

Privatising Sexual Harassment

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Abstract

Following the emergence of #MeToo, sexual harassment at work attracted sustained attention all over the world. In Australia, this resulted in multiple reports which confirmed high rates of sexual harassment and led to protracted agitation for law reform. Although the ensuing recommendations have been widely praised, this article argues that the continuing privatisation of the complaint process is a noted limitation because survivors are estopped from speaking out, while harassers remain free to harass others. With regard to the *Sex Discrimination Act 1984* (Cth), the article sets out to support the thesis as it pertains to the various steps associated with the individual complaint-based mechanism — namely, conciliation, non-disclosure agreements, litigation and the destruction of complaint files. While litigation is a public process, barely 1% of sexual harassment complaints proceed to a formal hearing, and there are strong disincentives for them doing so. Privatisation also ensures that the cumulative knowledge associated with individual complaints is denied to the public.

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I Introduction

Sexual harassment at work first came to the attention of the Australian public in the decade leading up to the millennial turn because of the periodic media reporting of scandals involving high-status harassers.¹ This created the impression that sexual harassment was the aberrant behaviour of powerful men rather than merely one manifestation of a systemic harm. A quarter of a century later, feminist activists hoped that this would change after the emergence of the international #MeToo movement. Influenced by developments in the United States, multiple survivors of sexual harassment, who formerly felt that they would not be believed, now felt empowered to speak out,² or they chose to lodge a formal complaint with a body such as the Australian Human Rights Commission ('AHRC').³ Nevertheless, in exchange for a financial settlement, they have been confronted with a demand for confidentiality regarding details about the workplace where the sexual harassment occurred, as well as the identity of the harasser. This means not only that the employer attracts no public disapprobation, but the harasser *himself* (as is invariably the case)⁴ is also subjected to no disadvantage and is theoretically left free to harass others.

The willingness of survivors to speak out following #MeToo led to vociferous campaigns for sexual harassment law to be reformed, including revelations regarding the extent of sexual harassment in prominent workplaces, such as the Australian Parliament.⁵ Numerous official inquiries have been launched into

¹ See, eg, the Ormond College affair: Jenna Mead (ed), *Bodyjamming, Sexual Harassment, Feminism and Public Life* (Random House, 1997); Helen Garner, *The First Stone: Questions about Sex and Power* (Picador, 1995). See also the David Jones affair: Bellinda Kontominas, 'David Jones Sex Harassment Case: Publicist Sues for \$37 Million', *The Sydney Morning Herald* (online, 2 August 2010) <<https://www.smh.com.au/business/david-jones-sex-harassment-case-publicist-sues-for-37m-20100802-112iw.html>>.

² See, eg, Laura Tingle, 'Brittany Higgins and Grace Tame Speak out at the National Press Club', 7.30 (Australian Broadcasting Corporation, 9 February 2022) <<https://www.abc.net.au/news/2022-02-09/brittany-higgins-and-grace-tame-speak-out-at-the/13748002>>.

³ Michael Pelly, 'Sexual Harassment Complaints Up by 25pc, Says Kate Jenkins', *Australian Financial Review* (online, 15 May 2022) <<https://www.afr.com/work-and-careers/workplace/sexual-harassment-complaints-up-by-25pc-says-kate-jenkins-20220515-p5alj1>>.

⁴ The most recent Australian national survey on sexual harassment revealed that 91% of women and 55% of men were harassed by men: see Australian Human Rights Commission ('AHRC'), *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces* (Report, November 2022) ('*Time for Respect*').

⁵ AHRC, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (Report, 2021) ('*Set the Standard*'). See also Margaret Thornton, 'Transforming the Culture of Parliament House', *AUSPUBLAW* (Blog Post, 27 April 2022) <<https://www.auspublaw.org/blog/2022/04/transforming-the-culture-of-parliament-house>>; Gabrielle Appleby and Prabha Nanda, 'Workplace Reforms in Courts and Parliaments: Some Guiding Principles', *AUSPUBLAW* (Blog Post, 27 April 2022) <<https://www.auspublaw.org/blog/2022/04/workplace-reforms-in-courts-and-parliaments-some-guiding-principles>>; Cheryl N Collier and Tracey Raney, 'Understanding Sexism and Sexual Harassment in Politics: A Comparison of Westminster Parliaments in Australia, the United Kingdom, and Canada' (2018) 25(3) *Social Politics: International Studies in Gender, State and Society* 432.

the institutional incidence of sexual harassment,⁶ the most comprehensive and wide-ranging Australian report being *Respect@Work*,⁷ which was based on data collected nationally.⁸ *Respect@Work* found sexual harassment to be widespread, with 33% of people (39% of women and 26% of men) having experienced sexual harassment in the workplace;⁹ those most vulnerable included young women under 30, LGBTIQ+ people, as well as those identifying as Aboriginal or Torres Strait Islander, and people with a disability. *Respect@Work* made 55 recommendations for change, most of which have now been enacted.¹⁰ Nevertheless, despite the positive response to remedying aspects of sexual harassment law, it is notable that the basic complaint-handling framework has remained the same, with a general preference for keeping details of complaints out of the public eye. The practice of confidentiality has persisted not only in respect of discrimination complaints arising from sex (a ground that includes pregnancy, sexual orientation and gender identity) as well as sexual harassment, but also in complaints relating to race, disability and age, the cognate grounds of discrimination proscribed at the federal level.¹¹

A flurry of reformist activity around sexual harassment occurred because of criticism from women that the government was not being sufficiently proactive in respect of women's issues, and it feared losing votes at the ballot box.¹² Although the tenor of the reforms was positive, this article argues that the approach towards sexual harassment has retained the conventional individual complaint-based model of liberal legalism. It will be shown that this individualised focus occludes the systemic nature of the discriminatory harm and the violation of human rights in such a way as to sustain the privatisation of the act of harassment. Despite sometimes

⁶ See, eg, AHRC, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (Report, July 2017); Law Council of Australia, Submission to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019); Chief Justice Susan Kiefel, 'Statement of the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia' (Media Statement, 22 June 2020); Equal Opportunity Commission (SA), *Review of Harassment in the South Australian Legal Profession* (Report, April 2021); *Set the Standard* (n 5); Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT: Report and Recommendations* (Report, March 2021); Alana Moretti, 'Sexual Harassment in the Legal Profession: An Analysis of the Current Legislative Framework' (2022) 47(2) *Alternative Law Journal* 95. Prior to *Time for Respect* (n 4) in 2022, the AHRC reported on similar sexual harassment surveys conducted in 2003, 2008, 2012 and 2018. The international impact of #MeToo led to comparable studies on sexual harassment being carried out elsewhere: see, eg, Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, 2019).

⁷ AHRC, *Respect@Work: Sexual Harassment National Inquiry Report* (Report, 2020) ('*Respect@Work*'). Legislation was enacted in 2021 to implement the first 12 recommendations, and work was subsequently undertaken regarding others prior to the change of federal government in May 2022, when the Australian Labor Party took over from the conservative Liberal-Country Party Coalition Government.

