

6 August 2019

Manager, Office of Domestic,  
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Dear Manager *Sarah*

**Re: Northern Territory Sexual Violence Prevention and Response Framework**

Thank you for the opportunity to make a submission to the Northern Territory Sexual Violence Prevention and Response Framework.

### Background

The Northern Territory Anti-Discrimination Commission (NTADC) administers the Northern Territory *Anti-Discrimination Act 1992* (ADA). We are a very small office charged with eliminating sexual harassment, discrimination and promoting equal opportunity in the Northern Territory (NT). The objectives<sup>1</sup> specifically provide “to eliminate sexual harassment.”

This submission will focus specifically on one component of the framework being sexual harassment in the workplace, as we are aware the Gender Equity Framework will address primary prevention, challenging stereotypes and attitudinal change.

Our submission will respond to Action areas 1, 3 and 5.

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<sup>1</sup> Section 3 *Anti-Discrimination Act 1992*

## General Comment

In progressing the framework it is important that it is developed based on evidence and that as well as providing aspirational guidance that it is accompanied by actions and short, medium and long term goals. Our submission shall make some recommendations about what these actions and goals could be to prevent and respond appropriately to sexual harassment in the workplace.

It is fundamental that it is developed through a gendered lens and that it is understood that there is no one action or option that will resolve gendered violence, but many parts to the puzzle. The work NT ADC does is part of this puzzle and seeks to redress gender inequity and inequality, including in the form of sexual harassment in the workplace.

### **ACTION AREA 1: PREVENTING SEXUAL VIOLENCE**

The primary approach taken by the NTADC to prevent sexual harassment is by providing training for organisations. This training is a mix of information and practical workshop and can be tailored to the needs of the particular organisation. Sexual harassment maybe the focus of training delivery or it may form part of other discrimination training.

Joint research<sup>2</sup> from the University of South Australia, New South Wales and Columbia University looked at sexual harassment training in Australia compared to the United States and found that only 58% of organisations were delivering sexual harassment training compared to 91% in the United States. While the NT ADC has a high demand for discrimination training, there remains a large number of organisations who do not undertake this type of training. It is also rare that dedicated sexual harassment training is requested. To our knowledge we are the only provider of this type of training in the NT.

Linked with training is the need for organisations to have specific sexual harassment policies supported by relevant effective training. Policies should be visible, accessible

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<sup>2</sup> Perry E.L., Kulik C.T., Golom F.D., and Cruz M. (2019) *Sexual Harassment Training: Often necessary but rarely sufficient*. Industrial and Organizational Psychology 12.

and part of induction for all new employees. They should be live, not passive documents that inform standards of acceptable behaviour, decision making and general approaches taken by organisations and individuals.

Policies should clearly support bystander intervention, provide alternatives to reporting to the human resources officer and set out a safe and appropriate grievance process for employees who need to complain. Employers should build confidence in their employees that complaining will result in concerns being taken seriously and will not result in adverse action against them – irrespective of the outcome.

Training needs to be effective training and be explicitly about sexual harassment, not general bullying and harassment training, or discrimination training. It also cannot be online training. It should incorporate information about the law, the specific policy of the organisation, what constitutes sexual harassment and how to be an effective bystander. It should be accompanied by clear information about the organisation's stand on sexual harassment. Most importantly though, it should be focused on challenging behaviour and workplace culture. Training that is limited to process and information is likely to be of limited value.

While such an approach does not guarantee sexual harassment will not occur, it will provide clear guidance to all employees about standards of behaviour and support employees in raising concerns if this standard of behaviour is not met. This is not currently a standard position in NT workplaces.

