

# Understanding workplace sexual harassment:

*Trends, barriers to legal assistance, consequences and legal need*

## Summary report

Prepared by the Centre for Social Impact

The University of Western Australia

June 2023

Paul Flatau

Leanne Lester

Yasmine Hooper

Sarah Zou

Bryn Young

Reuben Lester



## Acknowledgement of Country

In the spirit of reconciliation, CSI UWA acknowledges that its operations are situated on Noongar land, and that the Noongar people remain the spiritual and cultural custodians of their land, and continue to practise their values, languages, beliefs and knowledge. We acknowledge the Traditional Custodians of the country throughout Australia and their connections to land, sea and community. We pay our respect to their elders and extend that respect to all Aboriginal and Torres Strait Islander peoples.

## Authors:

Prof Paul Flatau	Paul.Flatau@uwa.edu.au
Dr Leanne Lester	Leanne.Lester@uwa.edu.au
Yasmine Hooper	Yasmine.Hooper@uwa.edu.au
Sarah Zou	Sarah.Zou@uwa.edu.au
Bryn Young	Bryn.Young@uwa.edu.au
Reuben Lester	Reuben.Lester@uwa.edu.au

## Address for Correspondence

Professor Paul Flatau  
Centre for Social Impact the University of Western Australia  
Business School  
The University of Western Australia  
35 Stirling Hwy, Crawley, WA, 6009 Australia  
Paul.Flatau@uwa.edu.au

**Suggested Citation:** Flatau, P., Lester, L., Hooper, Y., Zou, S., Young, B., & Lester, R. (2023). *Workplace Respect: Final Report*. Centre for Social Impact: The University of Western Australia.

**Keywords:** *workplace respect, sexual harassment, evaluation*

## Centre for Social Impact

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## Disclaimer

The opinions in this report reflect the views of the authors and do not necessarily reflect those of the Centre for Social Impact or Circle Green.

# 1. INTRODUCTION

In May 2021, the Commonwealth announced it would be providing \$5.514 million in funding to Western Australia (WA) over a four-year period (2021-22 to 2024-25) for the provision of legal assistance services for people who have experienced WSH or discrimination. Circle Green Community Legal (Circle Green) is the lead agency delivering the Workplace Sexual Harassment and Discrimination Legal Services Project (referred to as “the Workplace Respect Project”) in Western Australia.

*The Workplace Respect Project has the following seven objectives:*

- 1. Identifying current or emerging legal need**
2. Developing responsive intake pathways
3. Delivering legal advice and legal assistance services
4. Delivering community legal education
5. Developing pro bono resources
6. Capacity building within the legal assistance sector
7. Undertaking project outcomes measurement, impact, and evaluation

This report aims to address Objective 1, where the purpose is to identify and understand the prevalence, nature, and occurrence of workplace sexual harassment (WSH) and discrimination in WA, but also, Australia more broadly. It works to build a solid evidence base for identifying legal need (based on existing, available evidence) and how legal assistance services and other relevant organisations can position themselves to better care and respond to people who have experienced WSH. The latter parts of this report draw on the lived experiences of people targeted by workplace sexual harassment in WA to better inform the identification of legal need and the role of legal assistance services.

## 2. FINDINGS

### 2.1 Literature review

The Centre for Social Impact (UWA) utilised the findings of three key publications throughout this review: 'Enough is Enough' - Sexual harassment against women in the FIFO mining industry, (a WA-specific inquiry into the Mining Industry; The Community Development and Justice Standing Committee of the Legislative Assembly of Western Australia [CDJSC WA, 2022]; Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces (AHRC, 2022); and Respect@Work: Sexual Harassment National Inquiry Report (AHRC, 2020).

This review aimed to gather a better understanding of workplace sexual harassment (WSH) in the context of WA but was broadened to a national scope due to inaccessible and unavailable data at a state level.