⁸ *Time for Respect* (n 4).

⁹ *Ibid.*

¹⁰ *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth); *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) ('*Respect at Work Act*').

¹¹ *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth). See also *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*').

¹² Camilla Nelson, 'Women Stormed the 2022 Election in Numbers Too Big To Ignore: What Has Labor Pledged on Gender?', *The Conversation* (online, 22 May 2022) <<https://theconversation.com/au>>.

wishing to make their experiences public, individual survivors themselves become complicit in the privatisation thesis as they not only shoulder the psychological burden involved in having to prove the harassment themselves, but they also face substantial legal costs if they proceed to litigation and are therefore swayed by the lure of a financial settlement, despite its condition of confidentiality. While this article draws on the Australian federal legislation, the *Sex Discrimination Act 1984* (Cth) ('*SDA*'), to illustrate the argument, the individual complaint-based model found in state and territory legislation utilises a similar approach,¹³ thereby evincing a comparable deference towards the confidentiality of the substantive harm.

From the time a complaint is first lodged with the AHRC or other human rights agency, an attempt to retain a carapace of confidentiality around it is discernible, albeit not legislatively prescribed. While some survivors are in favour of privatising their complaints out of shame and embarrassment over what happened to them, others want their story to be told, particularly so that the harasser can be called to account. Corporate respondents, however, invariably insist on secrecy out of concern that any whiff of scandal could damage their brand name. Despite the fact that the official *raison d'être* of the *SDA* is to effect gender equality, sexual harassment highlights the dramatic inequality between corporate employers and harassers, on the one hand, and survivors, on the other hand — a triangular relationship that is invariably gendered.¹⁴ The formal complaint procedure under the *SDA* may assist in securing a monetary payment for the survivor as a condition of settlement, but it does nothing about calling the harasser to account or educating the community more generally. The primary concern would seem to be to ensure that there is minimal disturbance to the market activities of the employer.

To analyse the privatisation thesis, the article is presented in the following parts. Part II outlines the proscription of sexual harassment within the *SDA* and the steps leading to the lodgement of a formal complaint. It will be shown how, in lodging a complaint with the AHRC, the odds tend to be tilted against survivors from the outset as they assume responsibility for lodging the complaint, determining the course of action to be pursued and carrying the burden of proof despite the inequality of bargaining power between them and corporate employers. Part III shows how conciliation, the primary mode of dispute resolution under the legislation, operates to privatise justice from the outset, as the process occurs behind closed doors. Privatisation not only has the effect of protecting individual perpetrators who may go on to harass others, it also perpetuates the idea that making the harassment public is somehow shameful for survivors, a stance that does little to contain the incidence of sexual harassment in workplaces.

Part IV turns to non-disclosure agreements ('*NDAs*'), which entrench the confidentiality prescript. Once complainants have received a damages payment and

¹³ *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

¹⁴ Catharine A MacKinnon, 'Where #MeToo Came From, and Where It's Going', *The Atlantic* (online, 24 March 2019) 8 <<https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>> ('Where #MeToo Came From').

signed an agreement, they are legally bound not to reveal information about the harassment. Ironically, however, the signing of an NDA normally places no constraint on the harasser, who may be left free to harass others, as occurred in the infamous Harvey Weinstein case.¹⁵ NDAs, which have become the norm in the settlement of sexual harassment complaints, also preclude the possibility of warnings to others. #MeToo led to a campaign to prohibit NDAs, but this has met with limited success in the Australian context, as will be shown.

Part V addresses litigation, which is treated as a last resort, occurring only when conciliation is unsuccessful. However, barely 1% of sexual harassment complaints lodged with the AHRC proceed to litigation under the *SDA*. Even then, when a matter is referred either to the Federal Court of Australia or the recently established Federal Circuit and Family Court of Australia, conciliation is favoured in the first instance as complaints are referred to assisted dispute resolution in a further attempt to avoid a formal hearing, for alternative dispute resolution ('ADR') is more economical for the state. The article also considers other disincentives facing survivors contemplating litigation, such as the possibility of significant legal costs, a factor that has contributed to the limited jurisprudence in discrimination law.

While litigation is normally the end of the road for a complaint that is not settled at the conciliation stage, there is a rider to the privatisation story that is considered in Part VI, which deals with the way complaint files are destroyed or 'sentenced' once they are closed. This may not directly impact the parties to a complaint, but it has potential ramifications for subsequent complainants, as well as for research and policy. The destruction of records means that there is an inability to evaluate how community attitudes or appraisal trends in the handling of complaints have changed over time. Most significantly, sentencing is a palpable reminder that it is the state, not the parties themselves, which determines that complaints of sexual harassment should remain confidential.

II Lodging a Complaint

Sexual harassment is a proscribed subset of sex discrimination and in 2020–21, of the total complaints lodged under the *SDA*, 252 (or 26%) related to sexual harassment.¹⁶ These complaints should not be regarded as individual aberrations as they represent the tip of the iceberg in respect of the systemic sexualisation of women at work, which Catharine MacKinnon, an international expert on sexual harassment, likens to an 'arm of the sex trade',¹⁷ because it is so common. While contemporary understandings of sexual harassment include same-sex harassment, as well as language and imagery that is sexualised,¹⁸ popular understandings tend to

¹⁵ 'Harvey Weinstein Timeline: How the Scandal Unfolded', *BBC News* (online, 24 January 2018) <<https://www.bbc.com/news/entertainment-arts-41594672>>.

¹⁶ AHRC, *2020–21 Complaint Statistics* (Report, 2022) ('*Complaint Statistics*').

¹⁷ MacKinnon, 'Where #MeToo Came From' (n 14) 11.

¹⁸ Catharine A MacKinnon, *Only Words* (HarperCollins, 1994) 31–47.

focus on overtly (hetero)sexualised forms of harassment,¹⁹ although the slipperiness of sex and sexism is acknowledged.²⁰ The media attention accorded prominent male harassers underscores the predilection in favour of the heterosexed paradigm.²¹ The media focus associated with #MeToo strongly reinforced the assumption that legally cognisable sexual harassment is both sexed and sexualised.²² At the same time, the theoretical understanding of sexual harassment has broadened in terms of LGBTIQ+ issues as well as conduct that transcends explicit sexual advances.²³ The focus on the harm associated with intimate relations recognises psychological harm in the computation of damages. In addition, as a result of recommendations made by *Respect@Work*, sex-based harassment has been expressly proscribed by s 28AA(1) of the *SDA*,²⁴ with particular reference to unwelcome conduct of a ‘demeaning’ kind.²⁵ Regardless of the broader understandings of sexual harassment that have emerged, the point I wish to stress is that the imperative in favour of privatisation has not changed; nor has it been recommended for change by *Respect@Work*, other than to look again at NDAs, as will be discussed.

