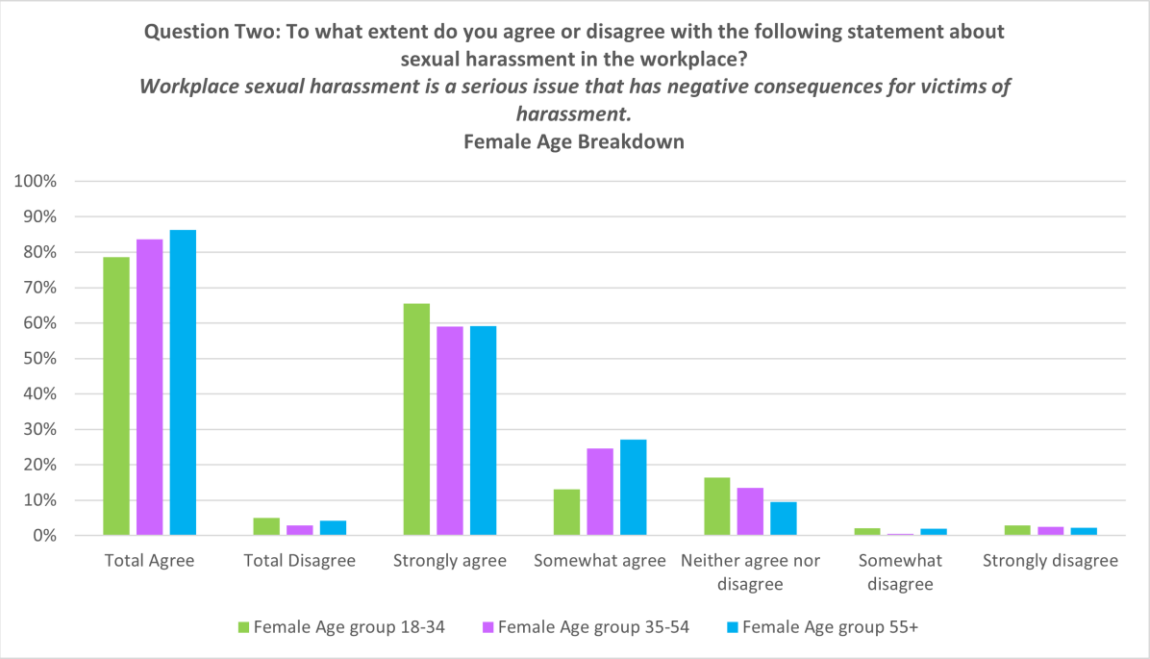


Women were more likely than men to strongly agree with the statement: 61% of females responded strongly agree versus 54% of males (see Graph 50). Younger women were slightly less likely than older women to agree with the statement: 79% of women aged 18-34 agreed with the statement compared with 86% of women aged 55+. However, young women were more likely to strongly agree with the statement, with 65% of 18–34-year-old respondents strongly agreeing compared with 59% of 55+ respondents. 16% of women aged 18-34 neither agreed nor disagreed with the statement (see Graph 51).

Graph 50

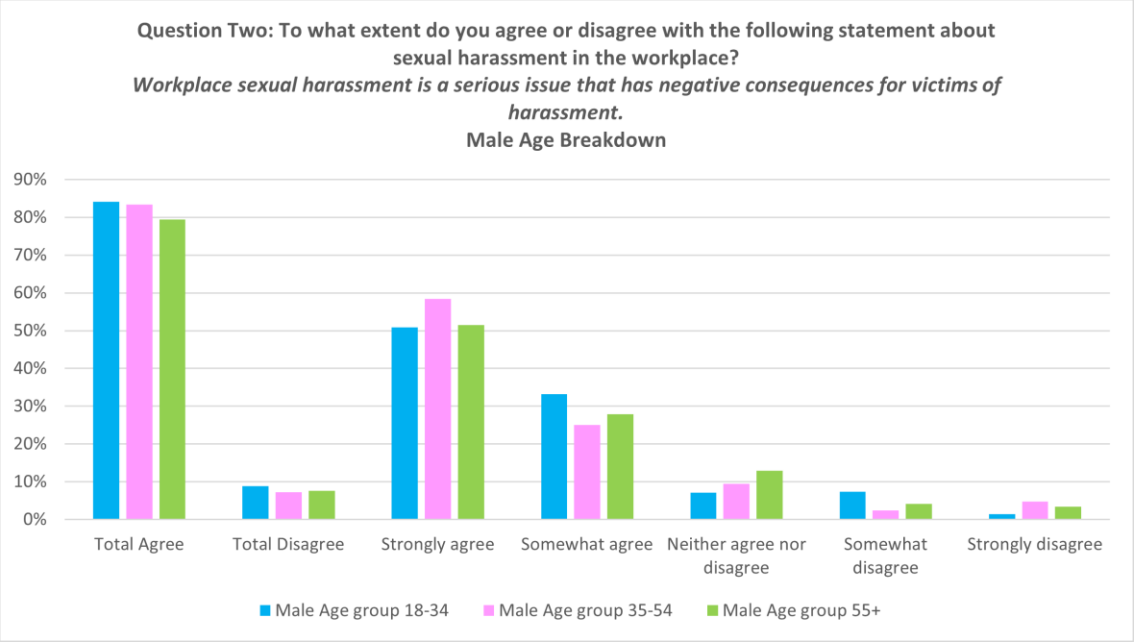


Graph 51



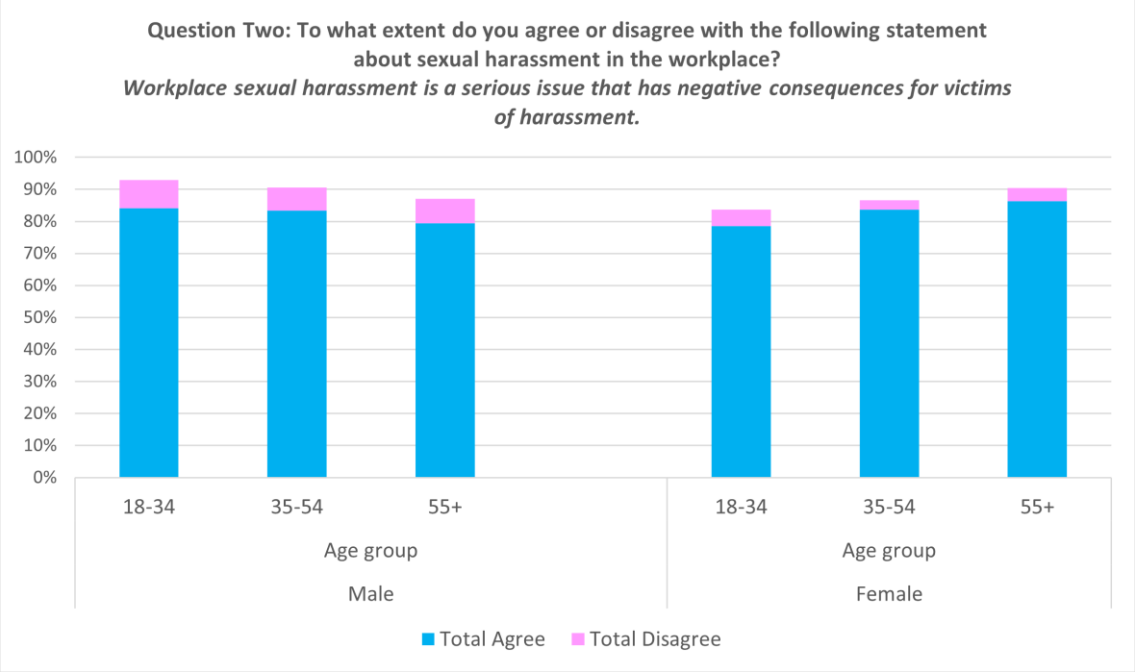
Young men were slightly more likely to *agree* with the statement: 84% of men aged 18-34 agreed compared with 79% of men aged 55+. Interestingly, more young men than young women agreed with the statement (84% for males versus 79% for females) (see Graph 52).

Graph 52



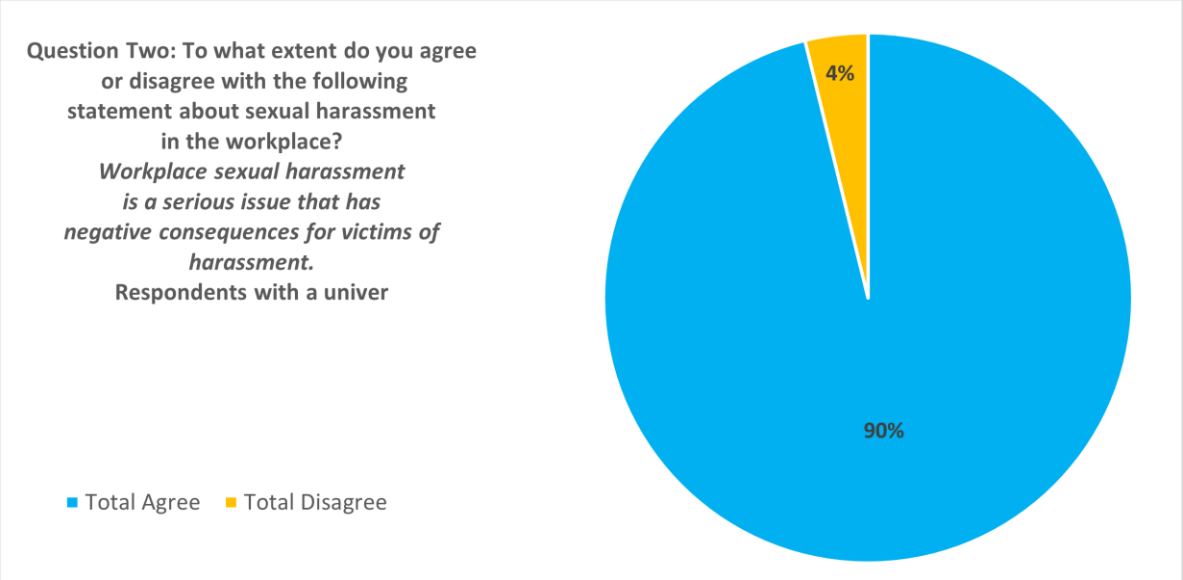
Men were more likely than women to disagree with the statement: 8% of men said they disagreed that workplace sexual harassment is a serious issue that has negative consequences compared with 4% of women (see Graph 53).

Graph 53



Those with a university education were more likely to agree than disagree: 90% of participants with a university education agreed that sexual harassment is a serious issue compared with only 4% who disagreed (see Graph 54)

Graph 54

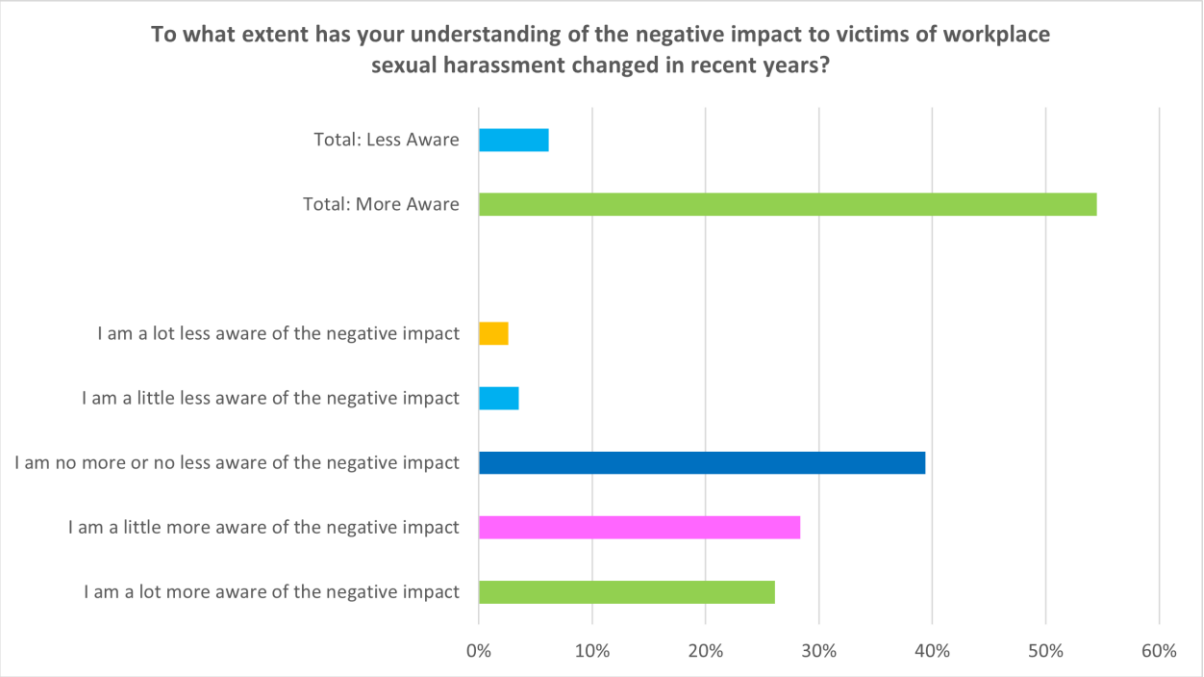


D Question Three: Evolving Perceptions

To what extent has your understanding of the negative impact to victimsof workplace sexual harassment changed in recent years?

54% of participants indicated they are now 'a lot' or a 'a little' more aware of the negative impact of workplace sexual harassment. 39% of participants indicated that they are 'no more or no less' aware of the negative impact of sexual harassment. Only 6% of participants indicated they were 'less aware' of the negative impact of workplace sexual harassment (see Graph 55)

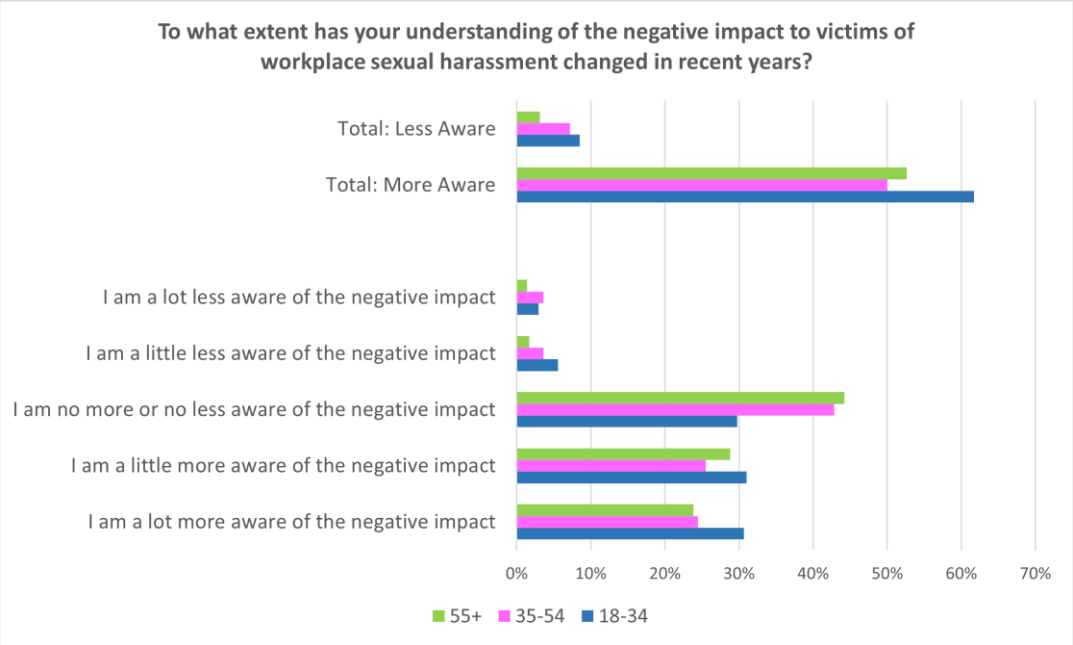
Graph 55



There was no significant difference between the responses of men and women. 54% of men and 55% of women indicated they were more aware of the negative impact.

Age played a factor in determining awareness (see Graph 56). 62% of participants aged 18-34 indicated they were a lot or a little more aware of the negative impact of workplace sexual harassment. This was compared with 50% of participants aged 35-54 and 53% of participants aged 55+. 30% of participants aged 18-34 indicated they were no more or no less aware of the negative impact compared with 43% of participants aged 35-54 and 44% of participants aged 55+.