## Definitions, nature and consequence

### Definitions

The subjective and contextual nature of workplace sexual harassment, and the complex and difficult to navigate legal and regulatory schemes regulating WSH in Australia were identified as two key issues.

The Commonwealth Sexual Discrimination Act 1984 (the SDA), together with state and territory anti-discrimination laws, provide the primary framework for understanding and addressing sexual harassment as a form of sex discrimination. As demonstrated in the table below, the SDA contains the most satisfactory definition of sexual harassment in current legislation. It does not contain a “disadvantage test”.

Table 1. Definitions of workplace sexual harassment

Definition	Source
For the purposes of this Act, a person sexually harasses another person (the person harassed) if: (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.	Section 28A of the Sex Discrimination Act 1984
Under the Act sexual harassment includes an unwelcome sexual advance or request for sexual favours or unwelcome conduct of a sexual nature. The harassed person must have reasonable grounds to believe that if they reject the advance, refuse the request or object to the conduct, they will be disadvantaged or they are in fact disadvantaged. Sexual harassment does not need to be repeated or continuous, it can involve a single incident. Sexual harassment can take many forms including, but not limited to: <ul style="list-style-type: none"><li>• Unwelcome physical touching, hugging or kissing</li><li>• Staring or leering at someone or at parts of their body</li><li>• Suggestive comments or jokes</li><li>• Insults or taunts based on sex</li><li>• Sexually explicit pictures, e-mails or text messages</li><li>• Intrusive questions about a person’s private life or body.</li></ul>	Equal Opportunity Act 1984

In the WA legal context more broadly, there are inconsistent legal definitions of sexual harassment in different pieces of legislation applicable to addressing sexual harassment in WA workplaces. The need for clear and consistent definitions of concepts in WA WSH legislation is essential if employers and regulators are to meet their responsibilities. Failure to define sexual harassment in the regulations represents a missed opportunity to remove ambiguity and confusion about the specific workplace safety risks it poses.

### Nature

People who experience WSH are often harassed by someone who holds more social power within the workplace; whether that be role-related (i.e., perpetrators who work in senior roles), or social-related (i.e., perpetrators who are white, heterosexual, cisgender men). Women and gender-diverse people, people of colour, LGBTQI+ people, and Aboriginal and/or Torres Strait Islander people are at greater risk of experiencing harm.

Women are disproportionately impacted by WSH, and men are perpetrators at a disproportionately higher rate than other genders. Certain industries, including male-dominated industries, may be at greater risk of creating a culture of acceptance and complacency around WSH. Change is needed to address covert and overt incidence of WSH.

### **Consequence**

WSH is a workplace health hazard. People who are targeted by WSH experience trauma and other psychological harm, physical and social impacts, and reduced quality of life. The financial cost of WSH is also incredibly high, contributing to a colossal loss of resources and revenue in Australia.

### **Reporting workplace sexual harassment**

In 2020-2021, sexual harassment complaints lodged with the Equal Opportunity Commission comprised over 20% (72 complaints) of all employment related complaints, ranking first in the top six grounds of complaints received in 2020-2021 (EOC, 2021). Out of the 72 complaints made, women submitted 60 complaints, whereas six were submitted by men. The most recent AHRC Annual Report (2021-22) was insufficient in accurately extrapolating the number of sexual harassment complaints that were also workplace related, however, of the 597 total complaints submitted under the Sex Discrimination Act, 438 of those complaints related to or took place in a work environment (73%).

It is predicted that WSH is grossly underreported. This is likely because form-based reporting is burdensome and challenging for people who have been targeted by WSH. Reporting does not address the cause or ongoing impact of WSH, with the potential to increase distress as there is often a lack of clarity around the reporting process, and often, perpetrators are not held responsible for their behaviour. Reporting does not reflect actual WSH incidence, though trends support the gendered nature of harassment in the workplace.

