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Mr Paul McKnight
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Review of Model Defamation Provisions
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Dear Mr McKnight

Review of Model Defamation Provisions - Stage 2 Review of the MDPs

Victoria Legal Aid (**VLA**) welcomes this opportunity to provide comments about the second stage of the review of the Model Defamation Provisions (**MDPs**).

VLA will primarily respond to questions raised under Part B of the Review of Model Defamation Provisions – Stage 2 Discussion Paper (**Discussion Paper**), in relation to:

- Whether the fear of being sued for defamation is a significant factor deterring individuals from reporting unlawful conduct such as sexual harassment or discrimination to employers or professional disciplinary bodies; and
- Whether absolute privilege should be extended to complaints of unlawful conduct such as sexual harassment or discrimination made to:
 - employers, or to investigators engaged by employers; and
 - professional disciplinary bodies.

VLA has a unique contribution to make to the review of the MDPs given our role working with victims of sexual harassment and discrimination through our specialist Equality Law Program. Our experience through this work is that, in addition to the many other barriers that stop victims from reporting sexual harassment, some clients are hesitant to report conduct because they are afraid of being sued for defamation. Underreporting of sexual harassment means that employers are rarely made aware that sexual harassment is occurring and the workplace hazard of sexual harassment remains.

Addressing the silencing effect caused by the actual or perceived threat of a defamation action can remove a barrier to reporting sexual harassment and thereby improve the safety of all women at work and in our community. To do this, it is our view that absolute privilege should be extended to complaints of unlawful conduct, such as sexual harassment or discrimination.

Certain groups, particularly First Nations people, experience sexual harassment at higher rates and face additional and compounding barriers to reporting. As a result, we urge direct consultation with Aboriginal and Torres Strait Islander organisations.

1. Our work to prevent and address sexual harassment

VLA has a free specialist discrimination law service, the Equality Law Program, which promotes and protects substantive equality by addressing individual and systemic discrimination through advice, casework, legal education, and strategic advocacy.

We work to enable people to obtain and retain employment, to remain engaged with key service and education providers, to receive fair compensation, and to use the law to help stop discrimination and sexual harassment occurring again in the future.

As part of this work, over the past five years we provided over 6,729 legal advice sessions regarding discrimination matters, including 1,058 advice sessions about sexual harassment and sex discrimination. Approximately 80% of clients who we assisted with a workplace sexual harassment complaint were women.

In 2019, we prepared a detailed report for the Australian Human Rights Commission's national inquiry into sexual harassment. This report, *Change the Culture, Change the System*, shares the stories of eight clients and highlights systemic failures of our laws, culture and complaints systems to prevent sexual harassment.¹

2. Sexual harassment mostly goes unreported

Despite the high incidence of sexual harassment, few victims report the conduct to their employer, and legal complaints are rare. As the 2018 Australian Human Rights Commission's (AHRC) Fourth National Survey on Sexual Harassment in Australian Workplaces (AHRC Survey) confirmed, less than 1 in 5 people who experience sexual harassment take action, and only 1 in 100 make a legal complaint to the Australian Human Rights Commission or equivalent State or Territory agency.²

There are many reasons why victims are reluctant to make a complaint, including the strain it has on their mental health and fears that it will have a negative impact on their reputation and career. This fear is not unfounded, as the 2018 AHRC Survey found that 'almost one in five people who made a formal report were labelled as a trouble-maker, victimised, ostracised or resigned.'³

¹ *Change the Culture, Change the System: Urgent Action needed to End Sexual Harassment at Work*, Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces (February 2019) (available at: <https://www.legalaid.vic.gov.au/law-reform/building-better-justice-system/change-story-change-system-urgent-action-needed-to-end-sexual-harassment-work>).

² Australian Human Rights Commission (2018) *Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces*, 9.

³ *Ibid*, 73-75.

3. Our experience working with clients experiencing threats of defamation

The *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplace Report* by the Australian Human Rights Commission identifies that: ‘sexual harassment complaints also take place against a backdrop of defamation laws that can discourage victims from making a complaint and do not provide sufficient protections for victims’.⁴

In our experience, some clients are fearful of reporting or discussing allegations of sexual harassment or assault due to concerns regarding defamation. In some cases, employers and alleged perpetrators have actively used the threat of defamation against clients who have raised a concern about sexual harassment.

Even when victims do make a complaint or seek legal advice, some decide to not to pursue their complaint further for fear of retaliation, as evidenced by Lydia’s and Christine’s stories below.⁵

Lydia’s story

“I felt that the threat of defamation on top of everything else was enough to scare me out of proceeding with the complaint”

I worked for a sole proprietor who subjected me to sexual harassment. He touched my bottom, sexually propositioned me, made comments about my appearance and invited me to his home. He also behaved this way towards other female employees.