Whatever sexual harassment survivors have endured, it can be difficult for them to articulate and report to a person in authority in their workplace.²⁶ Once they have done so, however, employers are anxious to keep such information in-house out of fear that the company’s brand name could be damaged. Even if the CEO of a company were unaware of the harassment by an employee, the employer will be vicariously liable unless it can demonstrate that it took all reasonable steps to eliminate or mitigate the risk through its policies and codes of conduct,²⁷ but there is a lingering societal resistance to holding the employer liable in the case of individualised, interpersonal sexual relations.²⁸ In-house resolution may also have the advantage (from the employer’s perspective) of protecting the harasser, who may

¹⁹ Jean L Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton University Press, 2002) 131; Vicki Schultz, ‘Reconceptualizing Sexual Harassment’ (1998) 107(6) *Yale Law Journal* 1683; Vicki Schultz, ‘Reconceptualizing Sexual Harassment, Again’, *The Yale Law Journal Forum* (Forum Post, 18 June 2018) 31; Margaret Thornton, ‘Sexual Harassment Losing Sight of Sex Discrimination’ (2002) 26(2) *Melbourne University Law Review* 422 (‘Sexual Harassment’).

²⁰ Leila Whitley and Tiffany Page, ‘Sexism at the Centre: Locating the Problem of Sexual Harassment’ (2015) 86(1) *New Formations* 34.

²¹ For a discussion of the various understandings of sexual harassment, see Thornton, ‘Sexual Harassment’ (n 19).

²² William E Foote and Jane Goodman-Delahunty, *Understanding Sexual Harassment: Evidence-Based Forensic Practice* (American Psychological Association, 2nd ed, 2021) 59.

²³ *Ibid* 59–62. For an insightful analysis of sexual relations in the workplace, see Barbara A Gutek, ‘Understanding Sexual Harassment at Work’ (1992) 6(2) *Notre Dame Journal of Law, Ethics and Public Policy* 335.

²⁴ *Respect@Work* (n 7) recommendation 16.

²⁵ The *Respect at Work Act* (n 10) removes the word ‘seriously’ from the phrase ‘seriously demeaning’ in *Sex Discrimination Act 1984* (Cth) s 28AA(1) (‘*SDA*’) in accordance with *Respect@Work* (n 7) recommendation 16(b).

²⁶ Whitley and Page (n 20) 38.

²⁷ *SDA* (n 25) s 106. See also Patricia Easteal and Skye Saunders, ‘Revisiting Vicarious Liability in Sexual Harassment Cases Heard under the *Sex Discrimination Act*’ (2020) 45(1) *Alternative Law Journal* 38.

²⁸ Cf Tristin K Green, *Discrimination Laundering: The Rise of Organizational Innocence and the Crisis of Equal Opportunity Law* (Cambridge University Press, 2017) 52–6.

be regarded as a valued employee,²⁹ which suggests that the interests of the survivor are unlikely to be taken seriously, particularly when that person is more likely to occupy a junior position. Nevertheless, the respondent employer will be anxious to dispose of the complaint as quickly as possible to ensure that the survivor does not complain to an external body. In-house resolution may be effective if the employer has a managerial structure and a human relations department, but a corporation may lack the requisite expertise to resolve a complaint satisfactorily,³⁰ in which case the complainant may choose to lodge a formal complaint with a human rights agency such as the AHRC.

The legislative framework in which the AHRC operates is directed towards discrimination in areas of public life, including the workplace, in accordance with the classical model of liberal legalism, which means that private life is off-limits to the law. Sexual harassment that occurs outside the workplace is not normally cognisable as a harm unless a clear connection can be established between that domain and the workplace;³¹ if the nexus is remote, it may raise questions as to employer liability.

While anti-discrimination legislation was regarded as a significant step towards equality in respect of gender and other specified grounds, it is notable that responsibility for lodging a complaint and taking any subsequent legal action in pursuit of a remedy is normally the responsibility of the person affected. Early state legislation, such as the *Anti-Discrimination Act 1977* (NSW), included provision for representative complaints, but such provisions appear to have been significantly under-utilised. However, it is notable that a new s 46PO has been included in the Respect at Work amendments to the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*') to enable unions and representative groups to apply for a matter to be heard as a representative complaint. The AHRC itself does not function as a regulator; nor is it empowered to initiate own-motion actions, including litigating claims in respect of the public interest.³² The individual complaint-based mechanism accords with the standard model of righting wrongs within the Anglo-Australian legal system. Tort law is the most familiar analogy, where the individual litigant bears the burden of proving the culpability of the wrongdoer in an endeavour to secure a remedy. If unable to satisfy the burden of proof to the requisite standard, the individual is bereft of redress unless a compromise can be reached.

The disproportionate burden placed on the complainant illustrates the privileging of the role of the employer and profit-making enterprises in a market-

²⁹ Joni Hersch, 'Valuing the Risk of Workplace Sexual Harassment' (2018) 57(2) *Journal of Risk and Uncertainty* 111.

³⁰ See, eg, Alison Mau, 'Wronged Academic Gets Public Apology As High-Profile #MeToo Case Comes to an End', *Stuff National NZ* (online, 25 August 2022) <<https://www.stuff.co.nz/national/300670732/wronged-academic-gets-public-apology-as-highprofile-metoo-case-comes-to-an-end>>.

³¹ *SDA* (n 25) s 106(2).

³² The AHRC has prepared a major discussion paper proposing reform of the present human rights framework, including that the Commission be empowered to conduct own-motion inquiries: see AHRC, 'Free and Equal: A Reform Agenda for Federal Discrimination Laws' (Position Paper, December 2021) ('Free and Equal'). The Equal Employment Opportunity Commission in the United States has an own-motion power, although it is rarely used: see Hersch (n 29) 127.

based society. This factor helps to explain why liberal legalism has long been resistant to shifting responsibility to employers to adopt a prophylactic approach in the first instance,³³ although central to a more progressive human rights advocacy. Indeed, it is notable that the legislative reforms designed to give effect to the *Respect@Work* recommendations include the requirement of a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.³⁴ However, the inclusion of a positive duty does not displace the legislative framework enabling the lodgement of an individual complaint by an affected individual.