### The Framework

It is critical that any framework seeking to address sexual violence acknowledges and provides for training and organisational policy to be part of the preventative strategy, in both the aspirational content and in any actions or goals that may fall out of the strategy. The Northern Territory Government is able to influence action in this regard. Some recommended actions in this area – pertaining to sexual harassment prevention include:

- Public sector organisations must undertake sexual harassment training and have a specific sexual harassment policy<sup>3</sup>, with public reporting requirements.
- Non-Government Sector organisations who receive Northern Territory Government funding must undertake sexual harassment training and have a specific sexual harassment policy with reporting requirements.
- Organisations tendering for NT Government contracts to provide evidence that their workplace has undertaken sexual harassment training and have an appropriate, relevant Sexual harassment policy<sup>4</sup>.
- Reform to the *Anti-Discrimination Act* that organisations must have undertaken sexual harassment training to demonstrate that they are not liable for the actions of their staff.

We note that recent research<sup>5</sup> indicates that for training to be most effective as intervention it should be accompanied by a systems based organisational diagnosis.

“Importantly, an ODC<sup>6</sup> perspective views problems like sexual harassment as *systemic phenomena* that reflect deeper issues embedded at multiple levels within the organisation (Golom, 2018). Seemingly isolated individual instances of inappropriate or egregious workplace behaviour are often reinforced by the organization’s reward systems, leadership and management practices, and organizational structures. Viewing sexual harassment as a systemic problem results in the understanding that effective interventions are ones that embed accountability and responsibility for change throughout the organizational system, addressing contextual factors that are larger than the problem immediately presenting itself.”<sup>7</sup>

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<sup>3</sup> Policies must demonstrate a clear grievance process and what steps a person must take if they choose to complain. They must also advise employees of their rights to bring a formal complaint to independent bodies such as the NT ADC and the Australian Human Rights Commission.

<sup>4</sup> The NT ADC commonly sees Sexual Harassment Policies from organisations that are based on templates from other states or territories that do not reflect Northern Territory Law.

<sup>5</sup> Perry E.L., Kulik C.T., Golom F.D., and Cruz M. (2019) *Sexual Harassment Training: Often necessary but rarely sufficient*. Industrial and Organizational Psychology 12.

<sup>6</sup> ODC is an abbreviation for organisational development and change.

<sup>7</sup> Supra p 90.

In considering the approach to take in relation to training this context should be considered as well as any information that may result from the National Inquiry into Sexual Harassment in Australian Workplaces, which may provide further opportunities to understand how to practicalise these findings or other new ideas that may support workplace cultural change.

### **ACTION AREA 3: RESPONDING TO ADULTS WHO HAVE EXPERIENCED SEXUAL VIOLENCE**

The *Anti-Discrimination Act* provides a formal complaint avenue for anyone who has experienced sexual harassment in their workplace, accommodation, while receiving goods, services or facilities, education, clubs or superannuation and insurance. Formal complaint must be made within 12 months, with discretion for the Commissioner to extend this time frame if satisfied it is appropriate to do so.

Sexual harassment includes sexual and indecent assault.

Individuals who have experienced sexual harassment that is also criminal conduct may choose to use the formal complaint process as well as or as an alternative to a criminal process. Key reasons a person may complain to the NTADC over accessing the criminal justice system may include:

- Quicker
- Confidential
- Can have input into the type of redress
- Greater range of remedies
- Lower standard of proof

Sexual harassment complaints received by the NTADC fluctuate in number. Consistent over the years though is that the number of formal complaints received is low compared to the number of stories shared. Stories are shared with the NTADC through enquiries, training, public consultation, community engagements or other public events.

Also of note is that despite the reporting of sexual harassment in the western world due to the #MeToo movement, no change in sexual harassment complaints was seen

in the NT. We believe the reason for no increase in formal complaint is because of the small population size of the NT and the risks associated with speaking up in a small community. Common concerns raised by individuals include fear of repercussions such as job loss or not being able to continue working in the NT. It is not uncommon that formal complaints lodged are made after someone has left their role or after they have left the NT. This is particularly true for employees that work in specialised areas where there is no viable alternative work option in the NT. For many employees, especially those with cultural links, children and financial commitments in the NT, leaving is not a realistic option. This is likely to be particularly true for Aboriginal employees for whom the NT is their country and where they have familial ties.