There is a risk of retaliation associated with reporting of WSH from the perpetrator, the organisation, and in some cases, the wider social circle of the person who was targeted by WSH. Reasons for not reporting were vast, majority were person/social centred (e.g., fear of reputation, loss of work) and systemic (i.e., due to the many different pieces of legislation, it becomes difficult for workers or employers to navigate).

### **Responding to workplace sexual harassment**

The current legal and regulatory system is no longer fit for purpose. Coordination, consistency and clarity between the anti-discrimination, employment and work health and safety legislative schemes is needed.

Secondly, incidences of WSH are often not reported. People targeted by WSH need to be aware of their rights, feel safe to make a complaint, and know what support options are available. Legal services are positioned to offer aid, however, there needs to be a clear pathway to accessing this support. Currently, onus is placed on the reporter (usually the person who has been targeted) to progress incidents of WSH, which creates additional stress.

Evidence suggests that workers who are targeted by WSH value information and support from sources independent of their employer. Legal assistance services cannot prevent WSH, however they are positioned to offer effective, responsive care to people targeted by WSH. Much of the literature focuses on interventions and responses within the organisation where the WSH occurs, and less so on the efficiency of external supports after the event has occurred. However, some of these strategies for managing WSH within the organisation are applicable to external services, including

adopting a trauma-informed approach, the integration of lived experience voices, ensuring communication and clarity, addressing needs (beyond legal need), and providing education about WSH. Legal assistance services are important because they will address the gap in access to justice left by private firms that are not accessible to people who cannot afford the cost associated with these services (an additional barrier faced by people targeted by WSH pursuing legal action).

To effectively help people targeted by WSH who report or disclose WSH, the focus needs to turn to identifying how to best respond and avoid further harm. This includes recognising the barriers to seeking support and understanding what currently works.

## **2.3 Lived experience feedback**

### ***Lived experience barriers***

Five women with lived experience of WSH were interviewed to discuss the delivery of legal assistance in relation to WSH and discrimination and the consequences of not addressing legal needs.

Consistent with the literature, key barriers raised by the lived experience interviewees were social and systemic. Specifically, interviewees reported feeling misunderstood – they noted concerns about how others would perceive them if they reported their experience, which included in the workplace, among their family, and within the wider community. Self-esteem and mental health were often severely impacted, which made seeking legal support much harder. The women also felt that reporting the WSH would result in judgement, loss of employment, or related backlash in the workplace. There was a tendency for women to downplay their experiences of WSH which created self-doubt and likely reduced drive to seek legal support. Interviewees expressed distrust and fear in response to reporting, out of fear that it would make their situation worse, stemming from lack of information about support options and outcomes.

### ***What worked***

Interviewees expressed a sense of comfort from having an external person help with the legal process. Most had not sought legal action, and although the reasons for this likely varied, there was the perception that seeking legal assistance can be validating via elevating their concerns. When people feel able to seek legal assistance, this creates confidence and ease, provided that this information is unbiased and easy to understand.

Additionally, seeking mental health supports was also noted as being important in managing experiences of WSH, irrespective of whether a person has sought legal assistance.

### ***What didn't work***

Internal reports of workplace sexual harassment for many interviewees resulted in having to continue working with the person who perpetrated the WSH, victim blaming or further harm/trauma.

Many of the interviewees did not seek legal assistance following the WSH resulting in insufficient data to make inferences about what is not helpful/working. One interviewee who sought support through a private legal firm expressed disappointment with the outcome she received. More evidence is needed to identify any unique challenges faced by people who have lived experience seeking out and receiving assistance from legal assistance services.

## **2.4 Organisational surveys**

Community Legal Centres (CLCs) across Western Australia were approached to complete an online survey which focused on the prevalence, nature, trends, reporting, action, barriers, available legal assistance, and referral pathways of WSH and discrimination data. A total of nine CLC organisations responded to the survey.

### **Referral pathways**

Organisations often referred to specialist community legal services such as Circle Green. All organisations that did not provide an employment law service, would refer to Circle Green.