Graph 56

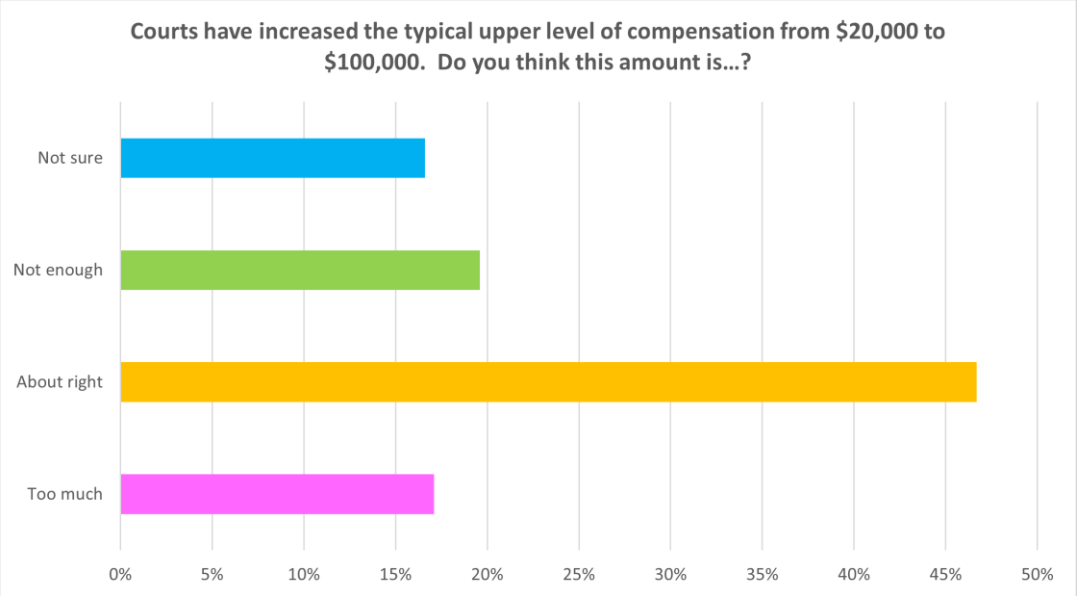


E Question Four: Quantum of Compensation

Where workplace sexual harassment is proven in a court, a victim can receive compensation for the hurt they have suffered. In recent years, to reflect changing community standards and greater appreciation of the impact of sexual harassment, courts have increased the typical upper level of compensation from $20,000 to $100,000. Do you think this amount is…? [Too Much] [About Right] [Not Enough] [Not Sure]

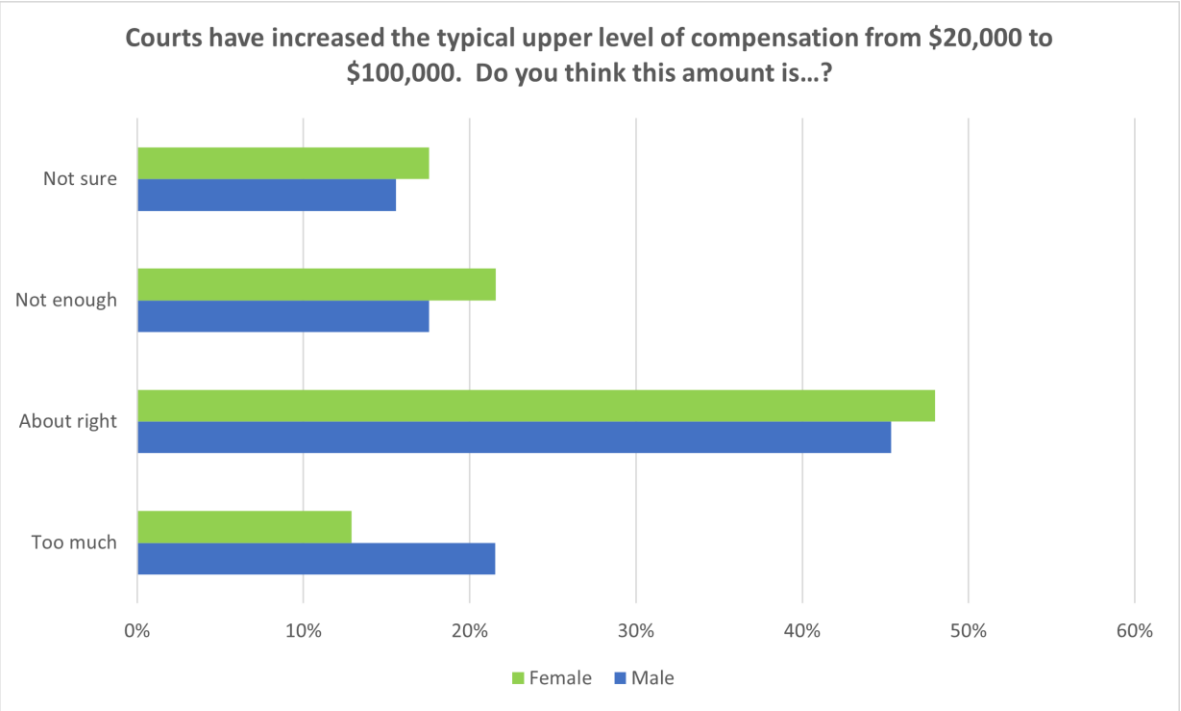
The increased upper level of compensation is seen as 'About right' for close to half (47%) of all respondents, while one in five (20%) think the amount is 'Not Enough'. 17% of respondents said the amount was 'Too Much' (see Graph 57).

Graph 57



Gender played a role in determining responses. Men were more likely than women to select 'Too Much' with 22% recorded for males versus 13% recorded for females. Women were slightly more likely than men to select the amount is 'Not Enough' with 22% recorded for females versus 18% recorded for males (see Graph 58).

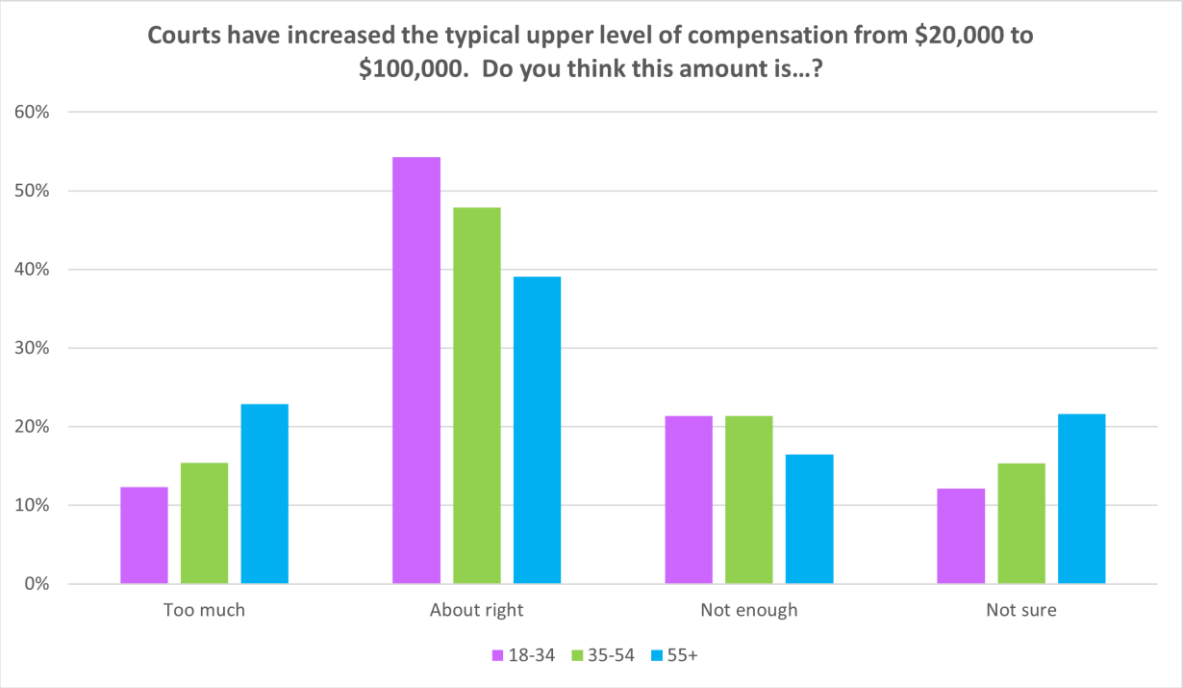
Graph 58



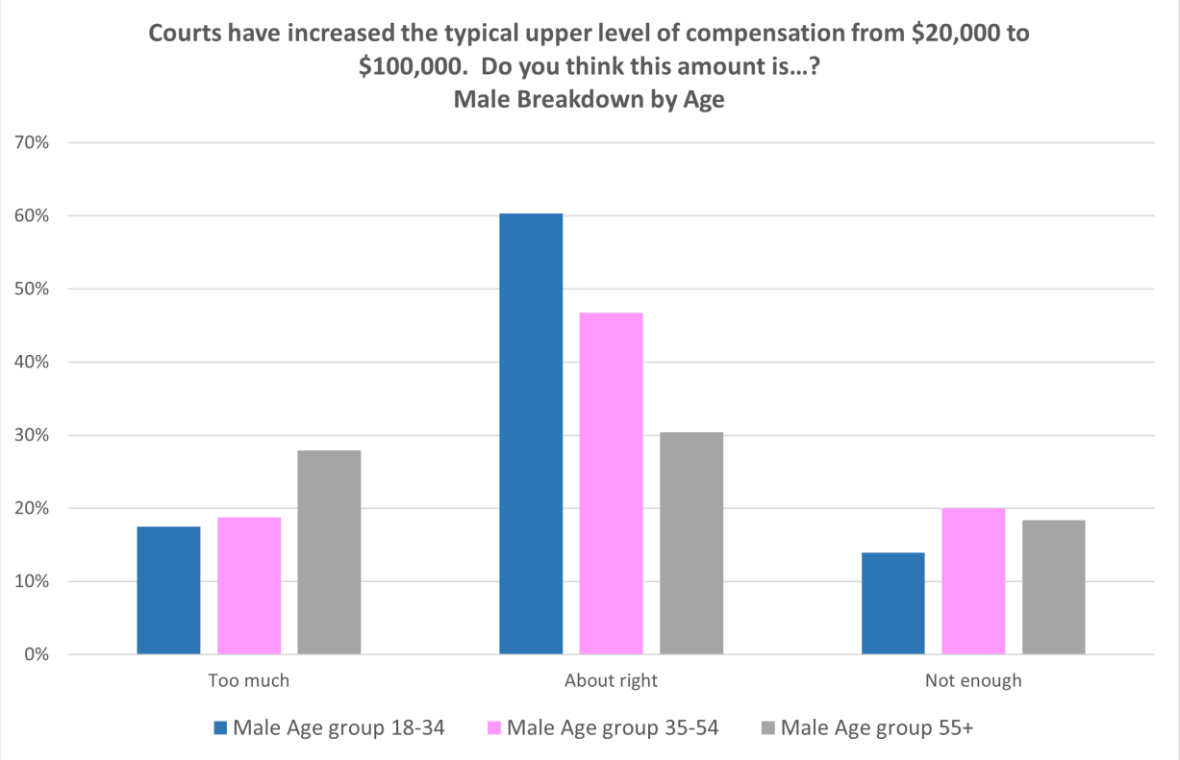
Age combined with gender was a critical factor (see Graph 59). Those aged 55+ were more likely to think compensation amounts were 'Too Much', with 23% of respondents in that group selecting this option. Males aged 55+ were more likely to hold this view, with 28% of males in this age group saying compensation was 'Too Much' compared with 18% of women in the same group (see Graph 60). This is in comparison with only 12% of 18–34-year-old respondents who selected 'Too Much'. Again, men were more likely to select 'Too Much' with 17% of men aged 18-34 selecting 'Too Much' compared with just 7% of women in the same age group.

In contrast, 18–34-year-olds were most likely to select 'About Right' with 54% recorded for this age group compared with 39% for over 55's. For males aged 18-34 this was even higher, with 60% of men in this age group saying compensation was 'About Right'. Further, those aged between 18 and 34 were slightly more likely to think compensation amounts are 'Not Enough' with 21% recorded versus 16% for respondents aged 55 and over. However, gender played a key factor: just 14% of men aged 18-34 selected 'Not Enough' compared with 29% of women in the same age group (see Graph 62). In fact, women aged 18-34 were the group most likely to select 'Not Enough', with 23% of women aged 35-54 and 15% of women aged 55+ selecting 'Not Enough'.

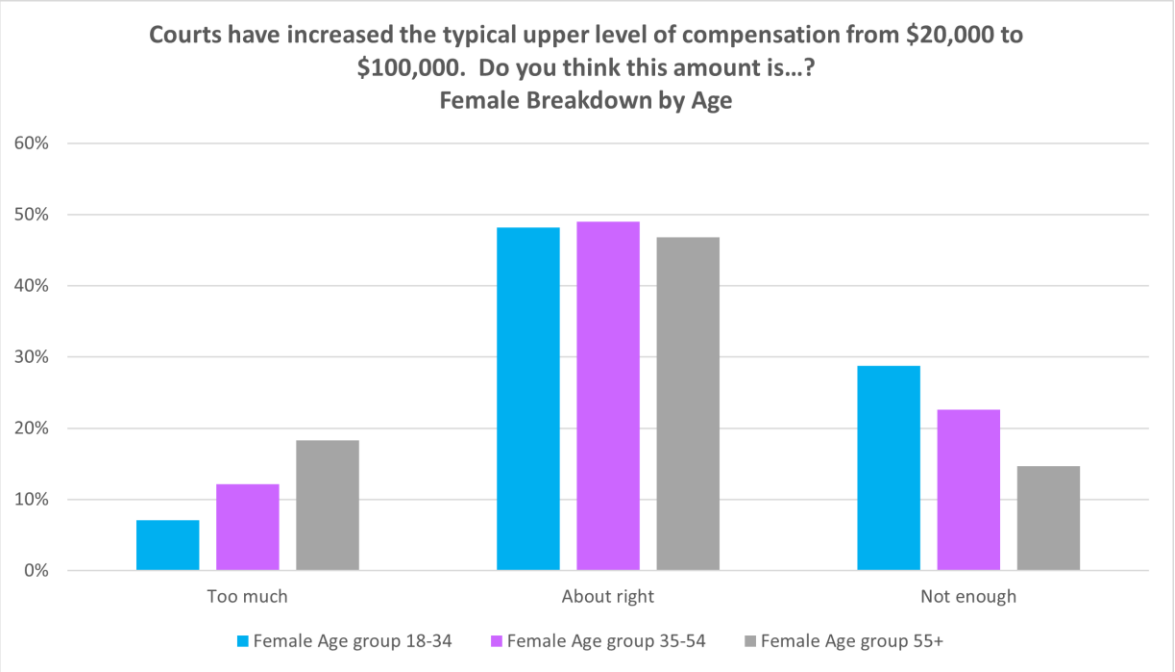
Graph 59



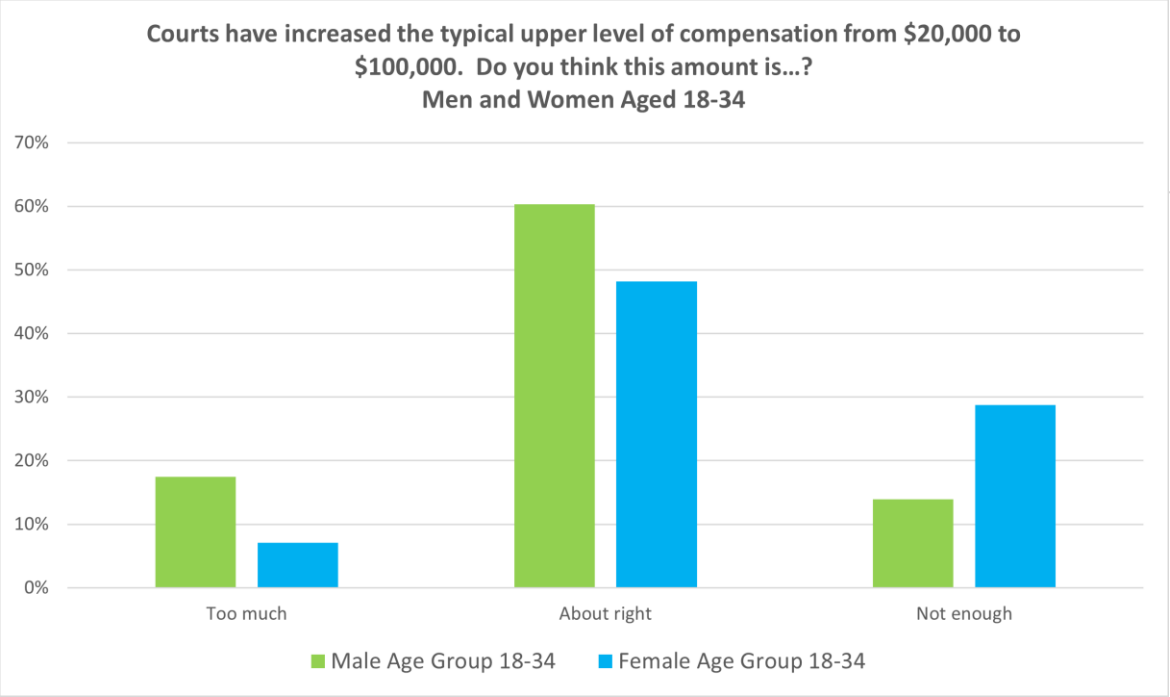
Graph 60



Graph 61



Graph 62



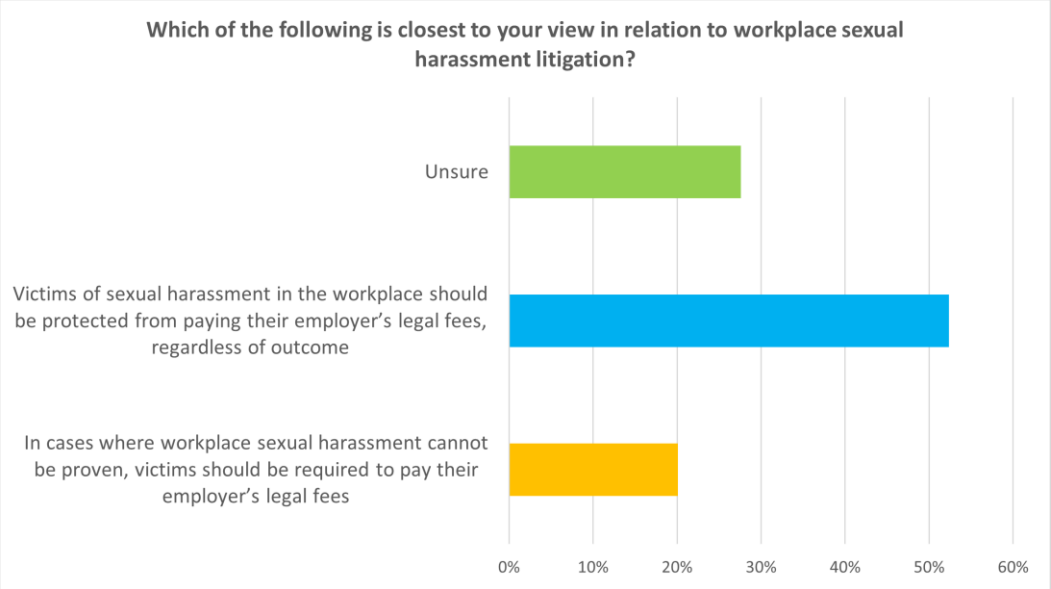
F Question Five: Costs in Sexual Harassment Litigation