The complaint-based system of righting wrongs places the probative responsibility entirely on the survivor, even though the employer is either the perpetrator of the wrong or is vicariously liable for the action of an employee. This imbalance in power is perpetuated within each phase of the complaint process and is crucial in whitewashing the role of the corporate employer in the harassment, a phenomenon that Green refers to as ‘organizational innocence’, which is central to her theory regarding the ineffectiveness of anti-discrimination legislation.³⁵ The focus on individual responsibility makes it very difficult for a complainant to succeed in a formal setting.³⁶

The primary mode of dispute resolution in all Australian anti-discrimination jurisdictions is conciliation, not litigation. Conciliation is treated as strictly confidential, so that it is difficult to determine what takes place behind closed doors or to evaluate its efficacy. However, it is the linchpin of sexual harassment law, as approximately 99% of complaints do not proceed to a formal hearing, although a proportion of complaints either fall by the wayside or are withdrawn.³⁷ In the case of comparable ADR methodologies that might be invoked to resolve civil rights claims in the United States, Kotkin points out that ‘the discourse about employment discrimination is skewed against workers by virtue of secrecy’.³⁸ This observation can be echoed in the Australian context and is central to the argument of this article. The confidentiality surrounding the complaint process at each stage signifies a desire

³³ See, eg, Margaret Thornton, ‘The Political Contingency of Sex Discrimination Legislation: The Case of Australia’ (2015) 4(3) *Laws* 314.

³⁴ *Respect at Work Act* (n 10) pt IIA. Victoria is in the forefront in terms of mandating positive action as duty holders are legally obliged to prevent (inter alia) workplace sexual harassment, not just respond to it: see *Equal Opportunity Act 2010* (Vic) s 15. For a useful case study, see Victorian Equal Opportunity and Human Rights Commission, *Preventing Sexual Harassment in Retail Franchises: Investigation under the Equal Opportunity Act 2010* (Report, 2022). See also Miranda G Stewart, ‘Positive Duties to Prevent Sexual Harassment at Work: Treat the Symptoms or Cure the Disease’ (2022) 47(2) *Alternative Law Journal* 101. An alternative suggestion with proactive effect, but involving criminal sanctions, would be to include sexual harassment in work health and safety laws, as proposed by Belinda Smith, Melanie Schleiger and Liam Elphick, ‘Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws’ (2019) 32(2) *Australian Journal of Labour Law* 1.

³⁵ Green (n 28).

³⁶ Cf *ibid* 49.

³⁷ Of the 3,113 complaints lodged in 2020–21, approximately 41% were conciliated, 26% were terminated or declined, 6% were withdrawn and 26% were discontinued: see AHRC, *Complaint Statistics* (n 16).

³⁸ Minna J Kotkin, ‘Invisible Settlements, Invisible Discrimination’ (2006) 84(3) *North Carolina Law Review* 927, 931.

to keep sexual harassment out of the workplace, arguably because sex has the potential to detract from productivity.³⁹ However, feminist scholars would also prefer to keep sex out of the workplace because of the prevalence of gender-based power differentials.⁴⁰

Despite the rhetoric of equality in the *SDA*, privatisation in the resolution of sexual harassment complaints results in a skewing of outcomes towards gender inequality. The disparity is compounded by competition and profit maximisation, which perennially outweigh the social liberal values of egalitarianism and collective good.⁴¹ This is because the institutional power associated with corporate respondents carries greater weight than the voices of survivors in a market-based economy so that the outcomes of disputes are skewed. Survivors of sexual harassment who lodge a complaint under the *SDA* are thereby caught in a web of conflicting values representing the implied inequality that necessarily arises from competition policy, on the one hand, and the rhetorical commitment to gender equality that infuses sex discrimination legislation, on the other.⁴²

III Conciliation

This Part expands on the concept of conciliation, the primary mode of dispute resolution mandated by all Australian anti-discrimination legislation, although the Victorian legislation permits a complainant to file a complaint with the tribunal in the first instance.⁴³ Conciliation is a flexible form of ADR that seeks to resolve complaints confidentially and expeditiously without the formality and costs associated with a court hearing. ADR is also indicative of the pronounced turning away from courts in Australia in recent years in civil matters.⁴⁴ Conciliation involves a human rights agency, such as the AHRC, endeavouring to settle a complaint informally by negotiating between the parties in whatever way it deems best, including bringing the parties together for a conciliation conference.

Conciliation as the *modus operandi* of anti-discrimination legislation in Australia has changed little since first developed approximately 40 years ago,⁴⁵

³⁹ Margaret Thornton, 'The Contradictions of Law Reform' (1991) 19(4) *International Journal of the Sociology of Law* 453, 465.

⁴⁰ Cohen (n 19) 132.

⁴¹ Margaret Thornton, 'Equality and Anti-Discrimination Legislation: An Uneasy Relationship' (2021) 37(2) *Law in Context* 12.

⁴² Alex Callinicos, *Equality* (Polity Press, 2000) 132.

⁴³ *Equal Opportunity Act 2010* (Vic) s 122 permits an initial complaint to be lodged directly with the Victorian Civil and Administrative Tribunal.

⁴⁴ Brian Opeskin, 'Rationing Justice: Tempering Demands for Courts in the Managerialist State' (2022) 45(2) *University of New South Wales Law Journal* 531.

⁴⁵ For analyses of Australian and UK jurisdictions, see Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98; Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31 *Australian Journal of Labour Law* 253(3); Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne*

although human rights agencies have adapted the model to accord with their own internal procedures,⁴⁶ such as determining what role lawyers should play.⁴⁷ Even though respondents may be legally represented or have their senior executive officers speak for them, representation for vulnerable clients is not always available due to cost and the scarcity of legal aid for civil matters.⁴⁸ The inherent inequality of bargaining power between the parties may induce a complainant to settle for less, an action that might be supported by a conciliator driven by the imperative of administrative efficiency.⁴⁹ The confidentiality of the process may also emphasise the deeply personal nature of sexual harassment as it suppresses the embarrassing, and possibly degrading, details of the conduct, a factor that puts added pressure on a survivor to settle.⁵⁰

Interviews that have been conducted by researchers with solicitors and AHRC conciliation officers indicate that a guarantee of confidentiality was also a major reason for respondents agreeing to settle.⁵¹ Because of the fear of reputational damage, they are willing to pay a secrecy premium to guarantee confidentiality.⁵² The downside is that the survivors of sexual harassment are denied any public acknowledgement of the wrong done to them in exchange for harmony, and the harassers go unpunished.⁵³ As each individual instance of discrimination is treated as discrete, the systemic nature of sexual harassment is also effectively denied. As conciliation takes place behind closed doors, a fair process cannot be assured but, if run well, it can represent a form of restorative justice for survivors.⁵⁴ Furthermore, if they are able to play a role in crafting the terms of settlement of a dispute, it may be empowering for them.

Nevertheless, the absence of public knowledge about the process means that prospective complainants are left in the dark as to how comparable complaints might have been determined, such as the time it took to achieve a resolution, as well as the terms of settlement and the quantum of damages. Indeed, the carapace of

University Law Review 384; Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778 ('Behind the Conciliation Doors'); Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) ('*The Liberal Promise*').

⁴⁶ See, eg, Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the Regime* (Themis Press, 2010).

⁴⁷ Kingsford Legal Centre, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Report, 2016) 12.

