PILCH VIC Public Interest Law Clearing House

Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality

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Part A - Executive summary & recommendations

1. Executive Summary

1.1 The Public Interest Law Clearing House (**PILCH**) welcomes the opportunity to contribute to the inquiry by the Senate Legal and Constitutional Affairs Committee (**Committee**) into the effectiveness of the *Sex Discrimination Act 1984* (Cth)(**the SDA**) in eliminating discrimination and promoting gender equality (**Inquiry**). We commend the Senate on its initiative to undertake the Inquiry.

1.2 The focus of this submission is on the most prevalent form of sex discrimination in Australia, sexual harassment. However many of PILCH's observations and recommendations are applicable to other forms of sex discrimination.

1.3 The SDA was enacted in 1984 to fulfil Australia's international legal obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women* (**CEDAW**), among other human rights obligations pursuant to conventions including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Its enactment raised hopes that women would be afforded equality of opportunity including freedom from sexual harassment in the public arena and the rights to work and equal employment opportunities. Sadly, this submission concludes the SDA is failing to achieve its objectives in relation to sexual harassment.

1.4 The regime established under the SDA to attempt to eliminate sexual harassment is predicated on an individual complaint based approach to sex discrimination. It relies upon the ability of an individual to understand the process and pursue a remedy whilst assuming that the individual has the resources and ability to enforce their rights under the law. The reality of the situation, however, is that many women affected by sex discrimination do not have the economic means to afford legal representation to assist them in making a complaint.

1.5 PILCH considers that sexual harassment remains prevalent in Australia and there is little awareness of the incidence, nature and consequences of sexual harassment. PILCH's experience indicates that many victims of sexual harassment have little confidence in the complaints based system, which may, in some cases, exacerbate the trauma associated with sexual harassment. Moreover, the remedies awarded in cases of sexual harassment are inadequate and often *ad hoc*; and victims of sexual harassment are not being rehabilitated nor actively reintegrated into the workplace.

1.6 In order to address these issues, PILCH submits that significant legislative amendment of the SDA is required. Such amendment should be guided by Australia's international legal obligations including, in particular, non-derogable principles in relation to discrimination.

1.7 PILCH submits that Parliament should move away from the complaints based model established by the SDA, in favour of an investigative model whereby the Human Rights and Equal Opportunity Commission (**the HREOC**) is resourced and empowered to investigate instances of sexual harassment and make binding determinations. PILCH also submits that HREOC should be afforded commensurate powers to identify and address systemic issues in relation to sex discrimination, and that the SDA should place a greater onus on employers to report instances of sexual harassment and to rehabilitate and reintegrate victims of sexual harassment in the workplace.

2. Recommendations

2.1 PILCH submits that the Committee should recommend:

(1) that the effectiveness of the SDA in eliminating sexual harassment be measured against the entirety of Australia's obligations to eliminate discrimination against women under CEDAW;

(2) an increase in the level of damages available in sexual harassment cases to reflect the seriousness of the conduct and its impact on victims;

(3) legislative amendments to the SDA to empower an appropriate enforcement agency to carry out investigations into individual complaints of sex discrimination, including sexual harassment;

(4) legislative amendments to the SDA to require employers to report serious instance of sexual harassment;

(5) legislative amendments to provide the HREOC with powers to: make findings and recommendations in relation to instances of sexual harassment; investigate and enforce compliance with orders or agreements arising from proceedings under the SDA; commence proceedings; and facilitate the effective rehabilitation complainants;

(6) legislative amendments to the SDA to include employer responsibility to take all reasonable steps necessary to ensure the rehabilitation and reintegration of the complainant into the workplace;

(7) legislative amendments to the SDA to extend the limitation period to three years in which HREOC may entertain a complaint if it relates to an alleged contravention of the SDA;

(8) legislative amendments to the SDA to remove the conciliation role of the HREOC in favour of an investigative role;

(9) that the HREOC be greater resourced to undertake research, policy reform, education and training;

(10) that community legal centres be adequately resourced to assist complainants with complaints of discrimination and that a specialist community legal centre be established to address all types of discrimination;

(11) legislative amendments to the SDA to grant the HREOC power to make binding codes of conduct; and

(12) legislative amendments to the SDA to include a positive duty on all workplaces, when carrying out their functions, to have regard to the need to eliminate unlawful sex discrimination and harassment and to promote equality of opportunity.

Part B – About this submission

3. About PILCH

3.1 PILCH welcomes the opportunity to make a submission to the Committee's inquiry into the effectiveness of the SDA.

3.2 PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

3.3 PILCH coordinates the delivery of pro bono legal services through five schemes:

- the Public Interest Law Scheme (**PILS**);
- the Victorian Bar Legal Assistance Scheme (**VBLAS**);
- the Law Institute of Victoria Legal Assistance Scheme (**LIVLAS**);
- PILCH Connect (**Connect**);
- the Homeless Persons' Legal Clinic (**HPLC**); and
- Seniors Rights Victoria (**SRV**).

3.4 PILCH's objectives are to:

1. improve access to justice and the legal system for those who are disadvantaged or marginalised;
2. identify matters of public interest requiring legal assistance;
3. seek redress in matters of public interest for those who are disadvantage or marginalised;
4. refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
5. support community organisations to pursue the interests of the communities they seek to represent; and
6. encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

3.5 In 2006-2007, PILCH assisted over 2000 individuals and organisations to access free legal and related services. Without these much needed services, many Victorians would find it impossible to navigate a complex legal system, secure representation, negotiate a fine, challenge an unlawful eviction, contest a deportation or even be aware of their rights and responsibilities.

4. Scope of this submission

4.1 PILCH has drawn upon the terms of reference and limited this submission to a consideration of key areas to which PILCH can offer particular insight and expertise.

4.2 In particular, this submission focuses on **sexual harassment**[1] and the extent to which the SDA:

(1) prevents sexual harassment, including by educative means;

(2) provides adequate and appropriate remedies in cases of sexual harassment;

(3) protects victims of sexual harassment, including the use and efficacy of the victimisation provisions under section 94;

(4) allows meaningful rehabilitation of victims of sexual harassment including the effect of confidentiality agreements in resolving sexual harassment complaints; and

(5) promotes and protects the right to be free from sexual discrimination.

4.3 In doing so PILCH has considered the provisions and objects of the SDA, the common law in relation to sexual harassment and Australia's international human rights obligations in relation to sexual harassment.

4.4 PILCH's experience and expertise in relation to this submission is drawn from the following:

(1) the personal and professional experience of the authors, including practice in discrimination law;

(2) observation and involvement in a number of sexual harassment cases through the facilitation of pro bono legal assistance;

(3) law reform activity, including a PILCH submission to the January 2008 review by the Victorian Government of the *Equal Opportunity Act 1995* (Vic);

(4) case law and social research; and

(5) consultation with victims of sexual harassment, health professionals and legal experts.

[1] While the submission focuses on sexual harassment, many of PILCH's observations and recommendations are equally applicable to other forms of sex discrimination

Part C – Objects of the SDA

5. The Convention on the Elimination of All Forms of Discrimination Against Women

5.1 PILCH considers that a necessary starting point for the Committee's inquiry is a consideration of the objects of the SDA when it was introduced and reflection upon the extent to which those aims have been achieved.

5.2 The SDA was introduced in 1984 following Australia's ratification of CEDAW in 1983[2]. This is reflected in section 3 of the SDA which provides, *inter alia,* that its objects are to give effect to certain provisions of CEDAW[3].

5.3 CEDAW does not deal with sexual harassment expressly. However, discrimination is defined broadly as 'any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field'[4].

5.4 According to HREOC**,** sexual harassment is a form of sex discrimination comprising 'any unwanted or unwelcome sexual behaviour which makes a person feel offended or humiliated and that reaction is reasonable in the circumstances' which has 'nothing to do with mutual attraction or friendship'[5].