Other observed reasons are:

1. Employees don't realise that what they are experiencing is sexual harassment.
2. A tolerance developed for sexualised behaviour in the workplace and a passive acceptance of this behaviour.

A further barrier to complaint in the NT is remoteness. Many Territorians reside outside the major centres. Access to regular information, advice and complaints processes can be difficult. Timely complaints processes can also be difficult from remote areas. In relation to sexual harassment, timely resolution of matters is of utmost importance due to the stress such complaints can have on all parties.

While we did not see an increase in formal complaints as a result of the #MeToo movement what we did see was an increased preparedness for people to tell us their story, including high school students, lawyers and public servants. This confirmed what we already suspected, that sexual harassment is a pervasive issue in the NT.

Despite the reticence to complain, an independent local complaints process should remain a critical part of any framework seeking to eliminate sexual harassment. For those who do use the process it can be:

- An opportunity to be believed<sup>8</sup>

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<sup>8</sup> Current process does not require any evidence to prove that sexual harassment occurred, it only requires the disclosure of an allegation. Conciliation can provide an opportunity for a

- An opportunity to seek redress quickly
- An opportunity to educate about the harm done.

The existence of an independent formal complaint model not only provides those who have experienced sexual harassment with a legitimate complaint avenue, it is also a strong motivator for organisations to address these issues in their workplace.

### Themes observed by the NTADC

Due to confidentiality and the size of the NT we are unable to share specific stories but we can share themes that we hear. Of note is the prevalence of sexual harassment in traditional male industries or professions. Views in the NT persist of the NT being an outpost that celebrates a blokey culture. Unacceptable behaviour is often justified with humour and acceptance that this is the outback and people coming here should just accept this behaviour. Any framework needs to tackle how men will be brought on this journey, as without their participation change is likely to be frustrated.

Also of concern in the NT is that in workplaces employees and employers often know who the problematic employees are. However nobody ever addresses the issue or calls out the behaviour, people choose to work around it. Stories have been shared with the NTADC that demonstrate female employees in small communities may have strong networks that seek to protect other female employees. This may include warning them not to socialise with certain individuals, suggesting other protective behaviour or warning them from working with a particular organisation to avoid an individual. A framework or actions falling out of it need to consider how to break down this culture. It is suggested that training is at least the start of this process but it is likely further forms of follow up would be required.

Another observation is that stories may reveal a history of what we have framed “try on” behaviour. This is where a complainant’s story indicates early behaviour that hinted at a problem but they felt it was not significant enough to raise. This behaviour then escalates to a point at which it is a problem that can no longer be ignored. Again training maybe a useful vehicle to stop this behaviour before further action is required.

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person to tell their personal story uninterrupted. In our experience this in itself can be extremely cathartic. They also have direct input into the solution.

Anecdotally we observe that it is also common that once a complaint is made that the person complaining, if they have not left their place of employment will do so within the life of the complaint. The employee against whom the complaint is made, in our experience rarely leaves and in some instances we hear is promoted after a complaint. Work needs to be done with organisations to better equip them to give employees the confidence to speak and the trust that their concerns will be fairly addressed.

We also see that some workplaces see sexual harassment complaints as a nuisance and employers will be quick to discredit the employee complaining. In contrast it is not uncommon that employers are quick to set out the virtues and values of the employee against whom the allegations are raised. Part of this behaviour is likely because of the inextricable link between employers and the employee against whom the allegation is made, as they are both made respondents to the complaint. Employers often assume that defending the employee against whom the allegations are made is in their best interest, rather than supporting the employee complaining. If an employer has in fact taken steps to discharge their vicarious liability, this would not be the case. Research from Harvard University also indicated that organisations who act swiftly, support complainants and take responsibility in a public way will often reverse adverse public opinion of their business to that of pre-complaint<sup>9</sup>.