Which of the following is the closest to your view in relation to workplace sexual harassment litigation?

a) **Victims of sexual harassment in the workplace should be protected from paying their employer's legal fees, regardless of the outcome**
b) **In cases where workplace sexual harassment cannot be proven, victims should berequired to pay their employer's legal fees**
c) **Unsure**

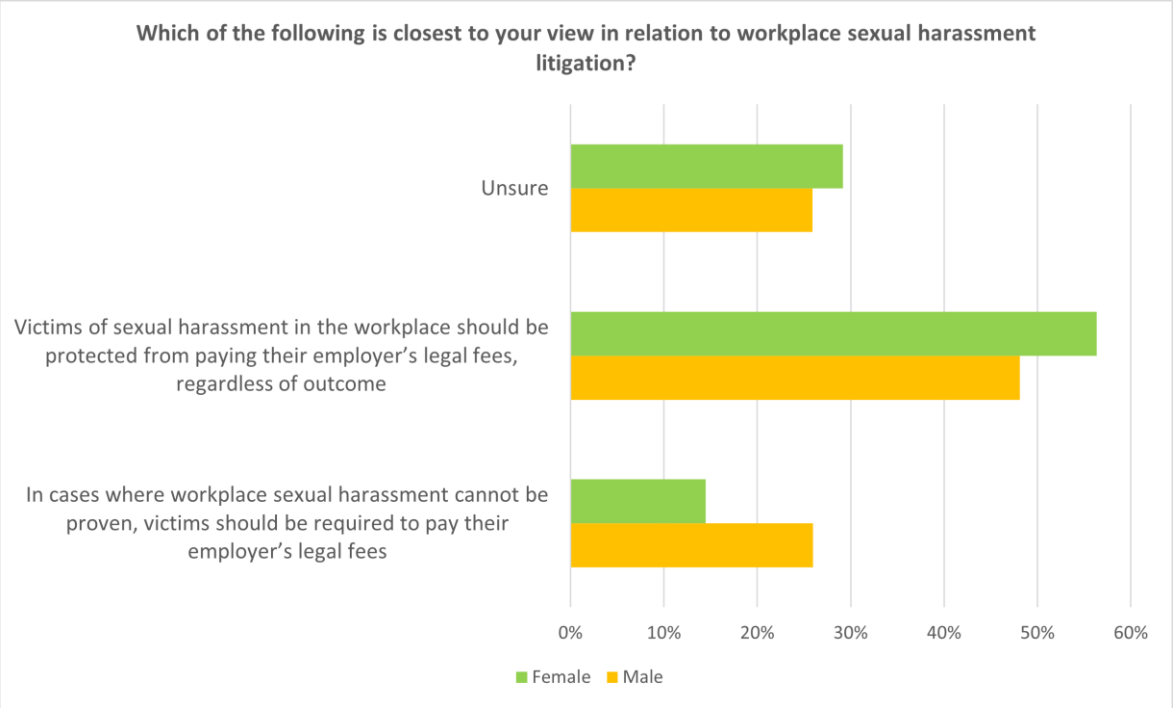
Over half (52%) of respondents think victims should be protected from paying their employer's legal fees regardless of the outcome. One in five respondents (20%) think victims should pay when sexual harassment cannot be proven (see Graph 63).

Graph 63

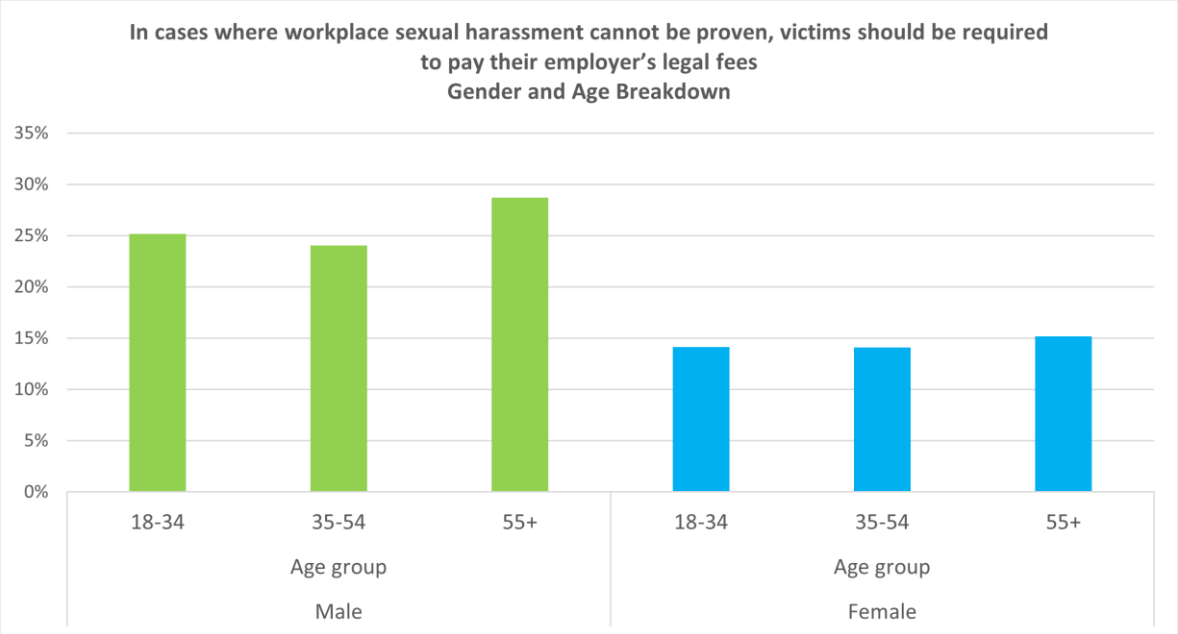


Men were more likely than women to think that where sexual harassment *cannot* be proven, victims should pay their employer's legal fees (26% for males versus 14% for females) (see Graph 64). Conversely, women were more likely to think that regardless of the outcome, victims should be protected from paying their employer's legal fees (56% for women versus 48% for men). Age played a factor in determining views (see Graph 65). 29% of men aged 55+believed that victims should pay their employer's legal fees when harassment cannot be proven.This is in contrast to 15% of women in the same age bracket. Similarly, 25% of men aged 18-34 hold this view versus 14% of women in the same age bracket.

Graph 64

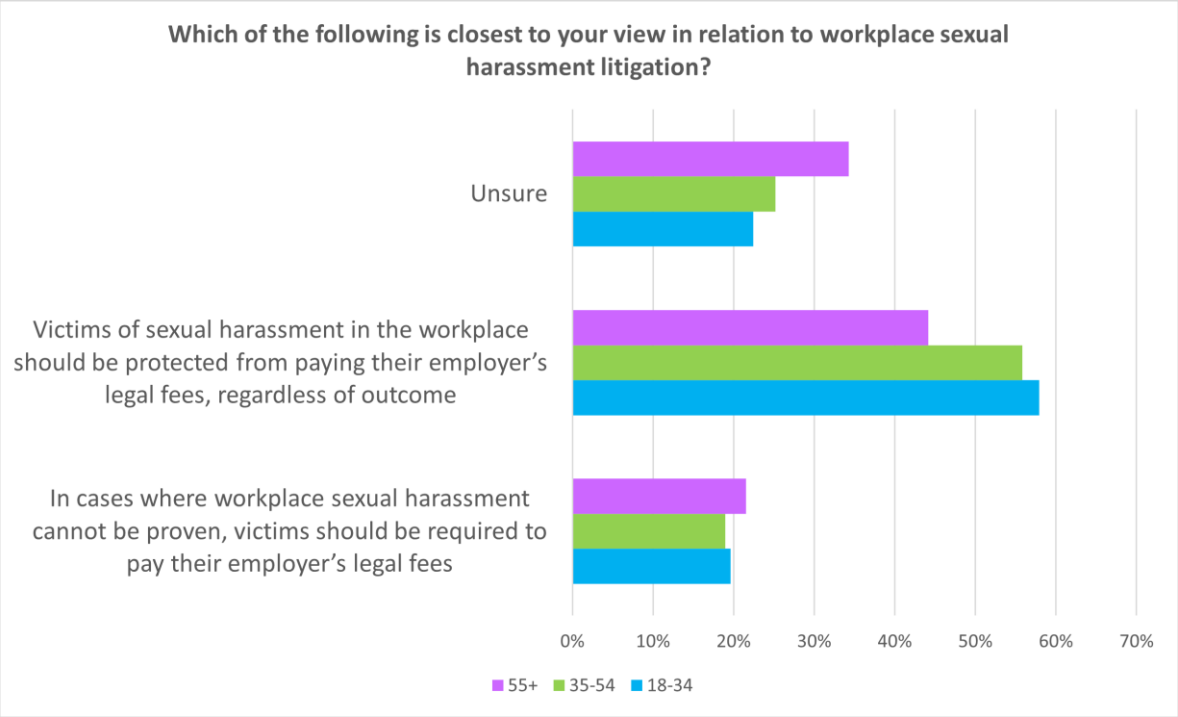


Graph 65

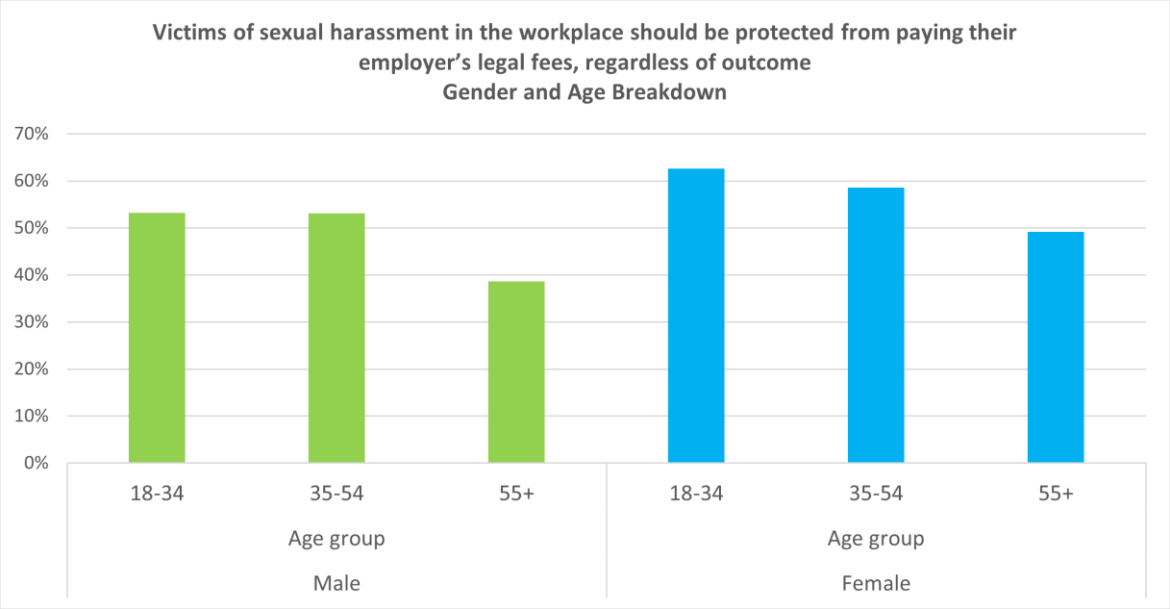


58% of respondents aged 18-34 believe that victims should be protected from paying their employer's legal fees regardless of the outcome, in contrast to 44% of respondents aged 55+ who hold this view (see Graph 66). However, these numbers were higher for women comparedwith men: 63% of women aged 18-34 believe that victims should be protected from paying fees compared with 53% of men in the same aged group. The same is reflected in the bracket over 55+ with just 39% of men in this age group saying victims of sexual harassment should be protected from paying costs compared with 49% of women in the same group.

Graph 66



Graph 67



G Question Six: Non-Disclosure Agreements

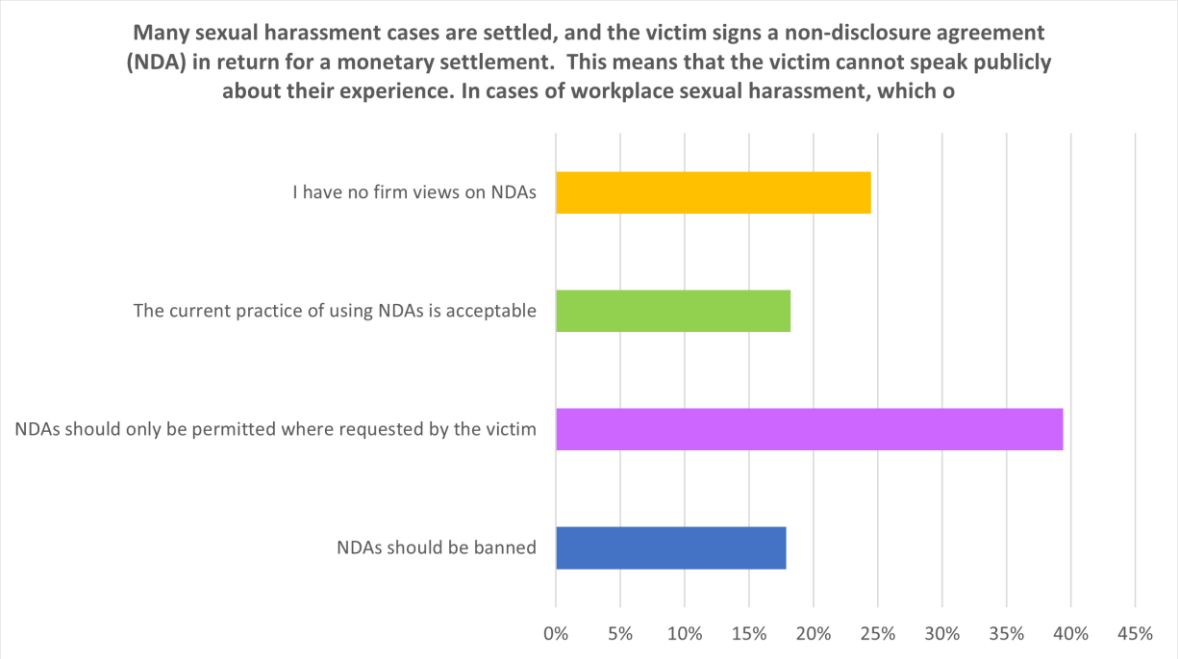
Many sexual harassment cases are settled, and the victim signs a non- disclosure agreement (NDA) in return for a monetary settlement. This means that the victim cannot speak publicly about their experience. In cases of workplace sexual harassment, which of these statements best reflects your view?

a. **NDAs should be banned**
b. **NDAs should only be permitted where requested by the victim**

c. The current practice of using NDAs is acceptable
d. I have no firm views on NDAs

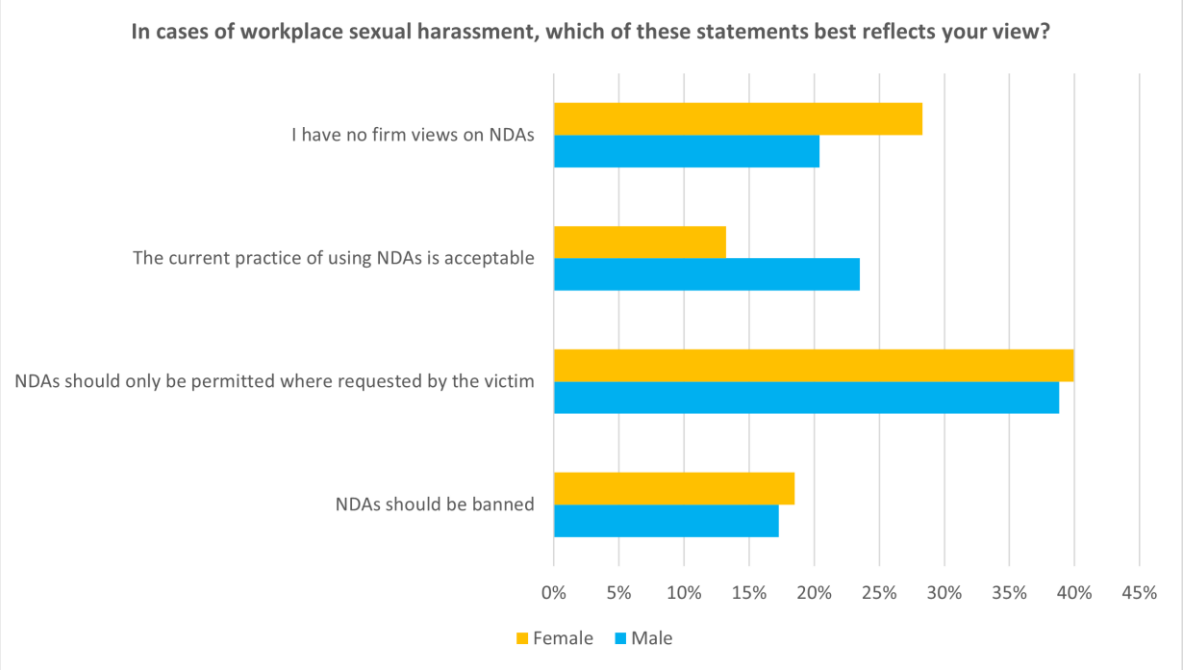
39% of respondents believe NDAs should only be permitted when requested by the victim while an equal percentage (18%) think they should be banned or think they are acceptable. 24% of respondents had no firm views on NDAs (see Graph 68).