5.5 Prior to the enactment of the SDA, unwelcome sexual conduct was held to be sex discrimination for the purposes of the *Anti-Discrimination Act 1977* (NSW) (as it then was)[6]. Sexual harassment has also been held to be a form of sex discrimination since the sexual harassment provisions were introduced into the SDA, which was necessary to resolve a question of the constitutional validity of those provisions given that CEDAW does not expressly deal with sexual harassment[7].

5.6 Clearly then, Australia's broad obligations in relation to the prevention and elimination of discrimination against women under CEDAW extend to sexual harassment. Most relevant to this submission, these obligations include:

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[2] CEDAW was signed on 17 July 1980 and ratified on 28 July 1983

[3] Sex Discrimination Act 1984 (Cth), s3(a)

[4] CEDAW, article 1.

5 See Sex Discrimination: A Guide to the Sex Discrimination Act (http://www.humanrights.gov.au/sex_discrimination/publication/guide/index.html#ques%204)

[6] *O'Callaghan v Loader* [1983] 3 NSWLR 89

[7] *Aldridge v Booth* (1988) 80 ALR 1

(1) the adoption of appropriate legislative and other measures, including sanctions where appropriate, prohibiting all forms of sexual harassment[8];

(2) ensuring through competent national tribunals and other public institutions the effective protection of women against any act of sexual harassment[9];

(3) taking all appropriate measurers to modify the social and cultural patterns of conduct of men and women with a view to the elimination of prejudices against women[10];

(4) taking all appropriate measures to eliminate discrimination against women in employment in order to ensure the rights to:

(i) work;

(ii) the same employment opportunities;

(iii) promotion and job security;

(iv) the protection of health and to safety in working conditions.[11]

6. Other obligations at international law

6.1 In addition to being bound by the terms of CEDAW, Australia is also bound by the content and terms of customary international human rights law which imposes responsibilities and obligations in relation to the realisation of the rights protected by CEDAW (among other covenants); namely obligations to respect, protect and fulfil human rights[12].

6.2 The obligation to respect human rights requires that States parties refrain from interfering, directly or indirectly, with enjoyment of human rights. The obligation to protect human rights requires that States parties prevent third parties, including organisations and individuals, from interfering in any way with the enjoyment of human rights. The obligation to fulfil human rights requires that States parties take positive steps to promote and support the realisation of human rights and, where necessary, to provide for the realisation of human rights for marginalised or disadvantaged groups.

6.3 In respect of sexual harassment, PILCH considers that the Committee should measure the efficacy of the SDA against these obligations. PILCH also notes and endorses the

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[8] CEDAW, article 2(b)

9 CEDAW, article 2(c)

10 CEDAW, article 5

11 CEDAW, article 11(f)

[12] UN Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water, [17]–[29], UN Doc E/C.12/2002/11 (2002). See also UN Committee on Economic, Social and Cultural Rights, General Comment 12: The Right

submission by the Human Rights Law Resource Centre in respect of Australia's obligations under international law.

Recommendation 1
The effectiveness of the SDA in eliminating sexual harassment should be measured against the entirety of Australia's obligations to eliminate discrimination against women under CEDAW

7. Objectives of the SDA

7.1 It is also clear that the elimination of sexual harassment is an object of the SDA. Section 3 provides that an object of the SDA is to 'eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity'.

7.2 During his second reading speech to the SDA's precursor, the *Sex Discrimination Bill 1984*, the (then) Special Minister of State, the Hon. Michael Young MP, said in relation to sexual harassment that:

> *'The Bill specifically makes unlawful discrimination involving sexual harassment in employment by employers or by co- workers and in education by members of staff.*
>
> *The Bill does not attempt to deal with all forms of sexual harassment but only with sexual harassment which can be characterised as discriminatory in nature, in the sense that it is linked to a belief that a rejection of an unwelcome sexual advance, an unwelcome request for sexual favours or other unwelcome sexual conduct would disadvantage the person in relation to employment or educational studies. The Government will be considering how best to deal with other forms of sexual harassment and will be seeking the views of women's organisations on this matter.'*

7.3 This submission will also consider the efficacy of the SDA in light of these objectives.

to Adequate Food, 66, [15], UN Doc HRI/GEN/1/Rev.5 (2001) and UN Committee on Economic, Social and Cultural Rights, General Comment 13: The Right to Education, 74, [47], UN Doc HRI/GEN/1/Rev.5 (2001).

Part D – The impact and extent of sexual harsssment

8. The prevalence of sexual harassment in Australia

8.1 Notwithstanding the legal and educative progress made by the SDA and the significant work of the HREOC, sex discrimination remains prevalent in our society. The majority of complaints lodged under the SDA involve sexual harassment[13].

8.2 Sex discrimination, including sexual harassment, overwhelmingly affects women more than men. Of 472 complaints made to the HREOC under the SDA in 2006-2007, almost 90 per cent were made by women. A national telephone survey commissioned by the HREOC in 2003 found that 41 per cent of women had personally experienced sexual harassment at some time in an area of public life compared to 14 per cent of men. Two thirds of these incidents of sexual harassment occurred in the workplace.[14]

8.3 Sexual harassment takes many forms ranging from unwanted sexual advances and propositioning, through to indecent exposure and sexual assault.[15] Anecdotal evidence suggests that the unique and sensitive nature of sexual harassment as a form of discrimination may lead to its underreporting. For example, a fear of victimisation in the workplace or job loss may prevent victims from making a complaint[16].

8.4 In PILCH's experience, additional factors such as the adversarial nature of the complaints-based system established under the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (**HREOC Act**); problems associated with internal grievance procedures; a failure to appreciate instances of sexual harassment; and inappropriate responses, suggests that the number of sexual harassment cases reported is not reflective of the scale of the problem.

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[13] Human Rights and Equal Opportunity Report, "A Bad Business, Review of Sexual Harassment in Employment 2002'.

[14] Human Rights and Equal Opportunity Commission Annual Report 2003-2004 Chapter 10, at 2

[15] Ball, J Commonwealth anti-discrimination law and the workplace: Recent developments. Paper delivered at the 2002 Workplace Review, October 2002, pg.5 Reference is made to case law developing jurisprudence on what constitutes sexual harassment. Refer also to Section 28A of the SDA which provides that sexual harassment occurs if a person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or engages in other unwelcome conduct of a sexual nature in relation to the person harassed.

[16] 2008 Gender Equality: What matters to Australian women and men: HREOC Listening Tour Report, 15

9. Awareness of sexual harassment

9.1 In addition to underreporting of sexual harassment cases, PILCH believes that a lack of awareness amongst victims as to what may constitute unlawful sexual harassment, combined with a common misapprehension that instances of sexual harassment are not 'serious enough' to warrant reporting, has significantly affected the number of sexual harassment cases being reported.

9.2 For example, PILCH's experience suggests that many employees fail to appreciate that unlawful sexual harassment is not confined to the workplace within working hours but also extends to work-related functions outside of work hours.[17] In addition, even where respondent employers may concede the facts of a dispute in sex discrimination cases it may be accompanied by a denial that such conduct was discriminatory,[18] resulting in a lack of vindication and closure for victims.

10. The nature of sexual harassment and its social context

10.1 In PILCH's experience of sexual harassment complaints, perpetrators are often in positions of relative power over victims: often the perpetrator will be a manager, supervisor or more senior member of staff. In some instances, perpetrators have even held positions within the workplace such as human resource managers and sexual harassment officers, designed to prevent sexual harassment. Power differentials may also be exacerbated by age differences between complainants and respondents[19] or factors such as the popularity and social standing of perpetrators. All of these factors may tend to silence victims or delay a complaint being made.

10.2 Meanwhile, workplace perceptions that such behaviour is trivial, personal, private or natural; or that victims should be capable of simply saying no and ignoring the harassment

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[17] *Lee v Smith and Ors* [2007] FMCA 59: In this case, since the rape occurred outside the workplace and outside work hours it was referred to by the respondent employer as a personal problem. This was despite the fact that the perpetrator was a work colleague and the alleged rape occurred at an after work drinks held at another colleague's home.