In regard to formal complaints received, they are mostly from women, and in most cases they are in relation to an employee or manager in a more senior position. Women complainants are mostly younger women. The AHRC<sup>10</sup> prevalence data however revealed that most sexual harassment occurs between colleagues. This may mean that employees are more likely to make a formal complaint if the sexual harassment is by a more senior staff member than a work colleague.

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<sup>9</sup> How Sexual Harassment Affects a Company's Public Image by Margaret Shih, Serena Does and Seval Gundemir; 11 June 2018.

<sup>10</sup> Everyone's business: Fourth National Survey on Sexual Harassment in Australian Workplaces (2018).



## Confidentiality

Current statutory complaint processes in Australia, including in the NT, require that complaints, including resolution of those complaints, be handled confidentially. This approach has been criticised as protecting individual respondents<sup>11</sup> and organisations from public scrutiny and exposure, preventing broader public discussion on the issue and transparency around prevalence. Nothing in this submission is intended to detract from these views, but the NTADC is in a position to appreciate the alternative side of this issue. While we agree confidentiality should not be used to silence women about their experience or to protect organisations or individuals who contributed to that experience, any framework needs to carefully consider how confidentiality can be critical to the safety of person who has experienced sexual harassment.

In our experience, confidentiality can and often does contribute positively to redressing sexual harassment for individual complainants, and may provide an opportunity for education and systemic change within organisations. Public exposure of individual complaints at the early stages may and can have adverse impacts for the person complaining and force parties into polarised positions rather than constructive discussion.

In regard to resolution of a complaint, it must be noted that confidentiality is a negotiable part of resolution, it is not required. In our experience however confidentiality is usually a desirable feature of settlement for all parties.

If public disclosure was required for sexual harassment complaints this would potentially create unsafe complaint processes, with the risk that the process could cause more damage than the incident(s) being complained of. We do not see this as being a useful catalyst for change. We believe such a requirement would raise the following risks:

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<sup>11</sup> Respondents are those individual against whom allegations of sexual harassment have been made.

- Reduced settlements. Confidentiality is often a critical leverage to negotiate for resolution. It can give some power back to the complainant in a situation where a power imbalance is likely to exist.
- Create further barriers for individuals considering making a formal complaint. Given the current barriers faced in making individual complaints, particularly in the NT, we do not see this as a positive move.
- For those who do complain, prevent matters settling and require complainants to run their matters to a hearing; a step many complainants would be unlikely to take. Hearings may reinforce inequity as complainants are more likely to be unrepresented or have limited representation against legally represented, better resourced organisations. This is often compounded by the fact that individual respondents are almost always included in the respondent organisation's legal case and representation.<sup>12</sup>

While public discourse on sexual harassment is essential to change culture and values around prevalence, it is not essential that this occur at the expense of individuals who are courageous enough to bring their stories forward.

## **ACTION AREA 5: STRENGTHENING THE SYSTEMS THAT RESPOND TO SEXUAL VIOLENCE**

The existing systems in place for individuals experiencing sexual harassment generally includes<sup>13</sup>:

- Informal/formal workplace avenues to complain
- Limited advocacy and legal services for individual to seek advice or information about rights
- Formal independent complaint bodies
- Conciliation

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<sup>12</sup> A different position maybe put forward if there were greater resources to support complainants through the lifecycle of a complaint. This is not the current landscape in which complaints operate. If a decision were made to remove confidentiality it would be essential that this resourcing issue were addressed, so further power imbalance did not occur.

<sup>13</sup> Note in addition there maybe criminal and crimes victim compensation options as well.

- Legal hearing before a Tribunal or Federal Court

These avenues seek to identify unlawful behaviour and to provide remedies for the person who has been sexually harassed. Outcomes may range from compensation, training, policy development and apologies.

The existence of an individual independent local complaints model is critical. While not all people who experience sexual harassment will choose to use this model, for those who do it can be an effective option to resolve their concerns, even when they don't make a formal complaint and use for self-advocacy.