Graph 68



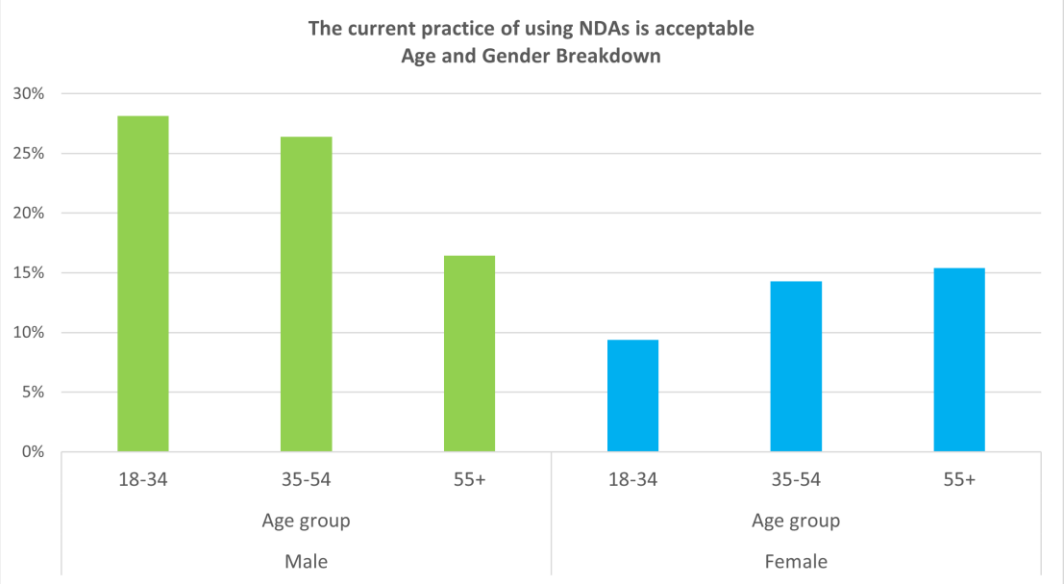
Men were more likely than women to think the current practice of using NDAs is acceptable (24% recorded for males versus 13% recorded for females) (see Graph 69).

Graph 69



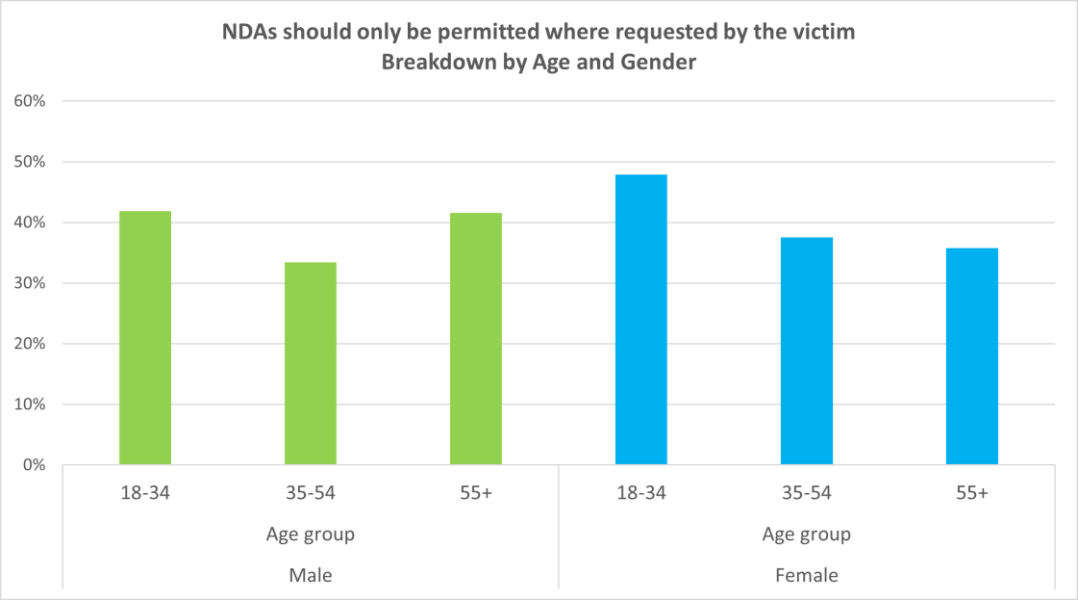
There was a significant difference in breakdown by age. Men aged 18-34 were far more likely than women in the same age group to think the current practice of using NDAs is acceptable (28% recorded for males aged 18-34 versus 9% recorded for females aged 18-34). Similarly, 26% of men aged 35-54 support the current practice of NDAs compared with 14% of women in the same age group. Men aged 55+ were far less likely to support the current practice of NDAs with just 16% recorded for men in this age group (this was similar to women in this age group,15% of whom supported the current practice of NDAs).

Graph 70



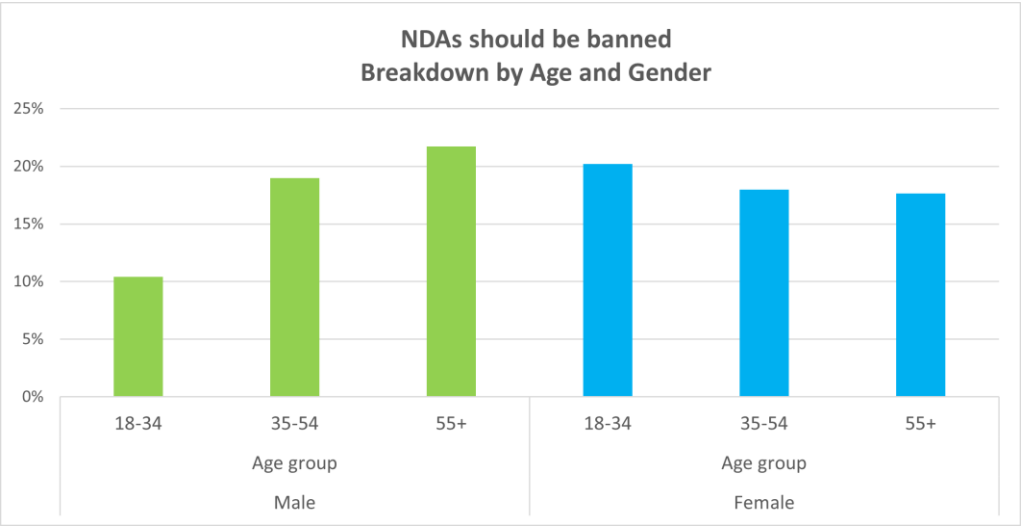
There was no statistically significant difference between the support of men and women for the idea that NDAs should only be permitted where requested by the victim (39% record for males versus 40% recorded for females). However, there was a difference in age (see Graph 71). Respondents aged 18-34 were more likely than those aged 35 and over to believe that NDAs should only be permitted where requested by the victim (45% recorded for 18–34-year-olds versus 35% for 35-54 and 38% for 55+). Women aged 18-54 were more likely than men in the same age group to believe that NDAs should only be permitted when requested by the victim (48% recorded for women aged 18-34 and 38% recorded for women aged 35-54 versus 42% recorded for men aged 18-34 and 33% for men aged 35-54). However, men aged 55+ were more likely than women in the same age group to believe NDAs should only be permitted when requested by the victim (42% for males versus 36% for females).

Graph 71



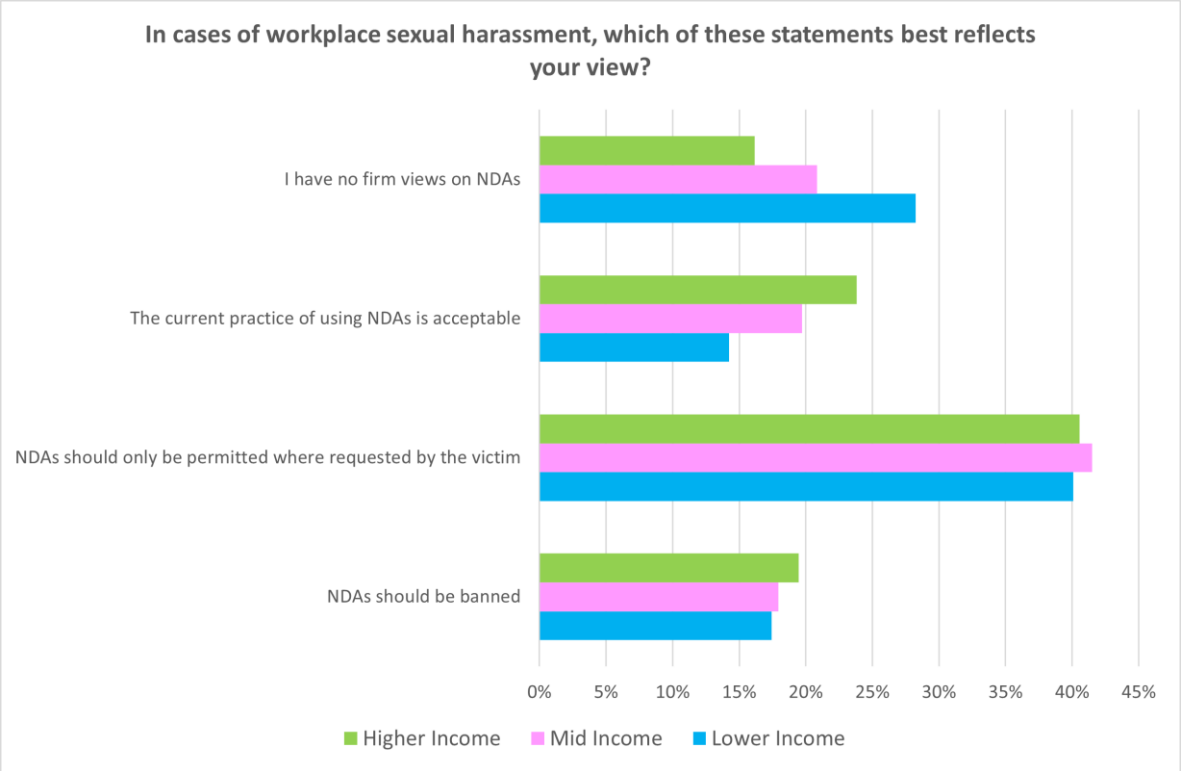
There was no statistically significant difference between men and women in supporting the banning of NDAs (17% recorded for males versus 18% recorded for women). Older respondents were more likely than younger respondents to support the banning of NDAs (20% recorded for respondents 55+ versus 15% for respondents aged 18-24). However, there was a significant difference between the views of young men. Only 10% of males aged 18-34 believe NDAs should be banned compared with 22% of males aged 55+. 20% of women aged 18-34 supported the banning of NDAs, making them twice as likely as men in the same age group to hold this view.

Graph 72



Income also factored into respondent's views. 24% of those in the higher income bracket believe the current practice of NDAs is working compared with 14% of those in the lower income bracket.

Graph 73



H Question Seven: Defamation

Defamation is where a lie or false statement or publication has been made against a person in public which unjustly harms their reputation. Where a person has been defamed, they can receive compensation for damage they have suffered to their reputation.

Which of these statements best reflects your view?

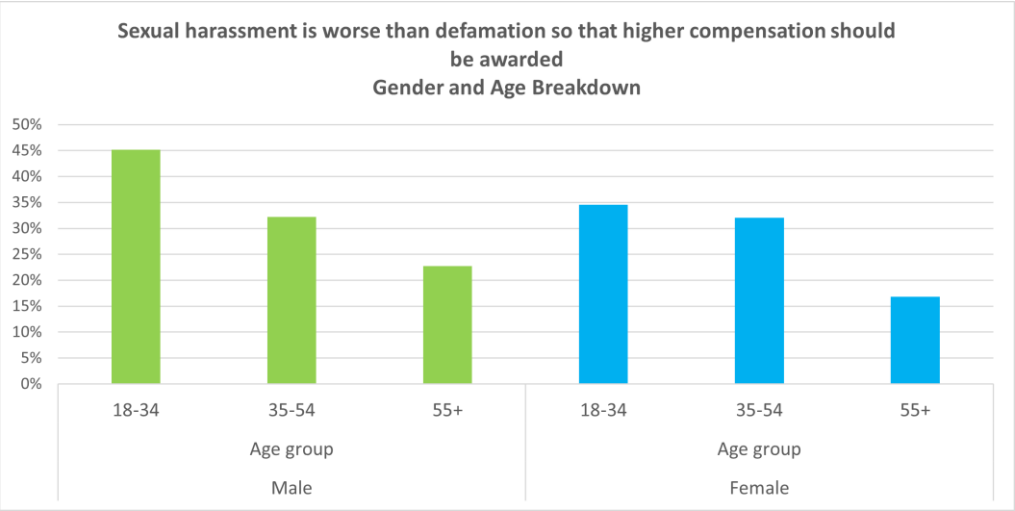
a. **Sexual harassment is worse than defamation so that higher compensation should beawarded**
b. **Defamation and sexual harassment have about the same impact and thecompensation should be about the same**
c. **Defamation is worse than sexual harassment so that higher compensation shouldbe awarded**
d. **Not sure**

30% of respondents believe sexual harassment is worse than defamation so higher compensation should be awarded, while 40% of respondents believe that the impact of defamation and sexual harassment is about the same and compensation should be about the same. 12% of respondents believe that defamation is worse than sexual harassment so that higher compensation should be awarded.

Age had a big role to play in respondent answers (see Graph 74). 40% of respondents aged 18-34 believe that sexual harassment is *worse* than defamation and should have higher compensation. This is in contrast to just 20% of respondents aged 55+ who hold the same view. Men were more likely than women to believe that sexual harassment is worse than defamation and should attract higher compensation (33% recorded for males versus 27% recorded for females). This was particularly the case for young men. 45% of men aged 18-34 believe sexual

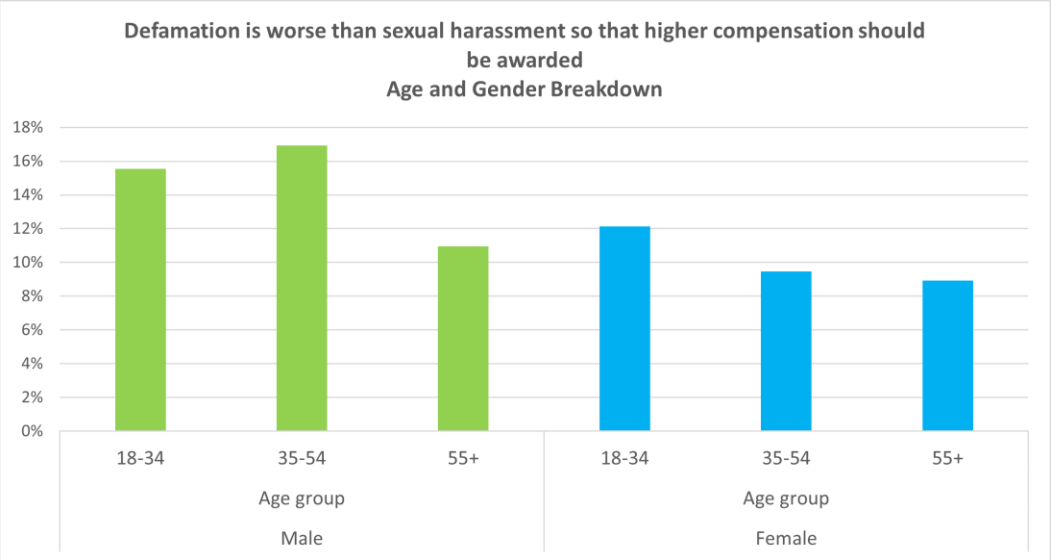
harassment is worse than defamation compared with 32% of men aged 35-54 and 23% of men aged 55+. There was also a large distribution in views among female respondents according to age. While 35% of women aged 18-34 believe sexual harassment is worse than defamation, just 17% of female respondents aged 55+ hold this view.

Graph 74



However, men were also more likely than women to believe that defamation is *worse* than sexual harassment so that higher compensation should be awarded (14% recorded for males versus 10% recorded for females) (see Graph 75). This view was highest among men young than 55, with 16% of males aged 18-34 and 17% aged 35-54 holding this view, compared with only 11% of men 55 or over.