[18]Charlesworth, Sara, The Clare Burton Memorial Lecture 2007, Understandings of Sex Discrimination in the Workplace: Limits and Possibilities, RMIT University, 7

[19] Davis Jodie, Markman Ariella, "Behind Closed Doors: Approaches to resolving complaints of sexual harassment in employment" HREOC website: www.hreoc.gove.au/complaints_information/publications/behind_closed_doors.h...28/07/2008 , 5 of 14

without damaging effects, exacerbates difficulties in ensuring that instances of sexual harassment are dealt with appropriately.[20]

10.3 Some commentators have suggested that the dynamic of sexual harassment flows from the nexus between power, sexuality, and socialisation and that it continues the practice of treating women primarily as sexual objects. It has been dubbed the ‘abuse of power sexually’.[21]

10.4 Others have suggested that a culture of disrespect towards women, led by the way they are portrayed in the media, normalises and encourages sexual harassment.[22]

10.5 Such observations suggest that the Committee should consider whether a more holistic approach to dealing with sexual harassment is required, rather than simply relying on greater legislative intervention under the SDA.

11. The impact of sexual harassment on victims

11.1 Consultations by PILCH with victims of sexual harassment, relevant health professionals, and other lawyers specialising in this field suggest that the impact of this discriminatory conduct is wide reaching. Victims report experiencing anger, humiliation, a low sense of self worth, a sense of isolation/alienation, and distress.

11.2 Victims of sexual harassment have also required treatment for mental illnesses including depression, anxiety adjustment disorders, and chronic post-traumatic stress disorder (**PTSD**) which may result in victims reliving or re-experiencing the trauma. In some instances, these symptoms have resulted in victims being placed on stress leave under WorkCover or Comcare. In addition to these adverse health consequences, such outcomes can come at a significant cost to the broader community.

11.3 In 2007, VicHealth reported on the health consequences of discrimination and found a strong relationship between exposure to discrimination and poor mental health, especially depression.[23] While the VicHealth study focussed primarily on racial discrimination, it

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[20]Guest, Krysti, Law and Bills Digest Group 20 March 1999, “The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984.’ Research Paper 16 1998-1999, 20

[21] Ibid, 21

[22] 2008 Gender Equality, HREOC Report, above n 16, 15

[23] VicHealth 2007, More than Tolerance: Embracing diversity for health – Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions, VicHealth, Melbourne.

estimated that depression-related disability costs around $14.9 billion annually in Australia and results in more than six million working days lost each year.[24]

11.4 A number of inquiries to PILCH for assistance have involved victims of workplace sexual harassment who report that they have been forced to leave their workplace due to factors such as the inappropriate handling of the case; a lack rehabilitation or support provided by their employer; victimization by other staff; and both overt and covert support for the perpetrator. These experiences are consistent with a review of complaints lodged with the HREOC in 2003-2004, which found that 67 per cent of those who made a complaint of sexual harassment had left their employment.[25]

11.5 The impact of leaving work under these conditions can make it extremely difficult for the victim to reapply for similar positions in appropriate organisations. This is particularly problematic where the victim works in specialised areas where employment options are limited. In addition, victims may have to confront distressing questions in interviews about why they left their former workplace.

[24] Ibid

[25] Human Rights and Equal Opportunity Commission Annual Report 2003-2004 Chapter 10 , 2.

Part E – The complaints system pursuant to the HREOC Act

12. The Complaints Based System

12.1 Sections 11 (1) and 46PO of the HREOC Act[26] establish a complaint-based model for dealing with allegations of sex discrimination including sexual harassment, whereby a complaint is lodged at the HREOC and may be settled at conciliation. If the matter is not resolved at conciliation or conciliation is deemed inappropriate, the President of the Commission will issue a notice of termination whereby the complainant can then pursue the matter at the Federal Magistrates' Court or the Federal Court where it may be listed for mediation or conciliation.[27] In both processes of conciliation at the HREOC and mediation or conciliation with the respective courts, the outcome will usually remain confidential to the parties[28] and there will be no finding as to whether the alleged unlawful conduct took place.

12.2 If an allegation of sexual harassment is not resolved at mediation/conciliation or such proceedings are deemed inappropriate, the matter will proceed to a hearing where findings will be made about whether the alleged unlawful behaviour is proven. These decisions are on public record and form part of the development of jurisprudence in this area of law.

12.3 While the aim of the SDA is to eliminate sexual harassment as far as possible in the workplace, educational institutions and in other areas of public activity, PILCH's experience of sexual harassment matters suggests that the complaints based model has failed to adequately achieve this. In fact, in some instances the complaints based model has compounded the adverse consequences of an experience of sexual harassment. The following section discusses a number of characteristics that, in PILCH's view, undermine the complaints based system.

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[26] See also Human Rights Legislation Amendment Act No. 1 1999 (Cth) which provided for determinations of discrimination matters to occur in the Federal Magistrates' Court and Federal Court at hearing rather than at HREOC due to the case of Brandy which challenged the constitutionality of HREOC in making determinations that were enforceable.

[27] Section 34 Federal Magistrates Act 1999. Section 23 also allows for Alternative Dispute Resolution and Section and Section 26 also allows the Court to refer matters for Conciliation. If conciliation at HREOC cannot resolve the matter or it is inappropriate, the complainant then has 28 days to lodge an application with the Federal Court of Australia or Federal Magistrates' Court: see Jodie Davis and Ariella Markman, n 19

[28] Davis, Jodie, Markman Arielle, above n19, 6 of 14

13. The trauma of a sexual harassment complaint

13.1 PILCH has received applications for pro bono legal assistance from victims of sexual harassment who have been significantly traumatised by the unlawful acts committed against them. Clients have reported receiving previous legal advice not to pursue the perpetrator or employer for compensation and/or other remedies through the complaints process established by the SDA and the HREOC Act due to the potential for that process to inflict further trauma.

13.2 In PILCH's view, a fear of further trauma as a result of a sexual harassment complaint is not unfounded. The resolution of a complaint made pursuant to the two-tiered process established by the SDA and the HREOC Act may, in practice, take many months if not years to resolve[29]. This can cause complainants further anxiety and make it even harder for them to return to work. In addition, the publicity generated by a public hearing regarding what is often very personal matter can also be very traumatic for clients.

13.3 The impact of undergoing an external complaints process such as that afforded under the SDA on vulnerable complainants is evidenced in the following case study:

Case Study A

Jane was a victim of sexual harassment. She underwent the external complaints process by lodging a complaint to the VEOHRC, the Victorian equivalent of the HREOC. She then had her allegations substantiated at a hearing in the Victorian Civil and Administrative Tribunal (**VCAT**).

Despite an outcome in Jane's favour, as a result of the trauma she had experienced in the workplace - compounded by the stress and anxiety of undergoing the external complaints process - she was detained in a psychiatric unit soon after the hearing.

14. Unequal bargaining powers of parties

14.1 The power imbalance inherent in many sexual harassment complaints is often reflected in an unequal bargaining power between parties during conciliated complaints.

14.2 Though the Conciliation process provides for parties not to be represented,[30] in many cases respondents will be. As a result, pre-existing power imbalances may lead to

[29] Lee v Smith (No2) [2007] FMCA 1092: This matter (which did not involve conciliation at HREOC) took 3 years from the date that the application was made to the Federal Magistrates' Court to the date that judgement was made with orders on 6 July 2007. If conciliation had been involved, it would have taken even longer.