Many organisations also have a human resource department or a complaint team that employees can report sexual harassment to. In our experience employees often do not want to use these mechanisms as they are seen as not independent but as representing employer's interests. What they want is an independent evaluation of the experiences they have had. Statutory discrimination and equal opportunity bodies provide this opportunity. In the NT a critical feature of the NTADC process is that a complaint can be made without the prerequisite that a person has followed an internal process first.

Key strengthening of these processes could include:

- Modernising the *Anti-Discrimination Act* to ensure the scope of protection offered reflects contemporary needs. For example protection for the LGBTIQ<sup>14+</sup> community, removing technical obstacles in proving sexual harassment claims (requirement for very specific areas to be proved), protecting service providers<sup>15</sup>.
- Retaining and developing the local independent complaint body to ensure access needs are met. Those experiencing sexual harassment may have access needs to

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<sup>14</sup> In line with the *Sex Discrimination Act 1975*.

<sup>15</sup> Currently protection for sexual harassment only covers a person receiving a service not those providing a service. This has been particularly problematic in the hospitality industry where reports of sexual harassment by staff from patrons is very high. A sexual harassment survey undertaken by United Voice found that 89% of female hospitality workers had experienced sexual harassment in their workplaces.

tell their story, sign and language interpreters, remoteness, literacy or cognitive needs.

- Adequate staffing levels of the NT ADC to meet the demand and to engage with the community about their rights.
- Ensuring appropriately funded advocacy support for those experiencing sexual harassment to support them in telling their stories.

It is also critical that a conciliation option attaches to any complaint process. The value of this process is the opportunity for people to tell their story – either to their employer or to the offending individual. This can be a really powerful, insightful and educative experience for all parties. It is an important part of the complainant process which may restore some balance in the employment relationship. It is also an opportunity to seek systemic resolutions that may not as easily be obtained through litigation such as policy development, training and awareness raising strategies.

In using conciliation it is vital that steps are taken to address any potential power imbalances (including considering if the person whom it is alleged sexually harassed should attend). It is also vital that the person who experienced the sexual harassment feels comfortable in the process considering factors such as:

- Using a shuttle rather than a face to face conciliation
- Considering who and how many people are present
- Considering the role of advocates and lawyers and their presence in this process

It is common that complainants choosing to use the NTADC process indicate their motivations as wanting to achieve remedies that contribute to organisational cultural change and to prevent others from having the same experience they have had. Conciliation, rather than litigation is better placed to provide a forum in which this can be discussed and these outcomes be achieved.

In relation to organisational change:

- Human Resource alternatives. Employees who are experiencing or have experienced sexual harassment in their workplace may feel they cannot report incidents to human resources, for the reasons set out above. Having an

alternative reporting avenue may be critical to create the environment of trust for safe reporting by employees about sexual harassment they experience or that they observe in regard to fellow employees.

Employees need to know that their allegations will be taken seriously and they won't be subjected to adverse conduct for raising their concerns. The NTADC has observed through complaints that frequently the greater grievance of employees is not the sexual harassment complained about but the way the organisation responded to their complaint.<sup>16</sup>

Alternative reporting avenues for sexual harassment can be an effective option to redress or minimise this issue for organisation. Creating roles where key people, who are well regarded by all employees in the organisation are trained<sup>17</sup> and made available to employees so they can raise their concerns with them. The employee may then support that person in resolving their issue, which may include being an intermediary with the employer or managers to help find a satisfactory resolution.

- Workplace investigations

As stated above, it is an observation of the NTADC that complainants are often more aggrieved by the workplace response to their allegation of sexual harassment than they are about the sexual harassment. A key factor in this is often how the matter was investigated. Examples are where an investigation is conducted internally. This can be viewed as lacking independence or indicating a lack of seriousness by the organisation in relation to the allegations.