⁴⁸ The issue of class is beyond the ambit of this article, but I note its centrality in many sexual harassment complaints. While high-status female executives are certainly not immune from harassment, it is young women in service jobs, such as waiting on tables or serving in a shop, who are most vulnerable. In the case of sexual harassment, the latter will be unable to afford legal representation and her bargaining power will be less, and even if she has suffered considerable trauma, her damages will be minuscule compared with those of the executive.

⁴⁹ Kingsford Legal Centre (n 47) 23.

⁵⁰ Susan K Hippensteele, 'Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution' (2006) 15(1) *Journal of Gender, Social Policy and the Law* 43, 58.

⁵¹ Allen and Blackham (n 45) 398.

⁵² Elizabeth C Tippett, 'The Legal Implications of the MeToo Movement' (2018) 103(1) *Minnesota Law Review* 229, 254.

⁵³ Foote and Goodman-Delahunty (n 22) 242.

⁵⁴ *Ibid* 17.

confidentiality prevents the development of a comprehensive evaluation of the process, which also precludes the possibility of using the information from conciliated complaints to effect policy change.⁵⁵ Public knowledge concerning the process is scant and details of settlement have been largely limited to statistical data in the annual reports of human rights agencies, although de-identified case summaries are currently published in the AHRC Conciliation Register that includes selective examples of successful conciliation.⁵⁶

Despite the convention that the process of conciliation is conducted behind closed doors and anything said or done in the process is treated as confidential, the extent of confidentiality is not altogether clear if the parties themselves agree to release information prior to a settlement. The *AHRC Act* does not expressly advert to the confidentiality of conciliation, other than with respect to the holding of a conference,⁵⁷ although anything said in the course of conciliation is not admissible in subsequent proceedings.⁵⁸ There are also strict non-disclosure rules for members of the Commission and staff members,⁵⁹ and the AHRC is subject to the provisions of the *Privacy Act 1988* (Cth).⁶⁰ This poses a significant constraint on undertaking research into conciliation, including a desire by researchers that the AHRC put them in touch with parties to a dispute.⁶¹

The conventional wisdom is that confidentiality is likely to encourage constructive negotiation in the interests of the resolution of a complaint, a stance that is supported by the common law. For example, the confidentiality of communications in negotiating a settlement is signified by lawyers conventionally marking communications to the opposing party ‘without prejudice’. The *Uniform Evidence Act 1995* (Cth) expressly excludes evidence that is adduced between persons who are in dispute and engaged in negotiating a settlement,⁶² but this privilege does not apply if the parties to the proceedings agree to disclosure.⁶³ Nevertheless, the combination of the common law and the various legislative imperatives, in conjunction with accepted practice, have all contributed to a norm of confidentiality in the conciliation process that is now generally accepted.

While a complainant may have the leeway to negotiate the terms of settlement, a well-resourced respondent invariably has the upper hand, which underscores the way the twin variables of markets and masculinity remain privileged

⁵⁵ Thornton, *The Liberal Promise* (n 45) 151.

⁵⁶ ‘Conciliation Register’, *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/complaints/conciliation-register>>. See also ‘Case Studies’, *Queensland Human Rights Commission* (Web Page) <<https://www.qhrc.qld.gov.au/resources/case-studies>>.

⁵⁷ *AHRC Act* (n 11) s 46PK(2).

⁵⁸ *Ibid* s 46PKA. Presumably, that would also include an application alleging a breach of natural justice in the conduct of a compulsory conference, as occurred in *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360.

⁵⁹ *AHRC Act* (n 11) s 49(1). The AHRC, in discussing proposals for the modernisation of the regulatory framework, questions the appropriateness of criminal sanctions for a breach of this provision: see AHRC, ‘Free and Equal’ (n 32) 106–7.

⁶⁰ For a thoroughgoing overview of the privacy provisions in the various Australian jurisdictions, see Allen and Blackham (n 45).

⁶¹ See, eg, Gaze and Hunter (n 46) 32.

⁶² *Uniform Evidence Act 1995* (Cth) s 131(1).

⁶³ *Ibid* s 131(2)(a).

within the context of sexual harassment complaint-handling, despite the reforms. The confidentiality of conciliation ensures that sexual harassment remains a private matter behind closed doors, aided by a salve in the form of ‘hush money’ for survivors, but without any substantive public consequences for either employer or harasser, a situation underscored by the phenomenon of non-disclosure agreements, to which I now turn.

IV Non-Disclosure Agreements

NDA's represent a further step in entrenching the confidentiality of sexual harassment. These agreements are legally binding contracts of the kind commonly used by companies to protect trade secrets when negotiating business, including acquisitions and mergers. The same model has been deployed by corporate employers to ensure that the details of a sexual harassment settlement remain confidential and receive no public scrutiny.⁶⁴ While there is likely to be relatively equal bargaining power between corporations with comparable interests, this is not the case with a corporate employer and an individual employee, who may be a vulnerable young person in their first job. Indeed, the inequality of bargaining power between the parties to an NDA is such that it would appear to be corrosive of one of the key principles of the rule of law.⁶⁵ It is a legal fiction that two parties to a contract are equal and a fair bargain will emerge from their negotiations, regardless of discrepancies in their wealth and power. By disregarding this factor, an NDA is treated as though it were just another commercial transaction between equals in which the complainant agrees not to reveal details of either the harassment or the settlement, nor to pursue litigation in exchange for a monetary payment. When the parties enter into a deed of release or a conciliation agreement on settlement,⁶⁶ the respondent's lawyer may deem it desirable to highlight factors of specific concern to a corporate employer, such as ‘embarrassment avoidance’, which could affect its brand. The vulnerability of survivors is likely to compel them to agree to sign out of fear for their future, such as the inability to secure a reference or another job, although it is recognised that they may sometimes desire confidentiality. When they have signed, they may still worry about repercussions, such as losing their job or being punished in some other way, if they speak about the harassment.⁶⁷

#MeToo shone a light on the widespread use of NDAs in sexual harassment complaints, and campaigns were initiated to abolish them or at least to restrict their use.⁶⁸ Concern arose from the fact that Harvey Weinstein had inveigled numerous women into signing NDAs to conceal the allegations against him, but, once the

⁶⁴ For a detailed analysis of NDAs in the commercial sphere, together with their deployment by prominent sexual harassers, see Jeffrey Gordon, ‘Silence for Sale’ (2020) 71(4) *Alabama Law Review* 1109. See also Catharine MacMillan, ‘Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law’ (2022) 18(2) *European Review of Contract Law* 127, 130.

⁶⁵ Cf MacMillan (n 64) 137.

⁶⁶ AHRC, ‘Free and Equal’ (n 32) 109.

⁶⁷ MacMillan (n 64) 135.