[30] Davis Jodie, Markman Arielle, above n 19, 7 of 17

potential abuses within the Conciliation process and the existence of these power differentials may result in inequities if left unaddressed.[31]

14.3 For example, in *A v B & Anor*[32], at a time when the HREOC was perceived to have the authority to make enforceable determinations on discrimination matters, the complainant victim of sexual harassment was unrepresented whilst the respondent employer was represented by two barristers, including a QC, and the respondent harasser had also retained counsel. Needless to say the complainant did not feel she experienced a fair or just outcome.[33]

14.4 Moreover, PILCH is concerned that without representation, many complainants (particularly those dealing with mental health issues, language issues and histories of vulnerabilities) will be unable to adequately express the nature and impact of the sex discrimination they have faced. The limited assistance provided to complainants by the HREOC in the form of information and reports on sexual harassment (including case law) does little to place complainants in an equal bargaining position with respondents.

14.5 In PILCH's experience, the cost of legal representation also deters many victims from lodging a complaint. While Victoria Legal Aid (**VLA**) provides some assistance for sex discrimination matters, assistance is limited to claims where the amount of compensation claimed is above $5,000 and where there are strong prospects of a benefit to be gained by the applicant.[34] Furthermore, the application of the means test is quite restrictive.[35]

14.6 In PILCH's experience, sex discrimination and sexual harassment matters do not generally attract high compensation payments. The strict financial guidelines for legal aid therefore often prevent individuals from receiving free legal assistance when they cannot afford private representation.

14.7 Despite the best endeavours of PILCH, pro bono assistance in sex discrimination matters can be difficult to facilitate, as solicitors and barristers generally will not undertake pro bono work in circumstances where the applicant is seeking compensation as a remedy. Pro

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[31] Ibid 6 of 14: here the authors make reference to this argument and then attempt to redress it.

[32] (1991) EOC 92-367 (HREOC).

[33] Margaret Thornton 'Auditing the Sex Discrimination Act' Castan Centre Annual Conference: Human Rights 2004: The Year in Review Melbourne, 3 December 2004, 7

[34] Victoria Legal Aid Handbook 12th Edition July 2007, 24-25

[35] For example, an applicant for assistance cannot have more than $100,000 equity in their principal place of residence. For further information about this and the means test in association to income refer to Victoria Legal Aid Handbook 12th Edition 12 July 2007, 74-76

bono assistance may be available in limited circumstances where there are special circumstances or a public interest element involved in the matter.

14.8 Most community legal centres do not have the capacity or the expertise required in sex discrimination and sexual harassment matters to provide the requisite advice and assistance.

15. Remedies afforded through the complaints based system

15.1 According to figures compiled by the HREOC, median financial payments obtained in Conciliation for sex discrimination cases remained relatively unchanged between 1998 – 2004 and compensation payments averaged around $5000.[36] In several reported cases, successful sexual harassment complainants who were forced to leave their workplace as a result of the harassment attracted only few thousand dollars in compensation. A small minority of successful complainants were awarded $20,000 or over and there was no indication why they received greater compensation than the others.[37]

15.2 In PILCH's view, the magnitude of such payments does not reflect the seriousness of sexual harassment cases. Moreover, the apparent arbitrariness of compensation levels suggests that some complainants are opting to accept inadequate payments in order to avoid traumatisation in further proceedings.

15.3 Damages awarded in the Federal Magistrates' Court have also been limited. One exception is the case of *Lee v Smith*[38], where the applicant received general damages of $100,000; and special damages (including medical expenses, and future loss of income) of $287,422. However, the sexual harassment in that matter involved allegations of rape, victimization and a significant degree trauma suffered by the complainant. The damages award included compensation for loss of enjoyment of life and loss of social functioning, relationship breakdown, and the development of post-traumatic stress disorder which included periods of being suicidal[39]. In this context, the compensation amount seems moderate.

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[36] Five Years On: An Update on the Complaint Handling Work of the Human Rights and Equal Opportunity Commission Report, 6 See HREOC website.

[37] HREOC Conciliation Register 1 April 2002-30 June 2002 listing outcomes for de-identified complaints conciliated and finalized during this period.

[38] *Lee v Smith* and Ors [2007] FMCA 59

[39] Lee v Smith and Ors [2007] FMCA 59 paras 7-43 and para 58.

15.4 PILCH considers that victims of sex discrimination and sexual harassment may be reluctant to make a formal complaint due to the perceived lack of appropriate remedies available under the current system. In addition, some complainants consider that the remedies available under the SDA are inadequate and would be reluctant to make a complaint again if they were sexually harassed in the future.[40]

15.5 It is PILCH's submission that the level of damages awarded in sexual harassment cases does not adequately address the seriousness of the unlawful conduct involved and its impact on victims.

Recommendation 2

That the Committee recommend an increase in the level of damages available in sexual harassment cases to reflect the seriousness of the conduct and its impact on victims

16. The use and impact of confidentiality agreements in sexual harassment settlements

16.1 Many sexual harassment complaints are settled either during the conciliation process at the Commission or at mediation/conciliation in the Federal Magistrates' Court.[41] Whilst early settlement of a dispute has many benefits to both parties, PILCH is concerned that some confidentiality agreements used in settlement negotiations may have terms that extend beyond ordinary terms of settlement and have adverse consequences for sexual harassment complainants.

16.2 For example, confidentiality agreements may seek to prevent disclosure of the harassment and its impact to health professionals, friends, future partners or employers. As a result, complainants who sign these agreements may be denied the opportunity for the unlawful conduct to be properly acknowledged and may, in fact, suffer further trauma.

16.3 Even where exemptions to the breadth of confidentiality provisions are negotiated, in PILCH's experience such exemptions are usually limited to permission to speak to health

[40] This information comes from consultations with complainants and lawyers practicing in the area.

[41] In 2006 only ten employment matters under the SDA were determined in the Federal Court or the Federal Magistrates Court, with three of these being procedural matters only. In the same year in Victoria, only seven cases concerned with different manifestations of sex discrimination in employment under the Victorian Equal Opportunity Act 1995 were determined by the Victorian Civil and Administrative Tribunal (VCAT), with four of these being procedural matters only: see Sara Charlesworth, The Clare Burton Memorial Lecture 2007 Understandings of Sex Discrimination in the Workplace: Limits and Possibilities, RMIT University, 5. In addition, many matters settled through internal grievance procedures may involve confidentiality agreements but data in this regard is not obtainable.

professionals and/or family members about the matter. In addition, confidentiality obligations may not extend to other employees or to people outside the workplace who may be aware of a complaint being made. Further, the extension of the requirement of confidentiality to other employees and people outside the workplace can be difficult for an employer to monitor. By signing a confidentiality agreement, therefore, a victim may forfeit the ability to protect his or her reputation and seek necessary support at the same time.

17. Facilitation of a complainant's safe return to the workplace

17.1 Despite the prohibition of victimization under Section 94 of the SDA, there is evidence that victimisation remains a problem, in some cases of extreme proportions.

17.2 In *Lee v Smith*[42], when the complainant attempted to complain about the sexual harassment (including allegations of rape), she was ridiculed for bringing her personal problems into the workplace and her position of employment was placed in jeopardy.

17.3 The serious problem of victimization is also outlined in the following entry on the HREOC Listening Tour Website whereby a complainant states:

> *"I have just been through six years of trying to seek some justice in my male-dominated place of work. The sexual harassment that I was subjected to was nothing compared with the victimisation that took place after I rejected my boss and eventually complained about him."*[43]

17.4 The SDA does not impose any obligations on employers in relation to the rehabilitation and reintegration of sexual harassment victims into the workplace. In PILCH's view, this does not reflect a holistic approach to sexual harassment and is not in the best interests of employers nor employees.