I was concerned about making sure he did not continue to sexually assault female staff, but I did not know who to speak to. I heard my boss say directly to me and other staff at the time that if anyone spoke out about anything, he would use his lawyers to come back at them with everything he could, including a defamation claim. When I spoke up about his conduct, I was made redundant.

I didn’t know much about defamation at the time, but I felt that the threat of defamation on top of everything else was enough to scare me out of proceeding with the complaint. Even though I received legal advice that I had a strong claim, I decided not to pursue the complaint because of fear to my reputation and risk of a defamation claim against me.

Today, several female ex-staff have come out publicly with sexual assault claims against him. I wish I had proceeded with my complaint at the time and not felt so intimidated to stand up for myself and other staff.

Lydia’s story highlights the role of the threat of defamation proceedings in preventing victims from reporting conduct. When people like Lydia are deterred from enforcing their rights, there is no justice for the victim and no steps are taken to stop the conduct from happening again. In some cases, the employer is not even aware that sexual harassment has occurred in their workplace.

⁴ *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplace Report*, Report by the Australian Human Rights Commission (2020) (available at: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>), 443.

⁵ Names have been changed. Our clients have consented to the sharing of their stories.

Christine's story

"I felt scared to make any further reports and scared to speak publicly in fear of being sued for defamation"

I worked for a company as a junior employee. As part of my role, I was required to work closely with the owner of the company. I was sexually harassed by the owner of the company a number of times during my employment.

I didn't know what to do about the harassment and felt really helpless because of my position as a junior employee and his position as the company's owner. I knew that I needed to keep my job to ensure I could continue to pay for rent and look after my family, and I was worried that if I spoke up, I would be fired. I felt terrified and unsure of how to make the harassment stop.

I decided to contact the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) to make a complaint. Soon after I made this complaint, the company's owner sat me down for a meeting and said he was terminating my employment because I made a complaint about him to the VEOHRC. After the meeting, I was sent a termination letter. The letter included a section about warning me against defamatory conduct, saying that legal action would be taken against me if I engaged in any defamatory conduct.

This letter made me feel angry but also really scared about what would happen if I continued with this complaint against the company's owner. I didn't know anything about defamation law and didn't have enough money to speak with a lawyer about the risks of a defamation claim being made against me.

Even though I knew I hadn't done anything wrong, I felt scared to make any further reports on my own and scared to speak out about what was happening to me in fear of being sued for defamation.

In Christine's circumstances, she may have been afforded protection from defamation proceedings in relation to her VEOHRC complaint.⁶ However, her story outlines the multiple difficulties victims face to reporting conduct, including reputational risks, mistrust of the investigation process, and fear of retribution. The threat of defamation is an additional barrier, which can ultimately coerce a victim not to pursue their complaint.

4. Additional barriers faced by First Nations clients

Although we have not highlighted specific stories of First Nations clients experiencing sexual harassment or discrimination, the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplace Report* identifies that:

- The 2018 National Survey found that more than half of Aboriginal and Torres Strait Islander workers said they had experienced workplace sexual harassment in the last five years, substantially higher than the rate for the general population;
- The Diversity Council of Australia's Inclusion@Work Index found that 38% of Aboriginal and Torres Strait Islander workers had personally experienced

⁶ s 189 of the *Equal Opportunity Act 2010* (Vic).

- harassment and/or discrimination in the past 12 months—the highest rate of workplace discrimination and harassment of any demographic group; and
- Aboriginal and Torres Strait Islander workers face intersecting forms of discrimination and particular barriers to reporting sexual harassment in the workplace. For example, repeated experiences of discrimination and marginalisation can create reluctance to engage with organisational or external agency processes.⁷

Accordingly, we would encourage the Defamation Working Party to consult directly with Aboriginal and Torres Strait Islander organisations to adequately consider the impact of the MDPs on the reporting of sexual assault and discrimination by First Nations people.

5. Adequate protections against defamation claims for victims of sexual harassment

Existing protections against defamation

The stories of Lydia and Christine demonstrate that threats of defamation action can silence victims of sexual harassment for several reasons, including because victims are uncertain about whether they are protected from a defamation claim if they pursue a complaint.

The Discussion Paper outlines that there are a number of protections against a defamation action available to people who make a complaint to an employer or professional body, including the defence of qualified privilege, protections against victimisation that exist under State and Federal discrimination law, or in the case of professional bodies, protections under relevant legislation or regulations.

However, the Discussion Paper recognises that it is not clear whether these protections apply until a court makes a determination, which is an uncertain, costly and time-consuming process. As a result, even if an arguable defence is available, the threat of a defamation proceeding is often enough to deter victims from pursuing a complaint, given that this is usually one of multiple concerns about reporting.