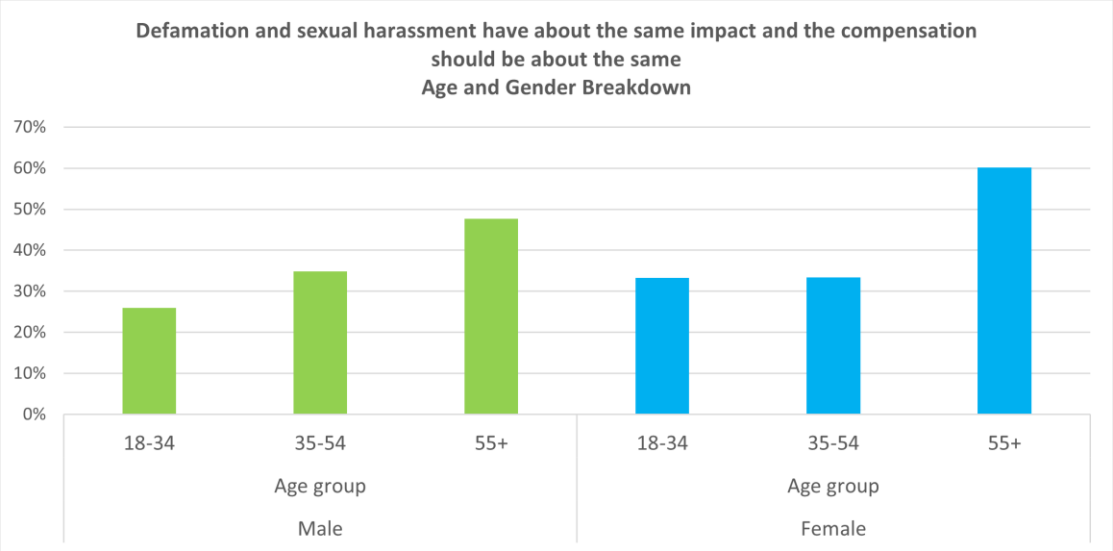
Graph 75



Over half (54%) of the respondents in the 55+ age bracket believe sexual harassment and defamation have the same impact, compared with 30% of respondents aged 18-34. Women were most likely to think that sexual harassment and defamation are about the same (43% recorded for females versus 36% recorded for males). This was far higher for older women, with 60% of women aged 55+ holding this view compared with 33% of women aged 18-34

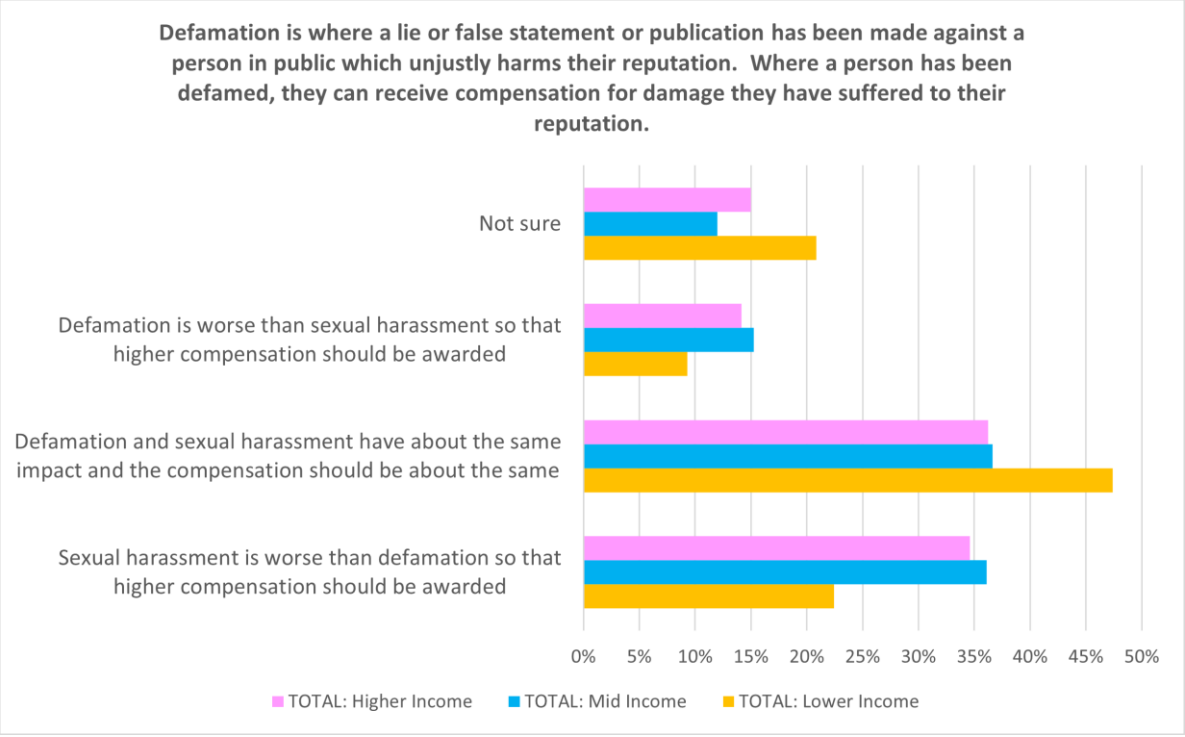
and 35-54 respectively. This distribution was also reflected amongst men: 26% of men aged 18-34 held this view compared with 48% of men aged 55+.

Graph 76



Respondents in the lower income bracket were least likely to believe that sexual harassment is worse than defamation (22% of lower income earners compared with 36% of middle and 35% of high-income earners). Low-income earners were most likely to believe that sexual harassment and defamation are the same severity (47%). However, low-income earners were the least likely to think that defamation is worse than sexual harassment (9% of low-income earner versus 15% of middle and 14% of high).

Graph 77



I Analysis

The polling demonstrates that most Australians think sexual harassment is a serious issue that has negative consequences for victims of sexual harassment and that people who experience sexual harassment deserve to be compensated accordingly. Notably, 67% believe that targets of sexual harassment should receive compensation of $100,000 or higher in general damages.

Views on sexual harassment can be broadly characterised into status quo and progressive change. The status quo cluster of views is more cautious, or against the provision of compensation to survivors of sexual harassment. They are similarly against protection from cost orders and the limiting of non-disclosure of agreements. They are overall less likely to believe that sexual harassment is a serious issue with negative consequences. The progressive change cluster believes in more compensation for sexual harassment survivors. They want protection from cost orders and the limiting of non-disclosure agreements.

The poll also indicates that community attitudes are changing. Age was a key determinant of responses. Younger respondents were more likely to provide progressive change views in response to the poll question. Older respondents were more likely to provide status quo views. Age was a more determinative factor amongst men. Younger men had a greater differential in their views versus older men, than young women versus older women. The change in community attitudes therefore appears to be more pronounced amongst the male population. That being said, young women were more likely than older women to support the progressive change cluster of views, particularly in regards to compensation.

Sex was also an important observable factor in poll responses when considered separately from age. Overall women were more in favour of progressive change views than men. However, interestingly young men were more likely than young women to agree to the statement:

> *Workplace sexual harassment is a serious issue that has negative consequences for victims of harassment.*

There are some possible explanations to this difference which goes against the above trend of "female" and "young" producing greater progressive change responses. Young men were a target audience for the #MeToo movement, and this may have elicited more social pressure for them to agree with the statement. Paradoxically while young men were more likely to agree that sexual harassment has negative consequences for the victim, they were *less* likely to support higher amounts of compensation for victims of sexual harassment.

Part III: Qualitative Research

A Interview Participants

To supplement the doctrinal and quantitative research, the researchers conducted 22 interviews with solicitors, barristers, policy-makers and stakeholders practicing in this field. The following individuals were interviewed.

Interviewee	**Role/Affiliation**
Samantha Mangwana	Practice Leader (Employment Law), Shine Lawyers
Kylie Nomchong SC	Barrister, Denman Chambers
Josh Bornstein	Principal Lawyer, Maurice Blackburn
Maria Nawaz	Acting Executive Director, Grata Fund
Bethany Hender	Head of Employment and Discrimination, Women's Legal Centre ACT
Sharmilla Bargon	Senior Solicitor, Redfern Legal Centre
Amanda Lyras	Partner, Clayton Utz
Melanie Schleiger	Program Manager, Victoria Legal Aid
Jen Lynch	Senior Lawyer, Victoria Legal Aid
Elizabeth Raper SC	Barrister, 5 Wentworth Chambers
Kate Eastman AM SC[61]	Barrister, New Chambers
Joydeep Hor	Founder, People+ Culture Strategies
Anthony Wood	Partner, Herbert Smith Freehills
Michelle Hannon	Partner, Gilbert+Tobin
Achalie Perera	Lawyer, Australian Building and Construction Commission
Diane Anagnos	Principal Solicitor, Kingsford Legal Centre
Emma Golledge	Director, Kingsford Legal Centre
Kate Jenkins	Sex Discrimination Commissioner
Prabha Nanda	Senior Lawyer, Australian Human Rights Commission
Jane Needham SC	Barrister, 13th Floor St James Hall
Jane Goodman-Delahunty	Professor, University of Newcastle Law School
Kenneth Raphael	Former Judge, Federal Circuit Court of Australia

We elected not to attribute quotations to interview participants in the analysis below, instead using de-identified labels (such as 'a senior legal practitioner' or 'a community legal centre lawyer'). There was one exception to this practice; given her statutory role, we elected (with her permission) to identify the Sex Discrimination Commissioner, Kate Jenkins.

[61] Kate Eastman AM SC was an advisor on this project. Given her expertise, it was considered desirable to also interview her for Part III. To mitigate perceptions of a conflict of interest, Eastman was not asked to provide input on Part III in her advisory capacity.

B Methodology

As the majority of sexual harassment cases settle out of court, the doctrinal analysis in Part I is necessarily incomplete. Accordingly, and expanding upon prior research conducted by members of the research team,[62] semi-structured qualitative interviews were conducted. The discussion was guided by specific questions, extracted below, although participants were given the space to speak generally and were not constrained by the questions. Interviews lasted between 30 minutes and an hour and were conducted via Zoom. Consistent with the ethics protocol, each participant was given an opportunity to review their quotes prior to publication.

Indicative questions were:

Damages

1. What trends are you aware of in relation to damages awarded in sexual harassment cases?

2. How do damages in sexual harassment claims compare with damages awarded underthe other federal heads of discrimination (sex, race, disability, age)?

3. In your experience, are there any factors in judicial decision making that go to a higher award of damages, for example the idea of 'community expectations'?

4. Do you think that damages awarded are in general adequate to compensate for the harm caused by sexual harassment?

5. To what extent, if any, do judicial decisions makers consider deterrence as a factor inmotivating awards of damages?

6. What considerations motivate the award of exemplary or aggravated damages?

7. Are complainants more likely to receive higher awards of damages if they settle out of court?

8. What are the principal motivations for pursuing a case to court, rather than settling? In your experience, are complainants more likely to receive a higher award ofdamages in your state/territory jurisdiction or in the federal jurisdiction?

9. Is your choice of jurisdiction (State/Territory or federal) influenced by awards of damages?

10. In your opinion, what are the major barriers experienced by complainants in regardsto awards of damage?

11. How do awards of damages in defamation compare with awards of damages in discrimination cases?

[62] See Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era' (2021) 49 *Federal Law Review* 231.

12. How do damages awards, or settlement claims, under the *SDA* interact with compensation awarded under the *SRC Act*?

Costs

1. To what extent does the federal anti-discrimination costs regime influence advice andrepresentation in practice?

2. State/Territory tribunals are largely no-costs jurisdictions. Does this influence yourchoice of forum to pursue a claim?

3. Are you aware of any trends in costs awards in sexual harassment cases?

4. What barriers exist in making an application for costs in sexual harassment cases?

5. How do offers of compromise impact upon costs orders?

6. To what extent do costs liabilities influence settlement or case abandonment?

7. To what extent do alternative costs models, such as those found in the *Fair Work Act2009* (Cth) or the *Public Interest Disclosure Act 2013* (Cth) influence decision-making in relation to pursuing claims?

C Trends and General Observations

'[Sexual harassment (SH)] is a difficult and misunderstood phenomenon even though it's so ubiquitous...a lot of it revolves around interactions and interpersonal relations…in very ordinary kinds of situations, so it's quite paradoxical. People...seem to suffer more after making a complaint than they do before...not necessarily because...the litigation itself is arduous, but because it's seen as socially inappropriate to complain...and people don't feel comfortable about asserting their rights' – Discrimination Law Expert and Administrative Tribunal Member

1. Sexual harassment was formerly regarded as a minor matter of hurt feelings. Typically tokenistic sums were paid in settlement until *Richardson v Oracle* in 2014.

2. The impact of allegations against Harvey Weinstein and the beginning of the #MeToo movement was slower in Australia than in the United States and United Kingdom. However, an awareness of rights on the part of survivors has increased, especially following allegations of sexual harassment against former High Court Justice Dyson Heydon. As one social justice solicitor with expertise in discrimination and employment law stated:

> *'All of a sudden I've gone from clients where I can start from the premise of previously, it had to be, "Okay, you're not gonna be believed", when it's just "He said, she said" to "You'll be believed", and that makes an enormous difference'*

3. The contemporary focus on mental health has changed the understanding of the harm of sexual harassment; there has been a shift from a focus on physical acts to a

recognition of psychiatric injury and trauma. As one legal practitioner and former administrative tribunal member stated:

> *'I think the [higher damages awards] reflects a much more nuanced acceptance of what sexual harassment can do to a career'.*

4. Similarly, practitioners indicated that the increased understanding of harm has influenced their approach to practice; as one private practice employment lawyer who acts for complainants put it,*' I run what I hope is a "trauma informed approach."'*

5. There is greater awareness of the harm of sexual harassment on the part of employers today. As a result, there is less likelihood of sexual harassment being 'swept under the carpet.' That said, a residual ambivalence about psychological harm remains.

6. Most survivors of sexual harassment wait until they have left the workplace to lodge a complaint.

7. The overwhelming proportion of complaints (about 99%) are settled behind closed doors. The confidential nature of conciliation means that it is incapable of addressing the systemic nature of sexual harassment or broader public interest issues. However, the experience of interview participants was that settlements tend to result in significantly higher damages than those awarded by a court.

8. That being said, there remains an inequality of bargaining power between claimants and respondents. As Federal Sex Discrimination Commissioner Kate Jenkins stated, recalling her experience as a practitioner:

> *'suddenly, a worker is suing their own boss - not just the co-worker who harassed them - the legal system lines the employer up with the respondent rather than recognising them as equally the employer of both and so the employer resources go behind the respondent worker rather than behind the complainant worker, so, when that happens, it's not just that you're litigating your harasser, you've actually just become the opposition to your own employer. The power imbalance behind the harassment is then reinforced. This is why I advocate for a positive duty. So it's not a surprise that…people leave their roles before commencing claims'*

9. The prospect of an adverse costs order within the federal jurisdiction is a significant disincentive to litigate.

10. Even in no-costs State/Territory jurisdictions, low damages may be outweighed by an applicant's own legal costs, which still must be met.

11. Legal costs have increased as cases have become more sophisticated, including cost of expert medical reports.

12. Few sexual harassment cases that proceed to a formal hearing are successful (2/15 applicants succeeded at the federal level in the last five years).

13. Higher damages are awarded by courts in negligence (eg, *Matthews v Winslow Constructions (Vic) Pty Ltd* [2015] VSC 728) than in discrimination however, as Kate Jenkins emphasised 'your best awards are your most tragic cases':

> *'the most significant awards are the most tragic cases, even involving attempted suicide and diagnoses that a complainant will never work again. The damages system creates a perverse incentive to not be able work'*

14. A **socio-economic division** exists within both the applicant and respondent classes. In the case of applicants, whether they are professional/white collar workers or they occupy lower status positions, and in the case of respondents, whether the organisation is a listed company or a small business. This affects:

    (a) the quantum of damages awarded; as a Legal Aid solicitor stated: 'the hurt and humiliation is somehow tied to the salary received'. An employment lawyer who acts for respondent employers similarly said:

    > *'[T]his just means there's not necessarily a clear objective basis. You were sexually assaulted at work and therefore, you should get, according to the "Table of Maims", $400,000, whereas the truth is, if it happens at BHP that it might be worth more or if it happened somewhere else, it might be worth less and that's not objectively fair, is it? But that's the way the system operates unfortunately'*

    (b) the type of evidence gathered, for example the nature and cost of medical reports); and

    (c) the ability to litigate, which only high earners can afford to do.

15. A class of vulnerable workers who may be underpaid or who occupy undocumented exploitative employment relationships are significantly disadvantaged by the existing framework:

> *'Our clients are low paid, non-English speaking, with a disability, Aboriginal and Torres Strait Islander or people with ongoing psychological injury. Many individuals feel so vulnerable that they are unable to lodge a complaint against their employer until the employment relationship has ended. By that stage, they are so traumatised that they are unable to return to the workforce and eventually receive 'a stingy award settlement of $3,000 to $25,000'* - a legal practitioner with a discrimination practice

16. Legal aid is limited in some jurisdictions and almost non-existent in others. Pro bono support is limited, as is the philanthropic funding of worthy public interest cases.

D Positives and Negatives of Settlement

Pros

17. It can be empowering for an applicant to speak in a confidential non-threatening environment and secure compensation. One senior legal practitioner described settlement as *'a private, hidden sense of achieving justice'*.

18. Publicity and media scrutiny are avoided and stigma is minimised.

19. Settlement is likely to exert a less drastic impact on an individual's life than litigation.

20. The matter is dealt with faster than is the case with litigation, however it is still drawn out for a person who may be traumatised. A private practice employment lawyer who acts for claimants emphasised:

> *'The longer it drags on for, the harder it is for them and [the] more likely [it] is to have longer consequences on top of the trauma that they've already gone through.'*

21. Similarly, a legal practitioner with a discrimination practice said: *'you're talking at least two years, optimistically, to get that damages payout'*.