17.5 In particular, such an approach does nothing to further the objectives of the SDA and CEDAW, namely:

(1) the attainment 'through competent national tribunals and other public institutions the effective protection of women against any act of sexual harassment[44]'; and

(2) taking all appropriate measures to eliminate discrimination against women in employment in order to ensure the rights to:

(i) work;

[42] *Lee v Smith* & ORS [2007] FMCA 59

[43] 2008 Gender Equality, HREOC report, above n 16, 14

44 CEDAW, article 2(c)

(ii) the same employment opportunities;

(iii) promotion and job security;

(iv) the protection of health and to safety in working conditions.[45]

17.6 In PILCH's experience, the absence of employer obligations under the SDA following instances of sexual harassment may exacerbate the adverse consequences of such experience for victims and prevent full rehabilitation. Examples include:

(1) an employer allowing a farewell party for a perpetrator of sexual harassment, including sexual assault;

(2) allowing photos of a perpetrator to remain in an office despite the victim still being traumatized by sexual assault and the internal investigation that took place;

(3) a manager shouting at a victim if she showed signs of trauma in an effort to keep the matter confidential;

(4) placing the victim on normal or unfamiliar duties that she is too traumatized to undertake due to a lack of consultation with the victim and counsellors involved.

17.7 It appears that not only is there a need for greater awareness about sexual harassment and its impact, but also victimization. The Committee should consider whether the victimisation penalties provided under Section 94 of the SDA are adequate to act as a deterrent.

17.8 In PILCH's view, there are strong grounds to support amendments to the SDA that require:

(1) employers to take appropriate disciplinary action against perpetrators based on the level of sexual harassment involved;

(2) employers to take all reasonable steps to ensure the rehabilitation of the complainant;[46]and

(3) increased penalties for victimization under Section 94 of the SDA.

45 CEDAW, article 11(f)

[46] Whilst an employer who reinstated an employee who had suffered stress or other mental injury as a result of sexual harassment without providing appropriate rehabilitation and prioritizing the employee's recovery by having effective measures in place could be at risk of breaching his or her duty of care to the employee and could be liable under Occupational Health and Safety Legislation, we believe that this is insufficient protection to ensure the rehabilitation of the complainant. In addition, for the purpose of raising awareness about this issue and in aid of clarification of employer responsibilities in dealing with sexual harassment, the employer's obligations in relation to rehabilitation should be clearly articulated under the SDA.

18. The two-tiered complaints system

18.1 The complaints regime established by the SDA and the HREOC Act generally requires that a complainant attend a conciliation conference at the HREOC before proceedings can be issued in the Federal Magistrates' Court (**FMC**).[47] Mediation or conciliation may follow at the Federal Magistrates' Court before the matter proceeds to hearing.

18.2 This process, which often requires the parties to mediate twice, renders the complaints process more costly and prolonged for both parties.

18.3 Advocates for this dual process of conciliation/mediation may argue that it ensures that complaints that are vexatious or lacking in substance do not proceed to the FMC, and that the less formal conciliation process at the HREOC affords greater accessibility for complainants.

18.4 However, the FMC mediation provides a similar opportunity for a complainant to be advised that his or her complaint is in danger of being found to be vexatious or frivolous at hearing. Complainants may also be cautioned about the risk of an adverse costs order should the matter proceed to hearing by their legal representative, or by the conciliator/mediator.

18.5 Further, for the reasons discussed above (at paragraph 14.2), the reality of the power imbalance inherent in most sexual harassment complaints is such that the formality of legal representation is highly desirable for most complainants. In any event, in PILCH's experience, the mere act of engaging in any form of legal process (either informal or formal) is a confronting and often distressing experience for complainants.

18.6 In PILCH's view, the Committee should strongly consider recommending a rationalisation of the complaints based system to address the problems inherent in the two-tiered model. This should include removing the HREOC's present conciliation role in favour of an investigative and/or arbitral role, with avenues of appeal to the FMC where a court sanctioned mediation can occur (discussed in detail at paragraph 29, below).

19. Alternatives to the official complaints system – internal grievance procedures

19.1 Throughout Australia many employers and organisations use internal grievance procedures where a complaint of sexual harassment or discrimination is made. These procedures are adopted to address the issue of vicarious liability arising under section 106

[47] Matters usually proceed to the Federal Magistrates Court although legislation also provides for the Federal Court.

of the SDA.[48] The procedures themselves have been further developed through the common law.

19.2 In PILCH's view, many complainants presently elect internal grievance procedures to resolve an instance of sexual harassment in favour of a formal complaint to the HREOC due to factors including:

(1) trust in employers to handle the matter appropriately and protect victims;

(2) lack of awareness of the complaint-based procedure available through the HREOC and the Federal Magistrates' Court; or

(3) apprehension regarding the stress of external complaint-based procedures, particularly absent legal assistance.

19.3 Whilst PILCH considers that the use of internal grievance procedures has been an important and positive development since the introduction of the SDA, we also believe that some factors are inhibiting the further uptake of these procedures as a viable alternative to formal complainants made through the HREOC or the FMC. These factors include:

(1) internal grievance procedures are not open to public scrutiny and the institutions are not required to report the number, nature or outcome of sexual harassment or discrimination complaints.[49] As a result, there is no way of assessing the incidence of sexual harassment nor sex discrimination generally within Australia;

(2) the procedures that employers or private investigators hired by employers use to investigate complaints are not consistent and there is no control over the quality of the investigation;[50]

(3) there is a potential conflict of interest in employers handling internal investigations as they may be a defendant to any legal action subsequently brought by the complainant;.

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[48] Section 106 of the SDA provides that employers are vicariously liable for the actions of an employee or agent unless they have taken 'all reasonable steps' to prevent the prohibited action. Several recent cases involving large banks and mining companies have fleshed out the meaning of 'all reasonable steps'. It not only includes the need to have sexual harassment policies and procedures, but to implement them and have grievance procedures to be established and effectively applied: see Krysti Guest Law and Bills Digest Group 30 March 1999, The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1983, 23 of 41

[49] Lawton, Anne, Tipping the Scales of Justice in Sexual Harassment Law, Ohio Northern University Law Review Vol27 2000-2001, 530.

[50] This is based on PILCH's consultations with complainants and lawyers in the area. Internal grievance procedures need to be regulated under the SDA. Also refer to Anne Lawton, above n49, 530

(4) employers often prioritize protecting their reputation before protecting the victim and may apply pressure on the complainant to agree to the matter being dealt with quickly and quietly in a manner that could jeopardize a just and fair outcome; and

(5) the use of confidentiality agreements that go beyond the terms of the agreement with the consequential effect on victim rehabilitation and workforce reintegration (as discussed at paragraph 16.2).

19.4 In PILCH's experience, in the most serious cases of sexual harassment established by internal investigations, victims have usually felt compelled to leave the workplace and been bound by terms of a confidentiality agreement. In these cases, victims have reported that they felt there was no choice but to resign either immediately after the investigation or at a later date when reintegration back into the workplace failed. The following case study illustrates the problems that may arise from the use of internal grievance procedures:

Case Study B

Katie was a victim of sexual assault and sexual harassment by a senior employee and mentor. After a an internal workplace investigation over a two month period during which Katie and the perpetrator were suspended with pay, the private investigator found the perpetrator guilty of the alleged unlawful conduct. The perpetrator later resigned, insisting that the employer sign a confidentiality agreement, which it did.

When Katie returned to work her employer made a statement to staff that allowed them to assume that she had committed some form of misconduct. Katie felt isolated and ignored by staff and was told by Human Resources not to tell anyone about what had happened to her.

After further inappropriate conduct by staff, Katie was diagnosed with chronic post-traumatic stress disorder and was placed on stress leave with WorkCover for 18 months. She contemplated lodging a complaint through the VEOHRC and also HREOC but decided against it given that settlements at both the State and Federal level involved the use of confidentiality agreements and the process would be too traumatic for her.

20. Limitation periods

20.1 Under the SDA, a complainant must lodge a complaint with the HREOC within 12 months of the conduct occurring unless the President of the Commission exercises his or her discretion to allow the complaint. [51] In practice, therefore, legal representatives are unable to advise clients confidently that their complaint will be accepted by the HREOC where the

[51] Section 46PH HREOC Act

sexual harassment or some of the incidences of sexual harassment occurred outside of the 12 month period.