⁶⁸ Kim Elsesser, ‘Five Years After #MeToo, NDAs Are Still Silencing Victims’, *Forbes* (online, 21 March 2022) <<https://www.forbes.com/sites/kimelsesser/2022/03/21/five-years-after-metoo-ndas-are-still-silencing-victims/?sh=36bbdefe588b>>.

women had signed, he continued to harass dozens of others with impunity.⁶⁹ This is because the NDA protects not only the reputation of the respondent employer who is providing the ‘hush’ money, but also the identity of the individual harasser. The privatising imperative of NDAs illuminates not only the retention of gender inequality but also the privileging of corporate power.

The question is whether survivors should continue to be prevented from disclosing details of the harasser’s misconduct indefinitely. While the primary aim of survivors may be a desire to ensure that the harasser is punished, they are also likely to have an altruistic desire to alert others to the threat posed by the harasser. Despite the public policy issues arising in the case of serial harassers, whose ongoing predatory behaviour remains hidden from public view, NDAs also illustrate the residual social resistance towards acknowledging sexual harassment as a systemic problem that inhibits gender equality in the workplace.

A further downside of NDAs is that they effectively isolate survivors and prevent them from receiving proper counselling and support, as the former Australian Sex Discrimination Commissioner, Kate Jenkins, pointed out.⁷⁰ Despite its far-reaching recommendations, *Respect@Work* did not go so far as to recommend doing away with NDAs, but merely that the Workplace Sexual Harassment Council identify best practice principles to inform the development of regulations on NDAs and that their terms should be reasonable.⁷¹ This ambivalent stance could be construed as evidence of a propensity to endorse the status quo and privilege corporate power.

Despite the dedicated support in the United States for freedom of contract, the country has adopted a notably stronger stance than Australia regarding NDAs, with Congress and at least 16 states enacting legislation banning employers from using NDAs to prevent employees from speaking up about harassment.⁷² They have also banned employers from imposing NDAs as a condition of getting or keeping a

⁶⁹ Ronan Farrow, ‘Harvey Weinstein’s Secret Settlements’, *The New Yorker* (online, 21 November 2017) <<https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>>.

⁷⁰ Katharine Murphy, ‘Weinstein Case Showed Nondisclosure Clauses Can Allow Abuser to Continue, Says Kate Jenkins’, *The Guardian* (online, 3 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/03/weinstein-case-showed-non-disclosure-clauses-can-allow-abusers-to-continue-says-kate-jenkins>>.

⁷¹ *Respect@Work* (n 7) recommendation 38. In exhorting the modernisation of the regulatory framework, the AHRC endorses the need for guidelines regarding the use of NDAs: see AHRC, ‘Free and Equal’ (n 32) 165. During the *Respect@Work* inquiry, the Sex Discrimination Commissioner wrote to organisations asking them for a limited waiver of the confidentiality obligation to allow people to make a confidential submission to the inquiry, to which only 39 organisations agreed: see AHRC, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Community Guide, 2020) 30.

⁷² Kim Elsesser, ‘Congress Passes Law Restoring Victims’ Voices, Barring NDAs in Sexual Harassment Cases’, *Forbes* (online, 16 November 2022) <<https://www.forbes.com/sites/kimelsesser/2022/11/16/congress-passes-law-restoring-victims-voices-banning-ndas-in-sexual-harassment-cases/?sh=624e36317b30>>; Andrea Johnson, Samone Ijoma and Da Hae Kim, National Women’s Law Center, *#MeToo Five Years Later: Progress and Pitfalls in State Workplace Anti-Harassment Laws* (Report, October 2022).

job. Alternatively, it may be possible to argue that NDAs are contrary to public policy, or they constitute a public hazard.⁷³

Can't Buy My Silence, an international organisation based in Canada, has had some limited success in its campaign against NDAs,⁷⁴ in addition to having elicited support from parliamentarians and several major organisations. For example, it has published a list of English universities that have signed a pledge to stop using NDAs for complaints about sexual harassment,⁷⁵ and it has collected anonymous case studies and published them on its website to inform the public of the hidden cost of NDAs.⁷⁶ In addition, it has prepared a model Bill banning the misuse of NDAs. To date, legislation has been enacted only by the Prince Edward Island legislature,⁷⁷ but the Bill has been introduced into several other Canadian provincial legislatures.

While signing an NDA may assist a complainant in receiving compensation, the process is skewed towards the interests of respondents and harassers in their desire to conceal the harassment, including the possibility of the harasser perpetrating further acts of harassment. We see once again that employer interests and those of the invariably male harassers are privileged over survivors, whose careers may well be destroyed because of the harassment, while those of the harassers thrive. This is clearly illustrated by high-profile cases, such as that of Harvey Weinstein, where successive NDAs did not deter repeat offending, but actually facilitated it. Such incidents point to the way sexual harassment contributes to the tolerance for gender inequality in the workplace. While survivors may decline to sign an NDA and opt for litigation instead, there are powerful disincentives for pursuing that route, as already suggested. While the values articulated within a court setting have wider ramifications,⁷⁸ litigation is not a straightforward process either, as I now suggest, even though it takes place in public.

V Litigation

If a complaint is unable to be conciliated and is terminated by the AHRC, the survivor of sexual harassment may opt to litigate. However, it is notable that, even after referral to the Federal Court, there is still pressure to achieve a confidential settlement by diverting the matter to mediation or 'assisted dispute resolution' rather than proceeding directly to a formal hearing, regardless of the parties' own views.⁷⁹

⁷³ Jingxi Zhai, 'Breaking the Silent Treatment: The Contractual Enforceability of Non-Disclosure Agreements for Workplace Sexual Harassment Settlements' (2020) 2020(1) *Columbia Business Law Review* 396, 434.

⁷⁴ 'Can't Buy My Silence', *Can't Buy My Silence* (Web Page, December 2022) <<https://www.cantbuymysilence.com>>.

⁷⁵ 'Universities Pledge List', *Can't Buy My Silence* (Web Page, 2022) <<https://www.cantbuymysilence.com/uni-pledge>>.

⁷⁶ 'Share Your Story', *Can't Buy My Silence* (Web Page, 2022) <<https://www.cantbuymysilence.com/share-your-story>>.

⁷⁷ *Non-Disclosure Agreements Act*, 2021 PEI.

⁷⁸ David Luban, 'Settlement and the Erosion of the Public Realm' (1995) 83(7) *Georgetown Law Journal* 2619, 2648–58.

⁷⁹ *Federal Court of Australia Act 1976* (Cth) s 53A; *Federal Court Rules 2011* (Cth) pt 28.