Cons

22. Applicants may feel pressured to settle quickly for a low amount. In some circumstances, an unsophisticated employer may regard conciliation as an opportunity to bully the complaint. As one community legal centre employment and discrimination lawyer said:

> *'We had one the other day [who] said, "We insist on a face-to-face conciliation at the Australian Human Rights Commission so I can look them in the eye and tell them I'm not paying them a cent."'*

23. Private and confidential settlement precludes transparency and accountability so that similarly affected individuals lack knowledge of the jurisdiction and what might be expected.

24. **Non-disclosure agreements (NDAs)** are routine but underscore the drawbacks of confidentiality in settlement. A legal practitioner with a discrimination practice emphasised that NDAs favour respondents and serial harassers:

> *'You've actually had four matters against him but they've all been settled (unless there's a whistleblower in the company) but he's really good at writing software code…or he's the boss's son…I think employers are also freaked out about potential criminal ramifications and procedural fairness to the harasser.'*

25. Additionally, NDAs highlight the problem of transparency and the lack of public knowledge. A discrimination law expert and administrative tribunal member said:

> *'People…feel as if they're somehow caving in and certainly not protecting other people's rights, which is often-times a motivation that assists [them] in actually formalising a complaint.'*

E Why Settle?

26. There is a general preference to avoid litigation because of its stress, expense and unpredictability. However, this can lead to an underdeveloped jurisprudence and lack of expertise. A senior legal practitioner said:

> *'some judges…might have done a few cases but you don't really have a deep expertise in terms of the way in which damages are assessed. And because it's got a blend of personal injuries meets human rights, we haven't really built up clear jurisprudential principles.'*

27. Similarly, a legal practitioner with a discrimination practice emphasised:

> *'It's bruising litigation where you're more likely to have a corporations law expert…We have this boutique kind of Human Rights Commission approach and then at the…determination stage, it's very hard to say to someone, "Okay, you're taking these big risks, this big leap of faith. We can't say that it's going to be dealt with sympathetically…We've got these really crazy outlier cases for people that had really different types of cases, but we don't know what's going to happen…'*

28. More creative terms of settlement can be agreed to in settlement rather than in a court. This includes higher damages.

29. The facts are irrefutable. For an applicant, the prospect of adverse legal costs could be devastating. This is a huge barrier to litigation for individuals; ordinary people are unwilling to take the risk as it could mean losing a major asset:

> *'Most of our clients have no assets [and] some of them might struggle on a very low income but…they might have inherited a small apartment or something, and they're not prepared to – I don't think I've ever had anyone who's been prepared to take that risk [of] the adverse costs order.'* - Social justice solicitor with expertise in discrimination and employment law

30. Additionally, applicants are often too exhausted, stressed and unwell to persevere. For some applicants, they are anxious to let go of the trauma and move on with their life.

31. **For a respondent**, reputational harm and damage to the business of a corporate body are more significant than the legal costs and lead to an elevated perception of risk. As one employment lawyer who acts for respondent employers emphasised:

> *'What kind of look is this for us?..."**Embarrassment avoidance**"' is a catalyst for settling'*

32. Similarly, another employment lawyer who acts for respondent employers recalled a respondent who was willing to pay 'go away money' to be 'rid of it' because it was 'a nuisance':

> *'it was 'costing us so much in legal fees and we just didn't need the distraction…but that could also be a very polite way of saying that we were*

really worried about the mental health impact of the case on the person against whom the claim was being brought.'

33. However, that being said, as another employment lawyer who acts for respondent employers highlighted:

> *'employers have to act in the best interest of their shareholders so they can't agree to a 'blackmail fee'. They have to reasonably consider the basis on which they're liable and what the quantum would reasonably be.'*

34. Sex Discrimination Commissioner Kate Jenkins recalled an experience as a practitioner:

> *'Negotiation of settlements are connected more to the commercial equation than the harm experienced by the individual. I recall one of my cases involving a claim by a senior executive against another senior executive made at a time that the Company was preparing to float on the stock exchange. Publication of the allegations were projected to have a negative impact on the float share price (costing millions), so the company was prepared to consider a much higher settlement sum, but they were also outraged that the woman involved would gain what they saw as an opportunistic "windfall" from her complaint.'*

35. The fear that applicant might go public with a claim can result in higher damages:

> *'A more sophisticated employer…will throw money at our clients in a very different way from a small business.'* - a community legal centre employment and discrimination lawyer

F Why go to Court?

36. Going to court is a last resort for both parties.

37. A case may end up in court because one or both of the parties is unreasonable. Alternatively, an inexperienced law firm with little understanding of discrimination may recommend that its client proceed to litigation.

38. Sometimes, the applicant may wish to expose issues publicly, however, there is resistance to using the court as a forum to change public policy:

> *'I've had pushback, quite extreme pushback, from the judiciary to ensure that the court processes are not used for any public policy purposes.'* - senior legal practitioner

39. A case may also fail to settle where the respondent believes that the applicant's claim is exaggerated, there is sympathy with the male perpetrator, or the harasser may be the firm proprietor. For example:

    (a) the respondent believes that the applicant is using sexual harassment as an instrument of retribution as a result of, eg, being denied promotion; or

(b) the respondent believes that a woman will settle for less once litigation commences; or
(c) in the case of a small business, the respondent may resist legal advice; particularly as the reputational damage is likely to be less than for a large corporation; and
(d) if legally unrepresented, a respondent may not appreciate the strength of an applicant's claim (suggested a legal aid solicitor)

G Which Jurisdiction?

40. The multiple jurisdictional options are confusing, with uncertain ramifications and different time limits. Kate Jenkins pointed out:

> *'It [is] just crazy that someone who's harassed needs a law degree to figure out what their rights are. This is a serious barrier to accessing justice. Even I was confused by the options…'*

41. Available jurisdictions include:

(a) Personal injury (tort);
(b) *Fair Work Act 2009* (Cth);
(c) Workers' compensation (including under the *Safety, Rehabilitation and Compensation Act 1988* (*SRCA*) ($110,000 is the maximum economic loss but never awarded);
(d) Anti-discrimination.

<u>*Fair Work Act*</u>

42. A community legal centre employment and discrimination lawyer stated:

> *'If you make a complaint of sexual harassment and you're terminated, [Fair Work is] one pathway, but…the jurisdiction isn't set up for sexual harassment…it's clunky; it doesn't quite work.'*

<u>Workers' Compensation</u>

43. One community legal centre employment and discrimination lawyer said that a benefit of worker's compensation is that *'everything is done for you'*, however *'it's about the injury and not actually an acknowledgement of systemic problems at a workplace or repeat perpetrators'*.

44. The perception of double-dipping is a live problem.

45. *Friend v Comcare* [2021] FCA 837, presently on appeal before the Full Court of the Federal Court, underscores the confusion. It involves an attempt to recover moneys paid under a settlement arising from the Comcare scheme under the *SRCA* as claims based on disability and sexual harassment under the *Disability Discrimination Act 1992* (Cth) (***DDA***) and the *Sex Discrimination Act 1984* (Cth) (***SDA***) were also settled. A legal practitioner with a discrimination practice said the siloed approach is confusing to lawyers as well as applicants:

> *'There's not a lot of lawyers who can say, "Here are all your options, and I'm going to walk [you] through, and I'm going to take the amount of time that is required." Most people don't see worker's comp as adequately addressing harassment, adequately addressing the cultural problems, punishing a perpetrator, which is something they want.'*

Anti-Discrimination

46. The anti-discrimination jurisdiction is the norm for sexual harassment; the other jurisdictions are exceptional.

47. An applicant may add negligence, underpayment of wages and breach of work, health and safety obligations to a complaint in an endeavour to enhance settlement prospects.

48. A comparison between the federal, state and territory anti-discrimination jurisdictions is below.

H Formal Hearing

49. Judges tend to be conservative rather than creative and innovative, in particular:

(a) They favour certainty in evidence;
(b) They tend to rely on precedent; and
(c) There can be divergence between punishing perpetrators and compensating applicants.

50. Some legal practitioners indicated improvement in judicial approaches to sexual harassment litigation. One senior legal practitioner said:

> *'I think there are judges who are well-aware of and understanding of the seriousness of the conduct (arising from sexual harassment claims) and the impact that it has on workplaces… Secondly, I think judges are now, by virtue of all that has happened quite outside the decision-making realm, well-aware of the fact that this conduct is prevalent within the community quite aside from the fact that many of these cases do not get to courts. But thirdly, judges are aware of the number of filings. So even though they might ultimately resolve, many of them don't resolve until the court level. Accordingly, I think judges are definitely more aware of its prevalence within the community and the impact in the last ten years, much more so than before.'*

51. Judges tend to rely on **community standards**.

52. While vague, community standards can be invoked to modify precedent, as in the landmark *Richardson* case.

I Computation of Damages

53. Conventionally modest compensatory damages are awarded for sexual harassment; cf victims of crime compensation.

54. There has been a shift away from a focus on **intimate interactions**. A former judge who heard numerous harassment cases emphasised that '[i]n my time on the Court, the harassment was generally physical'.

55. Today, greater attention is paid to **psychological impact**, distress and humiliation **however,** depressive disorders or PTSD resulting from sexual harassment are conventionally not well understood by male judges.

56. If tort-based, damages tend to be medicalised.

57. Where there is **psychiatric harm** damages may be in a high range.

58. However, the increasing focus on medicalisation can have a detrimental impact on any restorative goal of anti-discrimination legislation. As a senior legal practitioner said:

> *'If you're on an applicant's side, you…[do] a psych assessment pretty early on and it's in [the applicant's] interest then to remain psychiatrically damaged throughout the whole process. So…our system is not really about restoring women or empowering women, it's in our interest to keep them damaged and often the process tends to fuel it.'*

59. **Economic loss** can include both past and future damages. However, the predictive power of courts is limited, particularly when the applicant is young. As Kate Jenkins pointed out:

> *'[O]ne of the issues in sexual harassment quite often is that the complainant is early in their career, not [on a] high income.'*

60. The quantum is influenced by the size of the respondent organisation, ie whether it is a large corporation or a small business; the latter is 'not well versed around the issues' (suggested an employment lawyer who acts for respondent employers);

J Other Heads of Discrimination

61. **Sexual harassment** is the most active discrimination head at the federal level, with higher damages than other proscribed grounds, but there are few sexual harassment cases overall:

<u>Sex discrimination</u>

62. Damages in sex discrimination (e.g. pregnancy discrimination) are invariably low. As a senior legal practitioner emphasised, there is a problem in assessing the value of women's work (especially if unpaid leave is involved):

> *'We haven't developed…really creative thinking about how we might even approach the assessment of damages.'*

63. As the quantitative data revealed, there has been no successful *SDA* cases based on sex discrimination (rather than sexual harassment) in the last five years.

Race discrimination

64. **Race** damages are surprisingly low in the Australian context. Low damages are exacerbated by:

    (a) Problems with proof;
    (b) The ground is not taken seriously; and
    (c) Unconscious bias is poorly understood and admitting to race discrimination is rare.

65. There has nevertheless been some increase in damages in recent cases. The quantitative research showed that the average award of general damages has jumped from $8,167 between 2010-2015 to $45,000 between 2016-2021.

Age discrimination

66. Although ageism is widespread, there are very few cases.

67. The quantitative research showed that there has only been *one* successful age discrimination case.

68. The few cases there are tend to be dominated by *'fairly well-off, well-resourced, well-educated white men who are very unhappy about being compulsorily-retired from their partnerships either in law or in accounting'* - a senior legal practitioner.

Disability discrimination

69. **Disability** is poorly understood, with less than approximately 9% of people with a disability employed in Australia. Unsurprisingly, the success rate in discrimination litigation is low and damages are also low.

70. The quantitative research showed that just 20% of disability discrimination cases resulted in an award of damages, while the average award of general damages for disability discrimination was $13,323.38, lower than sexual harassment. Notably, there has not been a significant increase over time, with the average award of damages in the past five years being just $16,000.

71. Nevertheless, witness credibility is less of a problem than for sexual harassment, however, an employment lawyer who acts for respondent employers said the medical evidence can be 'murky'.

72. Sexual harassment is believed to have increased sensitivity to other discriminatory harms, especially race. An employment lawyer who acts for respondent employers added:

    'I'm not sure that [disability and age] are viewed with the same degree of seriousness'

K Damages – Deterrent or Compensatory?

73. Participants disagreed over whether damages should be deterrent or compensatory. Some participants argued that anti-discrimination law should purely be about compensation for *impact.* However, others indicated that there might be an element of disapprobation factored in to damages, particularly in light of the increasing emphasis on 'community expectations'.

74. A former judge who heard numerous harassment cases indicated that damages may have a deterrent element:

> *'As a court we gave significant (for the time) damages. If society sees there is a serious penalty for infringing the law people may take steps to prevent it. Remember that most cases were brought against employers who were held vicariously liable and who had an incentive to prevent the unlawful behaviour'*

75. Applicants invariably desire that respondents face accountability for their actions.

76. However, compensation is the primary aim of anti-discrimination legislation in accordance with the *restitutio in integrum* (restored to original position) principle.

77. A private practice employment lawyer who acts for claimants said that damages should be quantified 'based on the impact to the individual' rather than 'conflated with the nature of the wrongdoing':

> *'Whether the sexual harassment was overt and extreme and what we regard as completely offensive or depraved shouldn't determine whether the damages are higher or lower. It should be based on the impact. Those things can still be conflated by lawyers and judges, but to me, it's a question of impact'*

78. However, post-*Richardson*, community expectations have an increasing role to play in quantifying damages. Practitioners questioned the extent to which community expectations involve an element of 'punishment'.

79. The concept of community expectations is vague. As one social justice solicitor with expertise in discrimination and employment law stated:

> *'[T]he challenge is who is to know what that amount is or means? Why was it one level in the eyes of [the] community previously and it's a different level now? How does that help an individual to know the value of their own case? And, although there are risks to having a sort of table or level of compensation for different types of conduct, it… also provides a bit more clarity…not just for the parties and their representatives, but actually for individuals to be able to consider what the outcomes are likely to be'*

80. Similarly as a senior legal practitioner emphasised, community standards are:

> *'probably just another form of a "Table of Maims", that is, what is the disapprobation that we are going to apply to somebody's wrongdoing?...If it's a*

euphemism for punishing people for having to experience this at work, then we need to have some better guidance on how we make that assessment'

81. In any event, practitioners indicated that damages are unlikely to have a deterrent effect and tend to exert a minimal impact on large corporate respondents as they are likely to be covered by insurance.

82. Costs tend to be viewed as a greater deterrent than damages. As one senior legal practitioner stated, costs 'are often significantly greater than any monetary outcome'.

L Non-Monetary Outcomes

83. Non-monetary outcomes can be available to supplement monetary awards. Non-monetary outcomes can provide a sense of justice for applicants and may have an impact on securing future change in an organisation.

84. A legal practitioner with a discrimination practice said that *'[w]e get the non-monetary outcomes more often in other kinds of discrimination (race or disability) than sexual harassment.'*

85. Non-monetary outcomes can be important for applicants. As one community legal centre employment and discrimination lawyer said, *'My clients [say]: 'I don't care about the money; this can't happen to anyone else.''*

86. Non-monetary outcomes can include:

a) Apology, statement of regret, acknowledgement of being heard;
b) Code of conduct to be put in place;
c) An undertaking to review policies and or/or introducing new policies, including training programmes.

M Jurisdictional Differences

87. Participants were divided over the differences between the federal and State/Territory jurisdictions. Many participants criticised the various state jurisdictions for modest damages, uneven and unskilled mediators, lengthy delays and caps on damages. However, some participants indicated that the more 'familiar' and 'local' tribunal can be preferred by some applicants.

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88. Applicant must decide between the **Federal** (costs jurisdiction) or **State/Territory** (generally no costs jurisdiction). A senior legal practitioner said:

'If you got a strong case, you'd never go to the State jurisdiction, ever, because you just end up with $15,000 or $20,000 and then it's just not worth it.'

89. However, another senior legal practitioner stated:

'The state jurisdictions are good…if the person's damages are going to be modest, which means you're getting a… socioeconomic divide between the State and the federal'

90. A community legal centre employment and discrimination lawyer said the Federal Court: 'is a bit scary for people' and as a result people might choose the more familiar state jurisdiction.

Federal

91. **The Federal jurisdiction is** invariably recommended, especially for better off applicants.

92. The Federal jurisdiction is generally superior at conciliation, with skilled mediators who may possess legal knowledge. A legal practitioner with a discrimination practice said the Australian Human Rights Commission (**AHRC**) is:

'a really expert commission when it's properly resourced and funded - a really good therapeutic, trauma-informed approach.'

93. However, not all participants agreed. A former judge who heard numerous harassment cases said:

'I think they're [the AHRC] overworked…It's more conciliation than mediation…It would be terrible for me to say that they don't take it seriously; I'm sure they do, but it's just ineffective…There's no incentive to try and settle these cases.'

94. A benefit of the federal jurisdiction is that there can be cost recovery for strong cases that are litigated, because of the adverse costs regime.

State and Territory

95. **The State and Territory jurisdictions** are considered preferable if modest damages are sought. However, settlement is still generally preferred over litigation.

96. Participants said the skills of mediators are uneven at conciliating claims, including because agencies are bedevilled by resourcing problems.