20.2 In PILCH's experience, this limitation period is problematic because:

(1) many complainants suffer from mental illnesses or disorders as a result of harassment and may require a longer period of time to recover sufficiently to be able to initiate a complaint;

(2) complainants may fear retaliation or not know how to proceed which may contribute to delays in seeking redress;[52]

(3) sexual harassment can be cumulative in which case it is only later in time that a complainant may realise that the early events were the beginnings of harassment[53] and

(4) complainants may initially disclose to colleagues or family members the sexual harassment and be met with sympathy for the perpetrator or indifference. As a result, they may begin to blame themselves and minimize the seriousness of the abuse. The complainant may not feel the need to disclose the matter again to another person until later in time when the trauma cannot be repressed. By that stage they may be encouraged to make a complaint.

21. Lack of Jurisprudence

21.1 In PILCH's view, the underreporting of incidents of sex discrimination and sexual harassment, combined with the fact that many reported cases settle with confidentiality obligations, has the effect of limiting the development of further jurisprudence in this area of the law.

21.2 Reliance on the complaint-based system fails to identify the prevalence of sex discrimination and sexual harassment in the community and provides limited guidance to lawyers and the community in the way of case law as to what constitutes sex discrimination and sexual harassment, the appropriate remedies for various forms of misconduct and means of ensuring compliance with obligations under the SDA.

[52] Lawton, Anne, above n 49, 522.

[53] Ibid

Part E – Options for reform

22. The SDA is failing to achieve its objectives in relation to sexual harassment

22.1 In light of the matters outlined in this paper, PILCH considers that the SDA is failing to achieve its objectives in relation to sexual harassment. In particular:

(1) sexual harassment remains prevalent in Australia;

(2) awareness of the incidence, nature and consequences of sexual harassment remains limited, particularly in the workplace;

(3) victims of sexual harassment have little confidence in the complaints based system which may, in some cases, exacerbate the trauma associated with sexual harassment;

(4) the remedies awarded in cases of sexual harassment are inadequate and often *ad hoc*;

(5) victims of sexual harassment are not being rehabilitated nor actively reintegrated into the workplace; and

(6) systemic issues in relation to sexual harassment are not being readily identified.

22.2 In PILCH's view, the Committee should draw upon a range of relevant forums and jurisdictions in order to determine appropriate measures to address these shortcomings.

23. Investigatory powers in other jurisdictions

23.1 In other jurisdictions, some of the problems inherent in the complaints model have been addressed by granting investigative powers to human rights monitoring bodies.

23.2 For example, the Canadian Human Rights Commission (**CHRC**) may designate a person as an 'investigator' to investigate a complaint in relation to discriminatory behaviour.[54] The investigator is granted extensive powers in carrying out the investigation, including the power to enter and search any premises in order to carry out inquiries at any reasonable time with a warrant.[55] An investigator also has the power to require any individual found in any premises entered to produce material that may be relevant to the investigation.[56]

[54] Canadian Human Rights Act s43 (1)

[55] Canadian Human Rights Act s43 (2.1)

[56] Canadian Human Rights Act s43 (2.4)

23.3 In addition, the CHRC has extensive compliance powers. The *Employment Equity Act 1995* (Canada) imposes obligations upon Canadian employers to ensure equality in the workplace.[57] If a compliance officer believes that an employer is in breach of an obligation under the Act, the officer can attempt to negotiate a written undertaking with an employer to take certain specified measures to remedy the non-compliance.[58] If an employer provides a written undertaking and the compliance officer is of the opinion that the employer has breached the undertaking, the compliance officer is required to notify the CHRC of the non-compliance and the CHRC may issue a direction to the employer requiring them to take any action specified in the direction to remedy the non-compliance.[59]

23.4 Similarly, in the United Kingdom, section 20 of the *Equality Act 2006* (UK) empowers the Equality and Human Rights Commission (**EHRC**) to investigate whether a person has committed an unlawful act[60], complied with requirements imposed by an unlawful notice under the *Equality Act* (s21) or complied with an undertaking given under the *Equality Act* (s23).

23.5 In addition, the EHRC is empowered to:

(1) issue unlawful act notices;[61]

(2) enter into an agreement with a person in which the person undertakes not to commit an unlawful act;[62]

(3) enforce such undertakings where there is non-compliance in the courts;[63]

(4) make an application to a court for an injunction restraining a person from committing an unlawful act;[64]

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[57] Section 2 of the Employment Equity Act 1995. See also Section 5 whereby an employer shall implement employment equity by (a) identifying and eliminating barriers against persons in designated groups (including women) that result from the employer's employment systems, policies, and practices that are not authorized by law; and (b) Instituting such positive policies and practices and making reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in: (i) The Canadian workforce, or (ii) Those segments of the Canadian workforce that are identified by qualifications, eligibility, or geography from which the employer may be reasonably expected to draw employees.

[58] Canadian Human Rights Act s15 (1)

[59] Canadian Human Rights Act s15(3)

[60] Unlawful acts include discrimination on the grounds of, *inter alia*, sex

[61] Equality Act 2006 (UK) s22 (6)

[62] Equality Act 2006 (UK) s23 (1)

[63] Equality Act 2006 (UK) s23 (1)

[64] Equality Act 2006 (UK) s24 (1)

(5) assist an individual who is a party to equality legal proceedings;[65] and

(6) institute or intervene in legal proceedings if it appears to the ECHR that the proceedings are relevant to a matter in connection with its functions.[66]

24. Investigative Powers in the Other Contexts

24.1 Investigative powers are also common place in other forums which aim to reduce or prevent adverse workplace health outcomes.

24.2 For example, each Australian jurisdiction's Occupational Health and Safety (**OHS**) legislation establishes an enforcement agency to which workplace investigators or inspectors are appointed (ComCare, the Workcover Authority of NSW and Worksafe Victoria).[67] OHS inspectorates are empowered to conduct independent inspections of workplaces where it is alleged that there has been a contravention of OHS legislation and to ensure compliance with these laws. Their powers include:

(1) power to enter workplaces – an inspector may enter a workplace at any time during work hours;[68]

(2) general powers to investigate – these powers include searching, inspecting, examining, requiring the production of documents, questioning individuals and taking affidavits;[69] and

(3) requiring assistance from an employer – owners, employers and occupiers must assist the inspector in the exercise of his or her duties.[70]

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[65] Equality Act 2006 (UK) s28 (1)

[66] Equality Act 2006 (UK) s30

[67] Commonwealth: Safety, Rehabilitation and Compensation Act 1988 establishes ComCare as the OHS enforcement agency. Sections 40 and 51 of the Occupational Health and Safety (Commonwealth Employees) Act regulate the appointment and qualifications of investigators. New South Wales: Occupational Health and Safety Act establishes The Workcover Authority of New South Wales as the OHS enforcement agency. Section 49 of the OHSA (NSW) deals with inspectors. Victoria: Occupational Health and Safety Act establishes Worksafe Victoria as the OHS enforcement agency. Section 99-103 of the WHSA deals with inspectors. Similar provisions also in other states.

[68] Commonwealth: Section 42, New South Wales: Section 50; Victoria: Section 39 (1) (a), Queensland: Section 104; South Australia: Section 38 (1) (a) Western Australia; Section 43 (1) (a); Tasmania: Section 36(1); Northern Territory: Section 37 (1); Australian Capital Territory: Section 62.

[69] Commonwealth: Sections 41(1) and 41 (2) New South Wales: Sections 59-64 and 68-75 Victoria: Section 39 (1), (c), (d), (e),(i), (k), and Section 39(3) Queensland: Sections 108, 122, 120-121 148-157 South Australia: Sections 38(1) (b), (c), (f), (g), (h0 and 38(2) Western Australia: Sections 43(1)(d), (i), (k) (l), (m), (o), and 43 (3) and 44, Tasmania: Sections 36(1)(a),

24.3 Under the WorkCover regime, once a claim has been substantiated, the client is referred to a rehabilitation agency. That agency provides a rehabilitation officer to assist the injured employee to return to work with their current employer or to a new workplace.