### **Barriers**

Barriers noted in the organisational survey were consistent with what was presented in the existing literature, and those noted in the lived experience interviews – both personal/social and systemic.

### **Service users**

Information about service users was either unable to be easily retrieved, or is not collected, resulting in limited information about who presented with WSH claims. Of the information available:

- 76% females, 13% males, 4% non-binary, 7% unknown.
- 49% were aged 18-34, and 30% were aged 35-49.
- n = 2 service users were known to be from outer regional areas and n = 1 from a remote region.
- n = 14 service users were employed casually, and n = 21 service users had permanent employment.
- Two-thirds of service users presenting with WSH claims were considered to have a financial disadvantage, 16% did not have English as their first language, 13% had a disability or mental illness, 3% were experiencing FDV and 3% required translating and interpreting services.
- Approximately one-third had been employed for less than a year.
- Service users were from a range of industries.
- For the majority, the type of harassment experienced was not identified.
- Co-occurring workplace legal issues included workplace discrimination against sex/gender (72%), general protections of workplace rights (55%), occupational health and safety (30%), workplace bullying (30%), general protections against workplace discrimination (30%), and unfair dismissal (30%).

## **2.5 Organisational interviews**

Six organisations were selected to be interviewed with respect to the delivery of legal assistance in relation to workplace sexual harassment and discrimination, including a telephone counselling service.

Interviews with organisations suggests many barriers are experienced across all regions of WA, but several barriers are exclusive to rural areas. These included a perceived lack of privacy and confidentiality, isolation, and workplace culture which normalises WSH. In regional areas, a single company is more likely to monopolise an industry and people face more risks by acting against WSH and, anecdotally, regional and rural workplaces are more likely to tolerate a culture of acceptance of WSH. Challenging tolerance culture may be more difficult due to the lack of resources or biased leadership within smaller organisations.



Further, regional and rural CLCs expressed that they did not have the resources or capacity to prioritise WSH issues.

Limitation periods were identified as a barrier more broadly as many people targeted by WSH need to address their mental health before they can pursue a legal process.

Interviewees made recommendations for legal services, including the use of warm referrals, ensuring education and clarity around process and pathways to reporting, and more effective data collection procedures.

## 3. RECOMMENDATIONS

### Recommendations: Organisations providing legal assistance

**Recommendation 1:** Ensure legal assistance services are knowledgeable about the barriers to seeking help following an incident of WSH – including how these differ across regional/rural and metropolitan areas of WA.

**Recommendation 2:** Ensure staff providing legal assistance to people who have experienced WSH are trauma informed.

**Recommendation 3:** Ensure provision of an advocate with the same cultural background (to better support CARM persons and Aboriginal and/or Torres Strait Islander people). Ensure that information is available in languages other than English.

**Recommendation 4:** Legal assistance services should partner and/or provide warm referrals to other services to ensure a holistic, wrap-around model of care. This includes partnering with services that the client may already have relationships with (or who are operating in the same geographical area) to avoid isolation from prior supports.

**Recommendation 5:** Legal assistance services should partner with services that can aid clients with legal documents (to ensure correct form or allow access to technology).

**Recommendation 6:** Increase knowledge about legal assistance services – for example, using online information and resources.

**Recommendation 7:** Ensure client is aware of the options and pathways available to them and ensure they are presented with the cost and benefit of each option (precedents, likely length of the investigation, likely outcomes, and cost).

**Recommendation 8:** Improve or create comprehensive internal data capture systems to collect and collate information relative to legal need.

**Recommendation 9:** Integrate LE voices – advisory groups, peer support, etc. to more effectively support people who have experienced WSH.

**Recommendation 10:** Develop resources for clients to provide clarity and their understanding of processes – e.g., legal framework in layperson terms; rights; legal pathways and outcomes; information specifically for vulnerable populations (designed in consultation with LE).