Extension of absolute privilege to complaints to employers and professional bodies

To facilitate complaints by victims, it is our view that the MDPs should extend absolute privilege to complaints of unlawful conduct such as sexual harassment or discrimination made to:

- employers, or to investigators engaged by employers;
- professional disciplinary bodies; and
- for the avoidance of any doubt, any statutory body that is empowered to receive complaints of the unlawful conduct in question, including the Victorian Equal Opportunity and Human Rights Commission, the Australian Human Rights Commission and the Fair Work Commission.

In this regard, we consider that the extension of absolute privilege to complaints to employers, professional disciplinary bodies and the various commissions that deal with such

⁷ *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplace Report*, Report by the Australian Human Rights Commission (2020) (available at: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>).

complaints provides certainty to complainants, and may, for example, have provided sufficient comfort for Lydia or Christine to pursue their complaints.

We recognise the MDPs must balance the public interest in protecting witnesses and victims against the right to effective and fair remedies for persons whose reputations might be harmed, for example, by a false or malicious complaint.

In terms of safeguards, generally, a complaint would only be published to an employer or professional body solely for the purpose of an investigation of, and response to, the complaint. If the complainant or another party published defamatory material outside the complaint process, the absolute privilege protections with respect to the complaint process would not apply.

This limited extension of absolute privilege strikes an appropriate balance between the need to encourage genuine reports of sexual harassment and the interests of the person responding to the complaint.

Safeguards through the regulation of workplace investigations

We consider that improved regulation of workplace investigations would further improve safeguards for all parties, including persons subject to a potential false or malicious complaint. Such laws are a more appropriate method for protecting the interests of parties during a workplace sexual harassment complaint process and investigation than defamation actions.

*The Review of Sexual Harassment in Victorian Courts*⁸ identifies that the legal dimensions of workplace investigations are often complex and unsettled, and that one consequence of this complexity is that it is likely to be challenging for employers and employees involved in workplace investigations to navigate these rules, understand their legal obligations and/or assert their legal rights.⁹

While there is no legislation specifically directed at workplace investigations in Australia, workplace investigations take place within an intricate framework of regulation.¹⁰ VLA recommended in our *Change the Culture, Change the System* report that: “Consideration should be given to reforming Commonwealth, State and Territory anti-discrimination laws and the Fair Work Act to improve protection and redress for people who complain of sexual harassment and suffer detriment because the employer or other duty holder fails to respond reasonably or handles an investigation badly.”¹¹

Recommendations regarding investigations into unlawful conduct from the *Review of Sexual Harassment in Victorian Courts* include that:

⁸ *The Review of Sexual Harassment in Victorian Courts, Appendix 1: Summary Review of Interventions to Prevent and Respond to Sexual Harassment in Courts* (February 2021) (available at: <https://www.shreview.courts.vic.gov.au/wp-content/uploads/2021/04/Appendix-1-Summary-Review-of-Interventions-to-Prevent-and-Respond-to-Sexual-Harassment-in-Courts.pdf>).

⁹ *Ibid*, 112.

¹⁰ *Ibid*, 112.

¹¹ *Change the Culture, Change the System: Urgent Action needed to End Sexual Harassment at Work*, Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces (February 2019) (available at: <https://www.legalaid.vic.gov.au/law-reform/building-better-justice-system/change-story-change-system-urgent-action-needed-to-end-sexual-harassment-work>), Recommendation 16.


- they should afford procedural fairness;
- they must be prompt and timely, although not at the expense of objectivity, neutrality, fairness, or employee safety;
- investigators should be well-trained, objective, and neutral;
- reasonable support should be provided to all employees involved; and
- sufficient privacy and confidentiality obligations should apply to all parties to the investigation.¹²

Improved regulation of workplace investigations would strengthen procedural fairness for all parties, and facilitate an appropriate balance between privacy and transparency.

Additionally, in relation to the other aspects of Question 21 of the Discussion Paper:

- with respect to the best way of amending the MDPs to implement the extension to absolute privilege, we do not have a position; and
- with respect to the nature of the unlawful conduct to which the extension of absolute privilege should apply, we consider that it should apply to sexual harassment and discrimination, but do not have a position regarding any broader application.

We would welcome the opportunity to discuss our recommendations further and to provide additional information about the impact of threats of defamation on our clients.

Please contact Melanie Schleiger, Program Manager, Equality Law Program
) if you have any queries about our submission.

Yours sincerely



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Executive Director, Civil Justice, Access and Equity

¹² *The Review of Sexual Harassment in Victorian Courts, Appendix 1: Summary Review of Interventions to Prevent and Respond to Sexual Harassment in Courts* (February 2021) (available at: <https://www.shreview.courts.vic.gov.au/wp-content/uploads/2021/04/Appendix-1-Summary-Review-of-Interventions-to-Prevent-and-Respond-to-Sexual-Harassment-in-Courts.pdf>), 111-112.