25. Investigative powers in relation to sexual harassment?

25.1 In PILCH's view, the Committee should recommend that the HREOC (or another appropriate agency) should be empowered to carry out investigations into individual complaints of sex discrimination, including sexual harassment.

25.2 An appropriate model could include powers to investigate instances of sexual harassment by own motion, or at the request of employers or employees, including powers to enter premises and question witnesses; and to access all relevant documents, including workplace policies on sex discrimination and sexual harassment.

Recommendation 3

The Committee should recommend that the SDA be amended to empower an appropriate enforcement agency to carry out investigations into individual complaints of sex discrimination, including sexual harassment

25.3 PILCH sees several advantages in moving towards such a model, namely:

(1) investigators could be thoroughly trained in investigation processes, cross-examination witnesses, the weight to attribute to certain types of evidence, and the nature of sexual harassment and the context within which it occurs;

(2) investigators could ensure that, in appropriate matters, the complainant is referred for independent counselling to assist them in dealing with the distress and trauma of sexual harassment and the investigation process;

(3) victims of sexual assault would feel confident in the independence and expertise of investigators;

(b), (c) , (e), (f), and 36(7) and 36(5) Northern Territory: Section 10 (h), (j) and 11 and 12 and 36 (1) Australian Capital Territory: Section 62(3), (3)(a), (3) (b), (3)(c) , (3)(d), (3) (g) and Sections 81 and 83

[70] Commonwealth: Section 43 New South Wales: Section 68 Victoria: Section 41 Queensland: Section 108 South Australia: Section 38 (7) Western Australia: Section 43(1)(n) Tasmania: Section 36(6) Northern Territory: Section 38 Australian Capital Territory: Section 62(3)(h)

(4) the HREOC (or the relevant enforcement agency) could more easily observe the extent of sexual harassment and identify and analyse areas of systemic discrimination;

(5) if investigations replace the conciliation regime, it avoids a two-tiered mediation approach in favour of investigation, followed by mediation and hearing (in the FMC) if necessary.

25.4 Such measures would assist in cases where employers refuse to take the conduct seriously and enforce appropriate measures to deal with the situation. PILCH is aware of such a case in the matter of Elsa.

Case Study C

Elsa was a victim of sexual assault in her workplace. However, her employer refused to organize an investigation, discipline the perpetrator, nor ensure that Elsa did not have to continue working with the perpetrator. This was despite repeated requests from Elsa's counsellor from a Victorian centre against sexual assault that Elsa was in even greater danger of developing chronic post-traumatic stress disorder if the employer did not take any action and ensure supports were in place for her.

25.5 In order to facilitate the proposed new investigatory power of the HREOC, PILCH submits that the SDA be amended so that it is mandatory for an employer to report more serious forms of sex discrimination and sexual harassment to the proposed investigations Unit .[71] Failure to comply would result in penalties ranging from fines to prosecution.

Recommendation 4

The Committee should recommend that the SDA be amended to require employers to report serious instance of sexual harassment

26. Power to make findings and recommendations, and rehabilitation

26.1 PILCH submits that having undertaken a fair and comprehensive investigation, the HREOC investigators should be empowered to make a finding as to whether sexual harassment

[71] PILCH acknowledges that all forms of sex discrimination and sexual harassment are serious and amount to unlawful conduct. However, PILCH acknowledges that from a resource perspective, at least initially, it would not be feasible for HREOC investigators to conduct investigations into all complaints of this nature. However, similar investigation units at the state level using the State commission bodies would also be useful.

has occurred on the balance of probabilities. PILCH further submits that the HREOC should have the power to make recommendations as to any disciplinary action against the perpetrator if the claims are substantiated, together with an assessment of the liability of the employer, and any recommendations on what preventive measures the employer or organization should introduce.

26.2 Further, the HREOC should have the power to make directions to the employer in relation to the rehabilitation and reintegration of the complainant back into the workplace and should have rehabilitation specialists to assist the employer in understanding what procedures and programs need to be implemented to ensure the complainant's full recovery.

26.3 In support of this power, the SDA and the HREOC Act should be amended to provide the HREOC with the resources and expertise and powers to deal with rehabilitation of complainants returning to the workplace. In addition the SDA should also be amended to place a positive duty on employers to take all reasonable steps to ensure rehabilitation. Consideration could also be given to a provision analogous to section 32 of the *Occupational Health and Safety Legislation 2004* (Vic) whereby it is an offence to recklessly engage in conduct that places or may place another person who is at a workplace in danger of serious injury.

26.4 Such powers afforded to the HREOC and additional obligations on employers would lessen the risk of a complainant finding themselves on stress leave under OHS legislation, and would lessen the need for a complainant to take legal action through the HREOC and the Federal Magistrates' Court.

Recommendation 5

The Committee should recommend legislative amendments to provide the HREOC with powers to make findings and recommendations in relation to instances of sexual harassment; investigate and enforce compliance with orders or agreements arising from proceedings under the SDA; commence proceedings; and facilitate the effective rehabilitation of complainants.

27. Power to Enforce Findings and Initiate Legal Proceedings

27.1 PILCH submits that the HREOC should be vested with the power to enforce its findings through the courts. If the HREOC determines that legal action against a workplace or organization is necessary due to a breach of mandatory reporting, failure to provide compulsory education and training on discrimination and sexual harassment or breach of an order of the HREOC, the matter should be referred to a litigation section of the HREOC

to commence legal proceedings. This power is analogous to WorkCover's current capacity to refer matters to its Prosecutions Section.

Recommendation 6

That the Committee recommend that the SDA be amended to include employer responsibility to take all reasonable steps necessary to ensure the rehabilitation and reintegration of the complainant into the workplace.

28. Limitation Period

28.1 PILCH recommends that the period of limitation in making a complaint to the HREOC be increased to three years. The same period should apply with respect to the HREOC's capacity to conduct an investigation.

28.2 This is analogous to personal injury claims under section 27D of the *Limitation of Actions Act 1958* (Vic).which provides for a three year limitation period.

Recommendation 7

That the Committee recommend that the limitation period be extended by amending the SDA to provide that the HREOC may decline to entertain a complaint if it relates to an alleged contravention of the SDA that took place more than three years before the complaint was lodged.

29. Conciliation Power of HREOC

29.1 Due to the proposed increased investigatory powers of the HREOC and the duplication of the process of conciliation followed by mediation at the Federal Magistrates' Court, PILCH submits that the HREOC's current conciliation function should be removed.

29.2 This would establish a more efficient external complaints process whereby complainants or respondents seeking to appeal a finding of the HREOC's investigators, would proceed to lodge their appeal with the Federal Magistrates' Court. Where a complainant wishes to pursue the perpetrator or employer or provider of goods and services for compensation, they would need to proceed to the Federal Magistrates' Court.

Recommendation 8

That the Committee recommend amending the SDA to remove the conciliation role of the HREOC in favour of an investigative role.

30. Research, Law Reform, Promotion and Training

30.1 PILCH submits that the HREOC should not only have the responsibility of carrying out investigations into alleged unlawful conduct under the SDA but should also be greater resourced to undertake necessary research, policy reform and training to enable it to keep relevant legislation under review and act as a centre of expertise on equality and human rights and to undertake further research into systemic sex discrimination.

30.2 It is evident that there is still a lack of awareness in workplaces and industry concerning sexual harassment and victimization and the importance of the rehabilitation of complainants in the workplace. High level training to all workplaces in this area is crucial if Australia is serious about fulfilling its international obligations to eliminate sexual harassment and sex discrimination generally.

Recommendation 9

That the Committee recommend that the HREOC be greater resourced to undertake research, policy reform, education and training.

31. The Establishment of a Specialist Anti-Discrimination Legal Centre

31.1 The most immediate grievance for most clients upon application to PILCH is the difficulty they have accessing legal assistance. This goes directly to the right of equal access to justice – a right in respect of which Australia has obligations arising under arts 2(3), 14 and 26 of the ICCPR.