97. Long delays are 'a huge factor with really vulnerable clients' one legal practitioner with a discrimination practice said. They added:

'Even though there are cost benefits with the [Anti-Discrimination NSW] pathway…This is despite the fact that an unconciliated matter is unlikely to proceed to a formal hearing.'

New South Wales

98. Participants indicated that hearings in the NSW jurisdiction can be unpredictable, as there is variability in the expertise of tribunal members.

99. Further, the $100,000 cap on damages is a disincentive to pursuing a claim in the jurisdiction.

100. The quantitative research showed that the average award of general damages in NSW was $12,384, *lower* than the federal jurisdiction.

Victoria

101. Participants disagreed about the Victorian jurisdiction.

102. A senior legal practitioner said the Victorian jurisdiction was 'a little more sophisticated than the other jurisdictions.'

103. The quantitative research showed Victoria had average awards of $52,000 for general damages, compared with only $14,000 at the federal level. In the last five year, that average has jumped to $125,000.

104. However, a private practice employment lawyer who acts for claimants in sexual harassment matters had strong criticisms of the Victorian tribunal in terms of mediation experience and for its lengthy delays due to poor resourcing.

Tasmania

105. **Some participants** suggested that the local tribunal is favoured over the federal in Tasmania.

106. The quantitative research found 23 reported cases in Tasmania since 2000, with an average award of general damages of $11,700, less than the federal jurisdiction.

Australian Capital Territory

107. There was also support from practitioners for the ACT as a 'local tribunal':

> *'People like having a local human rights commission…conciliator "just around the corner"' - a community legal centre employment and discrimination lawyer.'*

108. The quantitative research found only three reported sexual harassment decisions in ACT, all of which were unsuccessful. This may be indicative of the success of conciliation.

Queensland

109. Participants suggested that Queensland differed depending on locality, with North Queensland being similar to Tasmania and the ACT with its emphasis on the 'local' tribunal, while Brisbane and the Gold Coast are more open to the Federal jurisdiction. However, practitioners also indicated that there is limited experience of anti-discrimination law among practitioners.

110. The average award of general damages in Queensland was $17,124, *higher* than the Federal jurisdiction. In the last five year, this has increased to an average of $77,855. Queensland also had an incredibly high success rate for complainants: 73% of all cases resulted in an award of damages.

Northern Territory

111. Participants indicated that the culture in the Northern Territory is resistant to litigation. Additionally, the legislation imposes a $60,000 cap on damages.

112. This is supported by the quantitative research, which found only three reported sexual harassment decisions in the NT, of which two resulted in only nominal damages.

Western Australia

113. Participants indicated that there are a number of women lawyers with expertise in anti-discrimination law in WA.

114. However, the legislation currently imposes a $40,000 cap on damages.

115. The quantitative research found only eight reported sexual harassment cases in WA, with no cases since 2008. This was be indicative of complainants choosing the federal jurisdiction due to the cap on damages.

South Australia

116. Practitioners indicated that there is an increasing willingness to use the federal jurisdiction in SA.

117. One discrimination law expert and administrative tribunal member said:

> *'The caps on damages, I think, have been very effective in restraining people from getting adequate compensation.'*

118. This is supported by the quantitative research, which found only *one* sexual harassment case that had resulted in an award of general damages. The award was $30,000.

N Costs

119. For many complainants, costs are the single biggest barrier to pursuing and litigating a claim. The costs risk posed by proceeding, even with a meritorious claim, can be simply too big to overcome. Costs can have an impact on respondents however, as outlined above, respondents are often motivated by reputation risk over cost. However, some practitioners were hesitant to endorse a move to a no-costs jurisdiction.

120. Other participants however emphasised the significant impact costs have on applicants, with some lawyers taking up to 95% of an applicant's winnings. As one senior legal practitioner said:

> *'Even a suburban solicitor's going to charge $2-5000 on the file, and so if you go into the State jurisdiction and you're only getting $10,000, well you're thinking, "I'm doing this for the lawyers; I'm not doing it for myself."'*

121. Similarly, an employment lawyer who acts for respondent employers emphasised:

> *'It's quite often the case that the lawyer gets much more in their fees…than actually ends up in the pockets of the victim. That's a very common reality.'*

122. Costs have risen since *Richardson v Oracle* as cases are increasingly complex with more witnesses called and independent medical reports sought, as psychiatric harm and PTSD are more difficult to prove. A legal aid solicitor said:

> *'We got a quote for a psychiatric assessment and report the other day, and it was $6,000'* [higher than usual].

123. An employment lawyer who acts for respondent employers said that costs *'can be a million dollars or more in a really complex case…and may not be awarded even if you're successful'*.

124. This can be because, as a senior legal practitioner pointed out, preparation and conference time is longer for sexual harassment (compared with a straightforward commercial case) because it invariably includes a 'social work' element.

125. The quantitative research showed that since 2001, the respondent has been ordered to pay a successful applicant's costs 67% of the time. Concerningly, in 10% of cases, a successful applicant has been ordered to pay the respondent's costs. In 56% of cases where an applicant was unsuccessful, they were ordered to pay the respondent's costs.

126. ***Calderbank* offers** are used as strategically by one party (usually the respondent) who has viewed all the evidence. The timing is critical. The other party may face a prohibitive costs order to continue, however, emotions run high around sexual harassment and this may preclude an applicant from giving proper consideration of the case at hand. As an employment lawyer who acts for respondent employers quipped, *Calderbank* offers are 'part of the litigation game'. *Calderbank* offers are rarely encountered in a no-costs jurisdiction.

127. However, some practitioners questioned whether the removal of the costs risk would have a detrimental effect. Other practitioners suggested that if there is no costs risk, a complaint of sexual harassment tends to be taken less seriously by the legal community (cf the federal jurisdiction pre-2000). However, this has a chilling effect for an applicant of modest means faced with a judgment debt of $40,000 or $50,000.

128. One senior legal practitioner said that when acting for an employer in respect of a meritorious claim, costs are a way to 'make people realistic'

129. There was some support amongst participants for the *Sex Discrimination Act* to become a **no costs** jurisdiction**,** as in the *Fair Work Act*. However, some participants indicated this may be a double-edged sword, as a respondent with deep pockets can make it unviable for an applicant to proceed in a 'no costs' jurisdiction:

> *'If your case is strung out for years, your costs will end up chewing up a significant part of any settlement or award, if not eclipsing it.'* - a private practice employment lawyer who acts for claimants

130. Barristers and solicitors are the beneficiaries of the current adverse costs federal system. As one senior legal practitioner observed, *'the winners in litigation are the solicitors'*.

131. However, one former judge who heard numerous harassment cases questioned whether people would say, *'No, I won't go to the Federal Circuit Court because it's a cost jurisdiction; I'll go to the State even though I won't get a quarter of the money'*.

132. While no win/no fee arrangements suit the economic model of some private practice solicitors, costs can still consume the damages.

133. A variety of costs arrangements can be made with lawyers, including no win/no fee (may involve some costs) or pay-as-you-go. Costs arrangements may be adapted according to financial position.

134. There can be costs implications for respondents. For example, self-represented litigants with a legitimate claim can take longer, causing respondent's costs to increase, which can be a problem for a small business.

135. As a result, even in no-costs jurisdictions, lawyers may feel compelled to act pro bono or charge clients only a nominal fee.

136. Costs remain the single biggest barrier for most complainants in successfully accessing and utilising the anti-discrimination system. However, many practising in the area believe costs still have an important role to play. Some potential solutions to the issue of costs are discussed below.

O Defamation

137. **Defamation is a jurisdiction with a long history, a different rationale and a patriarchal legacy**. Significantly higher damages are available for defamation than in sexual harassment. As community approbation of sexual harassment is increasing, so too are the consequences of being accused of sexual harassment. Defamation is being used as a tool by men to silence women.

138. Defamation is a lucrative area of practice for defamation specialists. The quantitative research showed that damages for non-economic loss in defamation were *four times* those that are available in sexual harassment. The average award at in the federal jurisdiction was **$239,856** (compared with just over $14,000 for sexual harassment).

139. Higher damages are awarded in defamation, but this corresponds with higher costs. As one private practice employment lawyer who acts for claimants in sexual harassment matters said, they advise clients that they would be crazy to go to trial as defamation is such a risky and expensive business.

140. Defamation is dominated by powerful and wealthy men with resources who are concerned about the risk of reputational damage. As a human rights and discrimination lawyer said:

> *'I think what we're seeing is generally defamation being used by powerful people to silence women who are making claims of sexual harassment or sexual assault…it shows the power imbalance inherent in our legal system, where victims or survivors aren't able to speak out as easily as people who are alleged perpetrators…we urgently need defamation law reform in this country in order to address that specific issue.'*

141. A private practice employment lawyer who acts for claimants in sexual harassment cases expressed the power dynamic in the following way: *'If you complain about me, you've got a tank coming your way all guns blazing'.*

142. Allegations of sexual harassment are traditionally treated as more serious than the act of harassment itself (for example, the Geoffrey Rush case), resulting in the award of considerably higher damages. As Kate Jenkins said:

> *'It's just so out of whack that a woman can be harassed and it's worth little and very difficult to prove, but someone can say a man has harassed them and the man can be awarded millions of dollars in damages; it's so off the spectrum. It's just…continually reinforcing community attitudes that say "don't believe her", but that "poor man" kind of thing', which is reflected in community attitudes research that shows high rates of distrust of women's allegations and sympathy for accused (and even guilty) men to resume their high paying careers.'*

143. Interestingly, this was not supported by the polling results. Just 12% of respondents believed that defamation is worse than sexual harassment and should result in higher compensation. 70% of respondents reported either that sexual harassment was worse than defamation, or that they were about the same and should receive the same amount of compensation.

144. A senior legal practitioner highlighted, as changing community standards find sexual harassment increasingly unacceptance, a corollary is an *'increasing the sense of community disapprobation' and the idea that 'to be accused of that conduct is a very serious matter and so, you can't have one [increasing disapprobation of sexual harassment] without the other [high awards for defamation]'.*

145. Conversely, some practitioners said there was a sense that defamation awards are decreasing while sexual harassment awards are increasing.

Part IV: Reform

A consistent theme across the qualitative research was that the federal anti-discrimination regime, in relation to sexual harassment, and generally, is not fulfilling its purpose. As one human rights and discrimination lawyer said, it should be 'a beneficial jurisdiction that protects and promotes human rights, but barriers in getting to court need to be addressed.' Below we consider possible reforms, with a particular focus on damages and costs, drawing on insight from the qualitative research. We note that this section was prepared prior to the introduction in Parliament of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*, which if enacted will impact some of the issues discussed below (particularly in relation to costs and a positive duty).

A Damages

Data Collection

1. The doctrinal and qualitative research revealed that damages in sexual harassment cases, notwithstanding some outliers, remain low. One factor is the opacity around settlement amounts. Given the extremely limited number of cases decided by the judiciary, the benchmark for damages remains relatively static and there is an absence of judicial guidance. Accordingly, **transparency and clarity** need to be developed around processes that are presently opaque. As a legal aid solicitor emphasised:

> '*I think there's a real risk that our view of a reasonable settlement sum is affected by the [lack of transparency], so we start to think that lower amounts of compensation are appropriate just because that's what we see day-to-day'*

2. There was support among numerous interview participants for the development of publicly available register with de-identified data to facilitate greater transparency (as is already done by the Fair Work Commission and unfair dismissals). The AHRC formerly made de-identified data available from time to time but lapsed due to resourcing challenges. The practice is continued by some State and Territory bodies, eg, Queensland Human Rights Commission.[63]

3. However, questions have been raised as to how effective this would be because of the diverse reasons for settlement. Subjective and individualistic factors influence outcomes, including individual resilience (the so-called eggshell skull), the extent of repetition of the conduct, their previous experience of sexual harassment or other trauma.

4. An employment lawyer who acts for respondent employers emphasised:

> *'For the respondent, the reason [for settling] might have been purely reputational risk because they wanted to settle it before they were engaging in a takeover or an acquisition or whatever. And so, it doesn't necessarily lend itself to any objective analysis…[A Register of Settlements] would be interesting, but I don't know how helpful it would be.'*

[63] See https://www.qhrc.qld.gov.au/resources/case-studies/sex-discrimination.

5. De-identified collection also will not address some of the wider issues relating to opacity and settlements via NDAs. A community legal centre employment and discrimination lawyer expressed this concern:

> *'I don't think it's going to do anything [about] repeat offenders…or stopping behaviour…These settlements allow repeat offenders to just keep on finding new victims.'*

6. Nonetheless, several interview participants considered it would helpfully inform solicitors acting for claimants in negotiation settlements or pleading claims, and assist the profession to understand trends. Accordingly, given the AHRC's existing involvement in the settlement process by way of conciliation, we recommend that it collect and publish settlement data. While every case is unique, to the extent possible the AHRC should seek to analyse and categorise cases by the nature of the sexual harassment, aggravating factors (such as repetition and power imbalance), the impact on the complainant and the nature of the respondent, such that the data can usefully inform the profession and prospective complainants and respondents.

Observation 1: Consideration should be given to the Australian Human Rights Commission being directed, and appropriately resourced, to publish on its website de-identified data annually about the quantum of settlement amounts in sexual harassment cases that settle via conciliation. To the extent possible, data should be grouped, analysed and published so as to enable an understanding of typical settlement sums for sexual harassment of differing forms and in differing contexts (including the variable impact upon claimants).

7. Damages, and particularly general damages for non-economic loss, remain low in sexual harassment matters, and even lower in relation to other forms of discrimination. This is the case both for judicial awards and settlements (although the nexus is not absolute, judicial awards influence settlement sums). While employment lawyers who act for large corporate respondents indicated that settlement sums have risen significantly (including to mid-six figure sums in some cases), this remains the exception rather than the rule. The continued inadequacy of damages is underscored in Part I, with defamation general damages four times higher than sexual harassment general damages. For as long as general damages remain low, and legal costs in pursuing a claim high, the utility of the anti-discrimination law for complainants will be diminished. By awarding higher damages in relation to other forms of legal wrong (such as defamation), but not sexual harassment, the judiciary is maintaining a patriarchal system which minimises the often-severe impact of sexual harassment.

8. It is hoped that greater transparency around settlement amounts (pursuant to Recommendation 1) and the observations below will collectively assist in the uplift of sexual harassment damages. However, it is recommended that the AHRC, as part of its existing role of monitoring the development of discrimination law, actively monitor damages awarded and undertake ongoing comparison exercises with cognate areas of law (such as defamation). Ongoing discrepancies may then form the basis for further law reform or other initiatives.

Observation 2: That the Australian Human Rights Commission actively monitor damages awards in sexual harassment litigation under the *Sex Discrimination Act 1984*

(Cth), comparing the quantum with awards in comparable fields (such as negligence and defamation), and publishing this comparison on its website. Continued divergence should be brought to the attention of the Australian Government for consideration of law reform to bring general damages in sexual harassment litigation in line with community standards.

Regulatory oversight

9. The present anti-discrimination paradigm requires individuals complainants, who have experienced traumatic incidents of sexual harassment or other discrimination, to vindicate their legal rights in the public interest. Despite the wider social objective of anti-discrimination law, the burden of change is placed on individual litigants. This was a cause for concern among several interview participants.

10. One senior legal practitioner suggested that an enhanced regulatory role should be given to the Australian Human Rights Commission: *'The AHRC should be running these cases for people'.*

11. Noting concerns about overly-burdening the AHRC, and the risk of conflicts of interest given its existing function, other interview participants suggested that an independent regulator should be established. A discrimination law expert and administrative tribunal supported such a move:

> *'I think that's often much more comfortable for many individual complainants, for many individual complainants are not only intimidated but are awkward about litigating…especially younger complainants…when they've got their careers ahead of them and would…be happier being seen as a witness rather than the originator and initiator of litigation.'*

12. While the establishment of an independent regulator or an enhanced regulatory role for the AHRC would be a significant positive development, and enable the regulator to litigate public interest cases, a publicly funded regulator cannot be relied upon solely. One interview participant raised concerns about other areas, such as workplace health and safety, where regulators have a monopoly on litigation under statutory obligations:

> *'they can never resource investigations or prosecutions systematically and effectively'.*

13. Accordingly, we suggest that a new regulator, or enhanced regulatory powers for the AHRC, operate alongside rather than replacing existing individual rights. As an interview participant noted: *'Your best system is at least two-edged systems with regulator and individual course of action.'*

Observation 3: Consideration should be given to the establishment of a standalone anti-discrimination regulator, or conferral of similar functions (and appropriate resourcing) on the Australian Human Rights Commission, to fulfil a function equivalent to the Fair Work Ombudsman in relation to the *Australian Human Rights Commission Act 1986* (Cth), *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). That the regulator be empowered, among other functions, to initiate and pursue public interest

litigation on behalf of individuals and groups, with particular regard to those affected by workplace sexual harassment.

Civil penalties and aggravated damages

14. Another mechanism to address ongoing failures by employers to prevent sexual harassment, and increase the level of damages awarded in sexual harassment litigation, might be the inclusion of civil penalties in the legislative scheme or the increased judicial use of aggravated or exemplary damages.