## Recommendations: Workplaces and employees

**Recommendation 1:** Ensure a safe and respectful workplace – culture of equality, diversity, inclusivity and WSH intolerance. How this is implemented and tracked will depend on the organisation, however each workplace should be expected to uphold these values, deliver training and other relevant resources, and specify how they will measure their performance.

**Recommendation 2:** Educate across the whole-of-organisation about respectful behaviour and what is expected of employees to keep each other safe at work.

**Recommendation 3:** Ensure the organisation is aware of the nature and prevalence of WSH – which includes covert, less ‘serious’ behaviours that constitute harassment and make others uncomfortable.

**Recommendation 4:** Develop and implement clear policy and guidelines for WSH – including the consequences and sanctions for people who breach WSH policies. Guidelines should also present pathways to reporting WSH - for people who have experienced harm, but also for bystanders of WSH.

**Recommendation 5:** Create a workplace culture that ensures transparency and accountability by ensuring that managers and leadership uphold values and policies relative to WSH. This could include offering additional training and resources to employees in management roles.

**Recommendation 6:** Prioritise the health and safety of any employees who experience WSH (e.g., EAP, changes to working arrangements to ensure the person targeted by WSH and perpetrator do not share work or physical space).

**Recommendation 7:** Deliver compulsory training relative to WSH that is delivered at induction and thereafter, regular intervals (e.g., biannually). Training should be developed with experts, or purchased through an appropriate, credible source.

**Recommendation 8:** Collect and track WSH data.

**Recommendation 9:** Reject use of NDA in WSH cases (unless requested by the person targeted) as these contribute to a culture of silencing.

**Recommendation 10:** Ensure there are strong sanctions imposed on employers and employees who perpetrate harm or do not appropriately respond to WSH. Sexual harassment (and assault) are grounds for dismissal.

## Recommendations: Systems/legal reform

**Recommendation 1:** Revise definitions of WSH and ensure consistency across definitions.

**Recommendation 2:** Ensure that Police, lawyers and judiciary are educated and trauma-informed.

**Recommendation 3:** Ensure that WSH laws explicitly prohibit WSH with guidelines, codes of conduct, and regulations.

**Recommendation 4:** Protection, empathy and support for people who have experienced WSH during court proceedings (e.g., peer support, service animals, advocate, etc.).

**Recommendation 5:** A review of the payment of legal costs.

**Recommendation 6: Remove compensation caps.**

**Recommendation 7:** Increase formal reporting time limits for people experiencing WSH to ensure that people are able to address social and psychological needs.

**Recommendation 8:** WSH criminal cases to be judge only – criminal and civil judges having trauma-informed specialist training and no personal bias towards cases of WSH.

## 4. CONCLUSION

Drawing on existing literature, lived experience voices and stakeholder organisation input, this report works to build a solid evidence base for establishing legal need, while identifying how legal assistance services can be more effective and responsive to the needs of people targeted by WSH.

Legal and regulatory schemes regulating WSH in Australia can be confusing to navigate, posing a systemic barrier to accessing justice. Clear, consistent definitions of WSH in legislation are necessary. Further, many people who have been targeted by WSH are fearful or distrusting of internal and external reporting processes as they are complex, and often burdensome, contributing to significant underreporting. Barriers such as short limitation periods, poor workplace culture, the mental health impacts of WSH and fear of retaliation or judgement were identified, with experiences of these barriers further exacerbated for people targeted by WSH living in regional Western Australia due to isolation and lack of privacy.

While the report highlights that more evidence is needed to understand the challenges faced by people accessing legal services, it frames legal assistance services as well-positioned to provide information and support to people targeted by WSH, minimising gaps in access to justice. Reporting alone does not address the cause or ongoing impact of WSH. In adopting trauma-informed approaches to service provision that address need beyond legal need, incorporating lived experience voices, and providing WSH education, legal assistance services, and other WSH services, can address social and systemic barriers to offer effective, responsive and person-centered support.