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<sup>16</sup> Note research by Jennifer J Freyd and colleagues demonstrating that sexual harassment may cause trauma and that all trauma is not equal, that the harm maybe greater when caused by someone who they depend on for basic needs because of an additional betrayal component. She includes institutions in this category. See Rosenthal, M. N., Schmidt, A. M., & Freyd, J.J. (2016) *Still Second Class: Sexual Harassment of Graduate Students* Psychology of Women Quarterly.

<sup>17</sup> The NTADC offers contact officer training.

It is clear to the NTADC that often investigations reveal a failure to understand the nature of sexual harassment, in particular that techniques applied are those that would be applied to any workplace investigations with no tailoring or consideration to the nuances of this issue. For example using a corroborative evidence framework, which results in an employee being advised by their workplace that no action can be taken because the investigation failed to show any proof that what they said occurred. Such an approach fails to take into account that it is common that there is no corroborative evidence, due to the nature of the offending alleged. It is also noted that this standard of proof is higher than the standard that would be applied by the NTADC if a formal complaint were made to us.

Other issues observed include asking many staff about the incident, including staff who would have no reason to know anything. This approach discloses personal information about the complainant unnecessarily and may generate a hostile work environment for the person who complained, particularly if the allegations are against someone who is popular in the workplace. Seeking evidence from work colleagues, when an investigation has been requested by a workplace, also assumes that other employees will voluntarily give honest information when they may fear repercussions for doing so.

Investigations may also take into account information that may not ultimately be relevant if a matter was to go to a formal hearing, such as the credit or motives of the person complaining or the person against whom the allegations were made. For example that the person complaining is not well liked or is mentally unwell versus what a great person the respondent is.

Investigations badly handled may result in an employee feeling unsupported and not believed. This can be very distressing for the employee who made the complaint, and may ultimately result in mental health concerns and the employee leaving their place of work.

Consideration should be given to what supports or education is required to build capacity of workplaces and investigators to develop the specialised skills required for an investigation in this particular area.

- Tools for business

Information for businesses about what tools exist or could exist to help them develop relevant organisational policies. Interactive policy development tools would assist organisations develop policies that work for their particular workplace and that are framed by relevant laws in their jurisdiction. It is noted that in the NT it is not uncommon for the NTADC to see workplaces' policies being standard stock policies that have been picked up from interstate referencing the wrong law. Workplaces have often obtained this material from Human Resource consultants or as part of franchise, not appreciating its lack of relevance to the NT.

### **Closing comments**

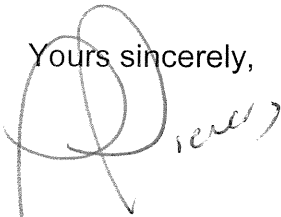
We are of the view that any framework should emphasise the responsibility of public sector workplaces and funded NGOs to be proactive to prevent sexual harassment rather than a reliance on individual employees to come forward and always share their stories. The evidence is clear that they will not always do this. The lack of formal complaint is not evidence that a workplace has no issues.

In considering recommendations for the framework we believe it is critical that any options are developed with an understanding that at the root of sexual harassment is gender inequality. While inequality between gender in relation to differential pay and career promotion is well understood, there is a developing understanding that inequality is also about the experiences you have while trying to get a job or stay in a job. Sexual harassment creates an unsafe environment, one that prevents employees from performing to their best. What flows from this is the risk that talent is not identified and promotion opportunities are lost or employees leave. Job change can have a fundamental impact on an employee's ability to grow and develop in their occupation of choice. Job change may mean

starting over, time and time again, with implications for promotion, reputation, salary, leave entitlements and superannuation in the long run, leading to long term financial insecurity.

Sexual harassment is about gender equality, it is about safety and it is about ensuring everyone gets a fair go. We appreciate the opportunity to comment on these important and critical issues and welcome any future opportunities for future contribution.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sally Sievers', written over a large, stylized circular scribble.

Sally Sievers

Anti-Discrimination Commissioner

Northern Territory Anti-Discrimination Commission

6 August 2019