15. Several interview participants suggested that civil penalties/remedies should available in the case of respondents who persistently violate sexual harassment prohibitions (cf regulatory action by regulatory bodies such as the Fair Work Commission and the Australian Building & Construction Commission (ABCC)). Legislative change to include civil penalties should specify that penalties should be awarded to the complainant. A lawyer with a federal regulator provided an example of civil penalties working in practice in an age discrimination case:

> *'We were able to apply to the court and have 50% of the penalties directed to the affected party… Total penalties imposed by the Federal Court were $29,000 and 50% of that ($14,500) was awarded to the affected worker. Although we don't really act for the complainants in the same way that law firms would…when we take building industry participants to court for contravening the Act, we…hope it…encourages changes in the way in which they behave and operate so that they comply with the law. Wherever possible, we also seek redress for victims and third parties who have suffered detriment as a result of unlawful conduct. The [regulator], as a model litigant, will only commence proceedings if there are reasonable prospects of success, and it is in the public interest'*

16. Currently, the anti-discrimination jurisdiction is solely compensatory when it comes to damages. Some interview participants suggested that might need to change. A legal aid lawyer recommended that there is *'a need for more punitive damages, where there has been really egregious conduct… [to give] a sense of justice for the victim/survivor'.*

17. Punitive damages could be an effective deterrent, which would align with one motive of complainants. As a community legal centre lawyer said, paraphrasing clients, *'"I don't want him to do this to someone else"'.*

18. While punitive damages are not currently utilised in the jurisdiction in Australia, they are used extensively in the US where substantial damages may be imposed. Instead, modest aggravated damages are occasionally imposed in Australia:

> *'Where [aggravated] damages are a very trivial nominal sum, it doesn't really achieve anything at all, and it certainly doesn't go anywhere near if you're saying it would be an alternative to costs or no costs. It doesn't go anywhere near what the costs are, so it doesn't help at all; whereas in the US, it effectively funds the cases.'* – a private practice employment lawyer who acts for complainants

19. As there is some uncertainty around the ability to award exemplary damages in anti-discrimination law (see *Wotton v Queensland (No 5)* [2016] FCA 1457 (5 December

2016), law reform may be required to enable more robust use of damages awards that go beyond what is merely-compensatory.

Observation 4: Consideration be given to amending the *Australian Human Rights Commission Act 1986* (Cth) to provide for civil penalties against employers vicariously liable for sexual harassment where there has been a persistent or egregious failure to take reasonable steps to prevent harassment (with the regulator empowered to seek civil penalties). That judicial consideration be given to greater use of aggravated and/or exemplary damages in cases of egregious sexual harassment and persistent failure to inhibit sexual harassment.

Clarification of workers' compensation law

20. Among interview participants, there was considerable uncertainty around the intersection between workers' compensation and discrimination law. These two areas of practice are relatively 'siloed', such that each does not typically have expertise of the other. While theoretically claims under both fields can be taken simultaneously, the uncertainty and potential for conflict, including under the *SRCA*, was described by one private practice lawyer who acts for claimants as 'a lawyer's picnic'.

21. As the judgment of Rares J in *Friend v Comcare* [2021] FCA 837 (23 July 2021) is on appeal, with the Full Court of the Federal Court's judgment presently reserved, it is not an opportune time to consider the intersection between these regimes in any detail. However, the disjuncture between the two fields was made clear in our research, in a way that ultimately supports the outcome of the case at first instance. Given the lingering uncertainty, even if Rares J's judgment is upheld, we recommend that the *SRCA* is amended to clarify its limited operation in relation to anti-discrimination law.

Observation 5: That the *Safety, Rehabilitation and Compensation Act 1988* (Cth) be amended to clarify that sections 44, 45 and 48 do not apply to general damages paid following judgment or settlement in anti-discrimination litigation. This recommendation is consistent with the Federal Court's decision in *Friend v Comcare* [2021] FCA 837 (23 July 2021), although it is noted that the decision is presently the subject of appeal.

Judicial approaches to sexual harassment

22. This research has highlighted the fact that a low level of understanding of the harm of sexual harassment continues to persist among many legal practitioners, judges and members of the wider community, who would benefit from focussed education and training programmes.

23. In the 1990s, the federal government funded the production of gender-sensitive materials to be made available to all Australian law schools. The initiative followed the public outcry that ensued from a remark by South Australian Supreme Court Judge, Bollen J, that 'a little rougher than usual handling' was acceptable on the part of a husband towards a wife who was less than willing to engage in sexual intercourse (*R v Johns*, 1992 (unreported)).

24. It is recommended that a new iteration of gender and diversity-sensitivity materials should be developed in conjunction with Continuing Professional Development (CPD)

courses for lawyers and training programmes for judges and other personnel. The materials could be developed by appropriately qualified academics and offered by the Law Council of Australia and the Australasian Institute of Judicial Administration.

25. Specific training for federal judges and justices in relation to the skills necessary for trauma-informed judging would be immensely desirable. This might build on training already provided to family law judges in relation to gender-based violence.

26. A theme emerging in the qualitative research was an absence of specialisation by those hearing and determining discrimination claims. Given the nature of these claims, specialisation is desirable. Accordingly, to address the concerns raised by interview participants, we recommend that courts consider establishing specific discrimination practice areas, with specialised training a prerequisite for hearing discrimination cases, including sexual harassment. To assist specialisation, the Federal Court and Federal Circuit and Family Court of Australia should consider the development of a bench book for discrimination cases.

Observation 6: Consideration should be given to specialist training by suitably-qualified experts on the nature, prevalence and impact of sexual harassment, discrimination and gender-based violence being developed and provided to judges (and the legal profession more broadly). This training would include skill-building around a trauma-informed approach to hearing and determining discrimination matters. That the Federal Court and Federal Circuit and Family Court of Australia consider establishing specific discrimination national practice areas, and require judges hearing sexual harassment cases to have undertaken the specialist training. That a bench book, equivalent to the National Domestic and Family Violence Bench Book, be established for discrimination matters.

B Costs

27. As explored in Part III, costs and costs risk remain a major barrier to complainants commencing and maintaining sexual harassment litigation.

28. The legal profession is resistant to radical change in regard to costs. As a senior barrister and former administrative tribunal member emphasised:

> *'The structures that we work under are so entrenched unless there's a complete reorganisation of the way the courts work [that includes] the adversarial system [so that] the costs issues, I think, [are] almost insurmountable.'*

29. There are several options for reform that already exist in other legal schemes, such that they can be transplanted with less difficulty than a more radical overhaul.

30. **No costs jurisdiction**: Such as in the *Fair Work Act 2009* (Cth), s 570, as recommended for by *Respect@Work*. However, a no costs jurisdiction will be a disincentive for some applicants and may reduce access to justice. Applicants require representation in courts because of legal complexity associated with these kinds of claim. As a senior barrister and former administrative tribunal member said, *'even in a no-costs regime…people still need to fund their own representation'*. Several practitioners who operate no-win, no-fee practices suggested that, if *Fair Work*-style costs protections were enacted, it

may no longer be economical for them to act in sexual harassment matters. Hence a reform intended to improve access to justice may paradoxically diminish access to justice.

31. On the other hand, many community legal centre and pro bono practitioners maintained that, notwithstanding that access to justice risk, costs protections were still desirable. It was suggested that the costs risk was such an insurmountable obstacle that addressing it was ultimately beneficial, even if it caused some issues within the profession.

32. A senior legal practitioner expressed concerns that making the *SDA* a no costs jurisdiction will allow unmeritorious claims to continue:

> *'…the meritorious claims settle and settle well in the sense that people receive compensation commensurate with a risk which is not insignificant, but which is much larger, for example, than in the adverse action space. And so, to the extent that cases do not settle, often they are the unmeritorious cases… And I think that when you're dealing with unmeritorious cases, the only leverage that the very good mediators at the Federal Court have is the costs exposure. Accordingly, a likely consequence of the discrimination jurisdiction no longer being one where costs are awarded is that the very unmeritorious cases will clog up the system.'*

33. The removal of the adverse costs risk could result in a small increase in litigation, but it is unlikely to open the floodgates. As a human rights and discrimination lawyer said:

> *'I think those cases will be very important cases because they're likely to be run on points where we need the court's interpretation of sexual harassment law, for example, where we have very little jurisprudence. I can imagine if the cost risk was removed, we'd see public interest cases being brought in this area which we haven't really seen…for example, if you are sexually harassed in a labour hire arrangement, who is responsible and what happens? Like those types of things which we know are increasingly common in our insecure labour system…when the Fair Work Act came in and there was this different cost model, lots of people thought we'd see a significant increase in, for example, discrimination claims under general protections, and we really haven't seen that'*

34. **Other hybrid models** have been suggested, including some sort of asymmetrical or capping of costs system, such as:

    a) Each party pays costs to a point, after which court-appointed mediation costs come into effect.

    b) Applicant pays the first $15,000 before issuing a costs order; cf Legal Aid NSW.

    c) No costs until after the first affidavit or failed second mediation (suggested by a senior legal practitioner).

    d) **Asymmetric costs:** Compare (*Corporations Act 2001* (Cth), Part 9.4AAA (Whistleblower protection): if applicant is successful costs can be recovered; if

applicant unsuccessful does not pay respondent's costs, unless vexatious (albeit untested in case law to date).

e) **Unmeritorious cases**: suggestion that a lawyer certifies that a case has a reasonable chance of success prior to commencing litigation. However, some interviewees regard such certification with scepticism:

> *'I don't know about those certifications. They exist all over the place and I don't think it changes matters, and I think it's a very hard thing to do to put the blame on the lawyer. The lawyer takes the instructions; [he] listens to what [his [client says; [he's] not there to cross-examine [his] client into the truth or otherwise. I think things are going too far.'* – former judge who heard numerous sexual harassment cases

35. Having extensively considered the issue of costs, including by reviewing the doctrinal data and raising the issue with all interview participants, we consider that the optimal reform is the introduction of asymmetric costs protections that currently exist in whistleblowing law (including the *Public Interest Disclosure Act 2013* (Cth) and the *Corporations Act 2001* (Cth)). This approach was supported by many, although not all, interview participants. We consider that this costs approach will alleviate the substantial barrier to justice that costs risk presently poses in federal discrimination litigation, without inadvertently reducing access to justice by making no-win, no-fee models uneconomical. We also believe that the exceptions to the rule for vexatious or unreasonable conduct in litigation provides an adequate safeguard from unmeritorious claims.

36. One factor behind our support for this model is the conceptual similarity with whistleblower protections. The costs protections in whistleblowing law recognise that whistleblowers act in the public interest when they speak up, and should be protected from adverse costs risk, but are able to recover their own costs if successful in litigation. Similarly, the individualisation of Australia's anti-discrimination regime means that sexual harassment complainants are acting in the public interest when bringing a claim – they are seeking to vindicate legal rights that ultimately contribute to wider societal change. Sexual harassment does not just impact the individual complainant, it has a negative impact on Australian society generally. Accordingly, complainants who litigate are acting in the public interest. They should receive equivalent costs protections to whistleblowers.

Observation 7: That costs protections, whereby an applicant may not be ordered to pay costs incurred by another party, except where an applicant has instituted proceedings vexatiously or acted unreasonably, modelled on s 18 of the *Public Interest Disclosure Act 2013* (Cth) and s 1317AH of the *Corporations Act 2001* (Cth), be implemented in federal anti-discrimination law.

C Wider Reform and Funding

Outstanding Respect@Work recommendations

37. **Positive duty**: While a positive duty is not the subject of this report, it is strongly supported by the researchers. There was also robust support for a positive duty among

research participants. A proactive approach that places responsibility on employers to create an environment committed to gender equity, cultural diversity and respect for all employees would minimise the current burden on survivors of sexual harassment to lodge complaints, pay for the cost of initiating litigation, carry the burden of proof, endure the stress of protracted negotiations and possible litigation, as well as being subjected to the likely shame and humiliation of being cross-examined about their experience in a public forum, to say nothing of the costs to their health and the deleterious impact on their careers. It could also represent considerable cost savings for employers in terms of legal costs, as well as staff turnover and absenteeism. A proactive approach would also represent a considerable saving to the public purse in terms of health care and unemployment benefits. As a private practice employment lawyer who acts for claimants in sexual harassment claims said:

> *'You can make a powerful public interest argument…making women safe at work…[reduces] worker's compensation claims, social security claims, health costs'*

38. **Historical sexual harassment cases**: A person's career can be destroyed as a result of sexual harassment and the survivor may never be able to work again. Survivors have tended to suppress past trauma, and legislative time limits have deterred the running of cases that are out of time (presently 6-24 months depending on jurisdiction). The long-term consequences of sexual harassment for many complainants were a recurring theme in interviews. As Kate Jenkins emphasised:

> *'What did surprise me, because I was talking to people who were sexually harassed 20 years ago, is the long tail of the impact of sexual harassment both psychologically and financially…"I left the industry I loved… I have never earned what I could have if I had stayed in that industry…But the perpetrator is now a global partner of blah, blah, blah… every time I see their name reported in the paper as a respected leader it triggers my trauma", and so some of the psychological harm was connected with the absolute injustice and economic harm for not returning to the industry they had trained for. Not just that they were harmed but also the injustice of the person continuing with impunity with whatever their great success was…Respect@Work for me was all about women never achieving their full economic potential as well as the harm.'*

39. Accordingly, we strongly encourage the implementation of the *Respect@Work* recommendation in relation to a historical complaint process. Insight might helpfully be drawn from some of the schemes established to address historical child sex abuse.

40. **Non-disclosure agreements (NDAs):** NDAs were another frequent topic of conversation among interview participants. While we note that the Australian Government is currently undertaking work in relation to best-practice guidance, following its acceptance of recommendation 38 of the *Respect@Work* report, we recommend that consideration be given to formal regulation, including carve-outs to explicitly allow complainants to speak up in certain circumstances. There was concern among some interview participants that NDAs immunise the actions of serial harassers. While a complete ban on NDAs may have unintended consequences, and we support the agency of complainants who desire that their experience be kept confidential, there should be greater scope for complainants to speak about their experiences. As a human

rights and discrimination lawyer said:

> *'I think many of the people I work with who have experienced sexual harassment often want to hold the respondent to account so this doesn't happen to someone else in the future'*

41. The freedom of complainants to speak following a settlement could enhance transparency and serve to educate employers and the community more generally, as recent high-profile examples have demonstrated. An employer lawyer observed: *'Storytelling is so powerful'.*

Observation 8: That the Australian Government implement outstanding recommendations of the *Respect@Work* report, particularly recommendation 17 (positive duty) and recommendation 27 (historical complaints process). The Australian Government should also consider going beyond what it has accepted in relation to recommendation 38 (non-disclosure agreements) and formally regulate their use to empower sexual harassment complainants to speak up.

Reverse onus

42. In other areas of workplace-related law, such as the *Fair Work Act 2009* (Cth), reverse onus provisions acknowledge that respondent employers have a monopoly on evidence and an inequality of arms. In such circumstances, the legal burden can be inordinately difficult for a complainant to meet. Reverse onus provisions typically involve the applicant adducing evidence of a prima facie case, whereupon the legal burden shifts to the respondent.

43. Interview participants, particularly those who act for sexual harassment complainants (especially in circumstances of acute vulnerability), suggested that the legal playing field remains significantly imbalanced against their clients. To address this imbalance, consideration should be given to include a reverse onus provision in sexual harassment litigation. Such a provision might be particularly necessary for complainants in litigation alleging a failure by an employer to comply with its positive duty, if a positive duty is enacted. However, the utility of a reverse onus provision is not so limited. Given the difficulties of sexual harassment litigation, as extensively documented throughout this report, consideration of burden-shifting is necessary.

Observation 9: Consideration should be given to reducing the burden on sexual harassment claimants by the inclusion of a reverse onus provision in the *Australian Human Rights Commission Act 1986* (Cth). It is envisaged that such a provision would be similar to that contained in the *Fair Work Act 2009* (Cth).

Funding

44. This report has shown that a minuscule proportion of matters proceed to litigation in the anti-discrimination jurisdiction for a range of reasons but, most particularly, because of the costs of litigation and the risk of an adverse costs order.

45. Legal aid, lawyers acting pro bono, community legal centres and specialist legal services wish to assist sexual harassment complainants in vindicating their rights, and

particularly in commencing and maintaining litigation that is in the public interest. Comprehensive legal support is not feasible without adequate funding. As a senior barrister and former administrative tribunal member pointed out, in one particular jurisdiction, *'legal aid at one point did fund these types of matters…over 20 years ago'.*

46. Lawyers acting pro bono, whether through a law firm, legal aid, community legal centre or special legal service, play a major role in the existing anti-discrimination framework. Without these lawyers, the system would grind to a halt. While some private practice firms take on complainants on a no-win, no-fee basis, and some complainants have the financial ability to pay legal fees, a significant proportion of those who experience sexual harassment and seek legal advice can do so only because that advice is free. But the capacity of these pro bono legal services is extremely stretched – as was made clear in our research interviews.

47. It is nevertheless noted that the Australian Government has provided significant additional legal assistance in the 2021-22 Budget, amounting to $43.9 million over four years, for specialist lawyers with workplace and discrimination law expertise consistent with Recommendation 53 of the Respect@Work Report. Funding is being provided to the States and Territories through the National Legal Assistance Partnership Agreement 2020-25 and the Commonwealth requires this funding to be directed to community legal centres, legal aid commissions and Aboriginal and Torrest Strait Islander Legal Services.

Observation 10: That the Australian Government ensure that a proportion of the funding to the States and Territories made under the National Legal Assistance Partnership Agreement 2020-25 be devoted to specialist community legal centres – including women's legal centres, Aboriginal legal services, migrant legal services and legal services for people with a disability – for the express purpose of facilitating comprehensive legal support for complainants involved in the resolution of sexual harassment complaints, including litigation.