31.2 While it is commonly stated that everyone, formally, is entitled to equal access to justice, this proposition is not borne out in practice. PILCH's experience shows that the need for legal assistance by the disadvantaged in the community far outstrips the legal services currently available to them.

31.3 Clients approach PILCH at different stages of the 'discrimination process': some have tried to initiate a complaint but have found it very difficult to do so without the assistance of a direct advocate; others have filed a complaint that has been dismissed and are unable to appreciate why; some request representation at conciliation and others have been dissatisfied and often damaged by the conciliation process and are seeking to refer their matter to VCAT or the FMC for hearing. In each circumstance the impact of discrimination is compounded by the significant difficulties in navigating discrimination complaint channels and a perception that the process is in and of itself discriminatory in that it favours the often better resourced perpetrator who is better placed to receive comprehensive advice and representation.

31.4 PILCH submits that community legal centres should be resourced to better deal expertly and efficiently with complaints of discrimination. We further submit that a specialist community legal centre should be established to address all types of discrimination with the provision of advice and representation for meritorious matters and where the applicant for assistance cannot afford private representation. The need for the establishment of such a service is based on:

a) narrow VLA discrimination guidelines;

b) the possible increase in discrimination complaints under the proposed regime; and

c) the need for individuals to receive comprehensive advice and representation in these matters that at present the community legal sector and pro bono sectors do not have sufficient capacity and resources to provide.

Recommendation 10

That community legal centres be adequately resourced to assist complainants with complaints of discrimination and that a specialist community legal centre be established to address all types of discrimination.

32. The HREOC to make binding codes of conduct regarding the requirements of the SDA

32.1 PILCH also submits that the SDA should be amended to provide the HREOC with the power to make binding codes of conduct and practice.

32.2 One of the key means of promoting equality and eliminating sex discrimination is to educate decision makers and the general community to ensure a greater understanding of the nature and illegality of all forms of sex discrimination. Binding codes of conduct and guidelines prepared by the Committee with its extensive expertise in the area are, in our submission, another means of bringing an immediacy to the promotion of equality to the Australian Community.

Recommendation 11

That the Committee recommend the amendment of the SDA to grant the HREOC power to make binding codes of conduct.

33. Positive Duties for Employers

33.1 Reliance on individual or group litigation means sexual harassment and other forms of sex discrimination are not addressed if there is no complaint. Positive duties, that shift the

burden onto the workplace to identify and address systemic disadvantage regardless of any receipt of complaints, are essential. [72]

33.2 PILCH submits that greater inroads could be made to promote and ensure equality of all Victorians if a positive duty to eliminate unlawful discrimination and to promote equality was imposed not only on public authorities but all workplaces under the SDA.

33.3 The potential impact of the imposition of a positive duty was recognised in the United Kingdom Equality Review which states at page 131 the “A strong, integrated public sector duty, covering all equality groups, with a focus on outcomes and not process, should enable better policy design as well as better service delivery”.

33.4 Following that review, the United Kingdom enacted *The Equality Act 2006* (UK) which empowers the Commission for Equality and Human Rights to assess the extent to which, or the manner in which a person has complied with, a duty under or by virtue of provisions of the *Sex Discrimination Act 1975* (UK), *Race Relations Act 1976* (UK) and the *Disability Discrimination Act 1995* (UK).

33.5 For example, section 76A(1) of the *Sex Discrimination Act 1975* (UK) provides that a pubic authority shall in carrying out its functions have regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women. A failure in respect of performance of the duty does not, however, confer a cause of action at private law.

33.6 PILCH submits that in order to ensure the promotion of equality and the elimination of sex discrimination including sexual harassment, it is necessary to impose a positive obligation to do so rather than rely on compliance with a negative duty. The proposed duty to eliminate unlawful sex discrimination and harassment to promote equality would apply to all workplaces and would not create a new cause of action. Rather, it would inform the actions of workplaces and bring a greater immediacy to the promotion of equality throughout the community.

Recommendation 12

That the Committee recommend that the SDA be amended to include a positive duty on all workplaces, when carrying out their functions, to have regard to the need to eliminate unlawful sex discrimination and harassment and to promote equality of opportunity.

[72] Charlesworth, Sara, above n18, 11

APPENDIX 1

An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report 2008[73]

i. Many of the recommendations made by PILCH in this submission reflect concerns regarding the two tiered complaints based process currently in place under the SDA to deal with sex discrimination.

ii. PILCH notes that on 31 July 2008, the Victorian Government released *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report 2008*[74] (**the EOA Review**). Chapter three of EOA Review examines the role of the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) in the Victorian discrimination complaints process. Of particular relevant to this Inquiry (and this submission), Chapter three 'recommends a new dispute resolution process for the [*VEOHRC*]'.[75]

iii. PILCH notes that the rationale for changes to the dispute resolution process in the EOA is based on similar concerns to those reflected in this submission in relation to the SDA. These include the complexity of the current process, unequal access to resources for the parties concerned and the time taken to resolve complaints.[76]

iv. For the benefit of the Committee, PILCH notes that many of the recommendations made in this submission are reflected EOA Review, in particular:

Recommendation 9

The Act should contain a duty to eliminate discrimination as far as possible.

Recommendation 15

The Commission must offer a dispute resolution service that features early intervention by the Commission and flexible processes, excluding arbitration.

Recommendation 18

The Commission should not require the lodgement of a written complaint before it can take action.

Recommendation 19

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[73] Julian Gardner (2008) "An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report", State of Victoria, Department of Justice

[74] Ibid

[75] Ibid, 54

[76] Ibid, 57

The Commission should no longer investigate contraventions alleged in disputes but may, as appropriate, gather information to inform the resolution of a dispute.

Recommendation 24

Complaints may be lodged directly with VCAT without first having been referred to or dealt with by the Commission. It should not be a requirement to seek leave to appear at VCAT (as is currently required for claims of racial and religious vilification).

Recommendation 31

Establish a legal service either within VLA or in a single community legal centre that can develop specialised expertise in relation to discrimination and equal opportunity law. The service should, among other functions, be a source of early strategic legal advice.

Recommendation 33

De-identified dispute outcomes should be collated and disseminated by the Commission. Any secrecy or related provisions should be amended to allow this to occur.

Recommendation 39

Enable the Commission to intervene in matters under the Act, in the same way that it can under section 40 of the Charter.

Recommendation 40

Enable the Commission to act as amicus curiae in any matter raising an issue under the Act with the leave of the court or tribunal.

Recommendation 54

The Commission's power to conduct research should be recast as a duty and relate to both the objectives of the Act and the link between discrimination and disadvantage.

Recommendation 67

The Commission should have power to conduct an inquiry of its own motion or on referral from the Attorney-General into any matter relating to the operation of the Act that raises an issue or issues that are serious in nature, which relate to classes or groups of people, including patterns or repeated instances of alleged contravention of the Act, and which are not appropriate to be dealt with by an individual complaint.

Recommendation 70

The Commission should have the power to compel the attendance of a person to provide information and the production of documents for the purposes of the inquiry, as well as the powers of entry, search and seizure.

Recommendation 72

The Commission should have the power to enter into enforceable undertakings with persons or organisations where, in the opinion of the Commission, an unlawful act is occurring or is likely to occur.

Recommendation 75

Where the undertaking is breached, the Commission should be able to apply to VCAT for enforcement of the undertaking.

Recommendation 76

The Commission should be empowered to issue a compliance notice where an investigation or inquiry has revealed a breach of the requirements of the Act.

Recommendation 82

A new summary offence should be introduced to protect people from victimisation who assist the Commission in performing its functions under the Act. Other than this, it is not recommended that any new offences be created.

Recommendation 83

The Commission's power of investigation under section 156(3) should be retained with appropriate amendment. This reflects the fact that it will no longer be dealing with complaints, but will be offering parties ADR interventions to assist in resolving their discrimination issues.

v. PILCH commends the EOA Review to the Committee.