Indeed, the desire by the state to settle complaints informally is such that complaints are ‘now almost routinely’ referred to some form of ADR.⁸⁰ In addition to the Federal Court, the Federal Circuit and Family Court is empowered to hear human rights cases.⁸¹ The website of the latter exhorts litigants to think differently about the need for litigation, to ‘focus on the areas of agreement and to remember that most parties to court proceedings do not require a trial or a judgment’.⁸² When the new court was established, it published a clear statement of its aim: ‘[t]o ensure that justice is delivered ... effectively and efficiently’,⁸³ which implies dispensing with a costly court infrastructure. An American commentator has suggested that the widespread trend in favour of ADR in the United States has similarly exacerbated the imperative in favour of ‘private and secret resolutions’.⁸⁴ Bypassing a formal court ensures privatisation of the details of any settlement that might be reached. Furthermore, whatever form of ADR that is invoked, it will undoubtedly save costs for the parties, as well as for the state. In fact, Opeskin points out that public expenditure on courts has declined in recent decades relative to other areas of public expenditure.⁸⁵ He argues that the state has sought to increase cost-effectiveness by tempering the demand for justice in the courts. The overwhelming preference for conciliation in the discrimination jurisdiction is a clear manifestation of this trend.

Due to the preference of the state for confidentiality and a desire to avoid paying the high costs of litigation, a very small percentage of sexual harassment complaints — barely 1% — proceed to a formal hearing at the federal level.⁸⁶ As court hearings occur in public, they are subject to the usual rules of procedure; the hearing is presided over by a judge and a reasoned decision in writing is produced. Hence, the positive side of litigation is its transparency so that, over time, the accumulated decisions come to represent an accessible body of knowledge about sexual harassment that includes matters pertaining to procedure and outcome. Nevertheless, as a result of the high rate of informal settlement, sexual harassment jurisprudence — as is the case with anti-discrimination law generally — is meagre and under-developed.⁸⁷ It would be impossible to imagine a significant decision with national ramifications, such as *Mabo*⁸⁸ in the Australian context, or *Brown v Board*

⁸⁰ Federal Court of Australia, *Annual Report 2020–21* (Report) 29–30. See also the *Civil Dispute Resolution Act 2011* (Cth), which requires that genuine steps to resolve a dispute be taken before the institution of civil proceedings.

⁸¹ The formation of the Federal Circuit and Family Court of Australia was controversial: see Opeskin (n 44) 2.

⁸² ‘Court-Based Dispute Resolution in the Federal Circuit and Family Court of Australia’, *Federal Circuit and Family Court of Australia* (Web Page, 1 September 2021) <<https://www.fcfcfa.gov.au/news/cb-dr>>.

⁸³ *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 5(a).

⁸⁴ Kotkin (n 38) 945.

⁸⁵ Opeskin (n 44) 35–6.

⁸⁶ For a comprehensive Australia-wide analysis of anti-discrimination case law since commencement of the *SDA* (n 25) in 1984, see Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Report, 2022). For a valuable case study, see Madeleine Castles, Tom Hvala and Kieran Pender, ‘Rethinking Richardson: Sexual Harassment Damages in the #MeToo Era’ (2021) 49(2) *Federal Law Review* 231.

⁸⁷ Blackham and Allen (n 45); Allen, ‘Behind the Conciliation Doors’ (n 45) 789.

⁸⁸ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

of *Education*⁸⁹ in the United States, emanating from other than a civil lawsuit.⁹⁰ The confidentiality of conciliation means that, if perchance a public interest complaint of national significance were to be lodged, the outcome would never see the light of day. While this observation should not be taken as unqualified support for litigation, such instances highlight the fact that there are sometimes advantages associated with a public hearing, for it enables justice to be seen to be done, in accordance with the old adage.

Despite the advantages for jurisprudence associated with a formal hearing, the majority of both complainants and respondents in sexual harassment complaints prefer the confidentiality associated with conciliation or assisted mediation. On the one hand, complainants are nervous at the prospect of losing the case and having to pay high legal costs. On the other hand, no rational respondent would willingly proceed to a formal hearing if it appeared that the complainant had a reasonable chance of success.⁹¹ Indeed, for this reason, some of the sexual harassment cases that have proceeded to a public hearing at the federal level appeared to have had little chance of success at the outset, although Katzmann J struck down a vexatious proceedings order as extreme in one of Cavar's claims.⁹² Some reported decisions involved extravagant damages claims; in *Picos v Servcorp Ltd [No 2]*, for example, the complainant sought \$2.9 billion for the alleged discrimination and another \$100 million in exemplary damages.⁹³ In *Chen v Monash University*, Tracey J acknowledged the strong conviction on the part of the complainant that she had been wronged, despite the unsatisfactory evidence that led to her appeal being dismissed.⁹⁴ While one suspects that Tracey J's observation regarding the complainant's conviction could be made about many other complainants, the privatisation of complaint data precludes such a finding. While a higher percentage of sexual harassment cases go to trial in the United States than in Australia, the success rate for plaintiffs is comparatively low, with a success rate computed at 15% compared with 51% for other civil cases.⁹⁵

Complications in sexual harassment cases may also emerge from the public scrutiny of intimate and personal issues that transcend the pragmatic issues of costs and damages. However, as Cohen points out, calling sexual harassment 'personal' or 'intimate' may be another way of shielding it from public scrutiny.⁹⁶ Hippensteele suggests, furthermore, that this sensitivity on the part of a plaintiff regarding public scrutiny may be a myth, rather than an evidence-based finding.⁹⁷ In other words, it

⁸⁹ *Brown v Board of Education*, 347 US 483 (1954). See also *Brown v Board of Education II*, 349 US 294 (1955).

⁹⁰ Owen Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073. See also Dominique Allen, 'Against Settlement? Owen Fiss, ADR and Australian Discrimination Law' (2009) 10(4) *International Journal of Discrimination and the Law* 191.

⁹¹ Kotkin (n 38) 962. Cf Cohen (n 19) 34.

⁹² See, eg, *Cavar v Secom Australia Pty Ltd [No 2]* [2021] FedCFamC2G 289; *Cavar v Secom Australia Pty Ltd* [2022] FCA 1548; *Cavar v Secom Australia Pty Ltd* [2022] FCA 1558; *Shammas v Canberra Institute of Technology* [2014] FCA 71.

⁹³ *Picos v Servcorp Ltd [No 2]* [2015] FCA 494.

⁹⁴ *Chen v Monash University* [2015] FCA 130.

⁹⁵ Foote and Goodman-Delahunty (n 22) 237.

⁹⁶ Cohen (n 19) 129.

⁹⁷ Hippensteele (n 50).

underscores the somewhat outdated view that anything to do with sex or sexuality should properly be treated as private, although it is undeniable that prurient media interest adds to the sense of discomfort for survivors associated with a public hearing.

As adjudication is invariably stressful, expensive, inflexible and drawn out, it is particularly inappropriate for vulnerable clients,⁹⁸ and is therefore likely to be regarded as a last resort for those without significant resources. It may be that only well-to-do professionals, such as senior executives, can afford to litigate. Ironically, their class position is likely to give them greater bargaining power in securing a favourable settlement even if the harm they have suffered is less than that of a survivor occupying a lower status. Nevertheless, the reality is that most survivors of sexual harassment are likely to be vulnerable employees, as epigrammatically pointed out by Catharine MacKinnon: ‘the age-old rule of impunity [is] the more power a man has, the more sex he can exact from those with less’.⁹⁹

The conventional position regarding costs is that parties are responsible for their own costs when appearing before a tribunal in state or territory human rights jurisdictions, which was also the case at the federal level prior to 2000 when the former Human Rights and Equal Opportunity Commission (‘HREOC’) conducted formal hearings. When HREOC’s judicial role was held to be unconstitutional,¹⁰⁰ it was determined that formal hearings could be conducted only by federal courts.¹⁰¹ Orders were then made according to the convention that costs lie where they fall, which meant that the losing party could face paying the substantial costs of the successful party, as well as their own. This factor inevitably influenced whether a complainant proceeded to a public hearing or not. In addition, a survivor could also face a substantial outlay in funding their own representation, particularly when confronted by a corporate respondent invariably represented by leading counsel. While individual litigants are entitled to represent themselves, they recognise that their chances of success are likely to be enhanced if legally represented.¹⁰² Taking this factor into account, Thornton, Pender and Castles, in their report for the Attorney-General’s Department, recommended that an asymmetrical costs regime would be fairer to applicants.¹⁰³ This position was supported by various lawyer and human rights groups, including the Australian Discrimination Legal Experts Group. In this model, applicants would be entitled to costs recovery if successful, but would not have to pay the respondents’ costs if unsuccessful (other than in the case of a vexatious action).¹⁰⁴ While the *Respect at Work Act* originally opted for a ‘costs neutrality’ approach, with each party bearing their own costs and the courts retaining

⁹⁸ Kingsford Legal Centre (n 47) 17.

⁹⁹ MacKinnon, ‘Where #MeToo Came From’ (n 14) 4.

¹⁰⁰ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹⁰¹ They were the Federal Magistrates Court (1999–2013), the Federal Circuit Court (2013–21), the Federal Circuit and Family Court (since 2021) and the Federal Court of Australia (since 1976).

¹⁰² Gaze and Hunter (n 46) 110.

¹⁰³ Thornton, Pender and Castles (n 86).

¹⁰⁴ Australian Discrimination Legal Experts Group, Submission to Respect@Work Taskforce, Attorney-General’s Department, *Review of Exposure Draft: Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (31 August 2022).

a discretion to depart from this position in the interests of justice,¹⁰⁵ the issue has been deferred subject to further consultation.¹⁰⁶ At the time of writing, the preferred costs model had not been settled.

The fear of facing significant costs is a marked disincentive for survivors who choose to pursue litigation, a fear that is well founded as, in the past decade, costs orders have commonly been made against unsuccessful complaints. More startling is the fact that several successful complaints in earlier cases were ordered to pay a proportion of the respondent's costs.¹⁰⁷ As there is comparatively little sexual harassment jurisprudence, as mentioned, and generalist judges may be inexperienced in the jurisdiction because of the minuscule number of cases heard, outcomes can be unpredictable. Representation is further complicated by the fact that state-funded legal aid for public interest cases has declined, and community legal centres have limited capacity to address the needs of low-paid workers, particularly those of culturally and linguistically diverse backgrounds.

While the federal legislation does not specify an upper limit for a judicial award of damages, as is the case with some state and territory legislation,¹⁰⁸ damages for sexual harassment tend to be modest, although they increased somewhat following the decision of Kenny J in *Richardson v Oracle*.¹⁰⁹ In fact, it might be argued that one of the reasons that sexual harassment has continued to be prevalent in the workplace is because damages are so low: the assumption being that higher damages would act as a deterrent to employers. If assessed at a low level, it may be more cost effective for corporate respondents simply to pay them rather than launch an appeal.¹¹⁰ On the other hand, unsuccessful applicants, confronted with the respondent's costs as well as their own, could face bankruptcy as costs orders are enforceable.¹¹¹

Unsurprisingly, therefore, when litigation moved from HREOC to the Federal Court and became a costs jurisdiction, there was a decline in the percentage of discrimination complaints that were filed.¹¹² The majority of litigants opted to settle, generally with the advice of a lawyer,¹¹³ either during conciliation or at the court-assisted dispute resolution stage. The issue of costs is likely to be less significant for corporate respondents, however, as legal costs are regarded as an

¹⁰⁵ This position accords with the stance adopted by AHRC, 'Free and Equal' (n 32).

¹⁰⁶ Attorney-General's Department (Cth), 'Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws' (Consultation Paper, February 2023).

¹⁰⁷ *Ho v Regulator Australia Pty Ltd [No 2]* [2004] FMCA 402; *Font v Paspaley Pearls* [2002] FMCA 142; *Richardson v Oracle Corporation Australia Pty Ltd [No 2]* (2013) 232 IR 99.

¹⁰⁸ Except for the following: *Anti-Discrimination Act 1977* (NSW) s 108(6) (\$100,000); *Equal Opportunity Act 1984* (WA) s 127(b)(i) (\$40,000); Northern Territory Anti-Discrimination Commission, *Complaint Handling Process* (Guidelines) 2 (\$60,000).

¹⁰⁹ *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334. For discussion, see Castles, Hvala and Pender (n 86); Joshua Taylor and Alice Taylor, 'Richardson v Oracle More than Half a Decade On: Did the "Ground Break" for Victim Compensation?' (2022) 47(1) *Alternative Law Journal* 36.

¹¹⁰ Hersch (n 29).

¹¹¹ Federal Court of Australia, *Guide to Human Rights Cases* [D13] <<https://www.fedcourt.gov.au/law-and-practice/guides/human-rights>>.

¹¹² Gaze and Hunter (n 46) xxx.

¹¹³ *Ibid* 139.

incidental cost of doing business. In any case, corporate respondents may have in-house legal counsel, they may be eligible for a tax deduction, or they may be able to pass the costs on to consumers. Their primary concern is to minimise the damage to their brand name, in which case a settlement involving a few thousand dollars may be of little consequence.

In the United States, corporate and securities law is beginning to be used to bring sexual harassment to public attention in a new form of lawsuit instituted by shareholders against large companies because of the reputational damage to the corporate brand caused by the actions of senior executives.¹¹⁴ Most claims have arisen from the adverse publicity relating to sexual harassment, which caused the price of shares to slump. Such actions show that when company boards and management are slow to respond to employee complaints, innovative causes of action can emerge. Zhai points to the very substantial settlements that have emerged from derivative suits by shareholders,¹¹⁵ such as a Fox News case in which Rupert Murdoch and his sons were involved,¹¹⁶ and which entailed a settlement of at least USD90 million.¹¹⁷ Shareholder suits can be effective if they are able to demonstrate that a company's failure to address sexual harassment has damaged its 'reputation, operations and long term value'.¹¹⁸ The shareholder cases nevertheless suggest that they are likely to be instituted only when high-status senior executives are involved, particularly those whose names are well known and publicly associated with a company; otherwise corporate boards and management are expected to take action. No shareholder actions of this kind are known to have been initiated in the Australian context to date. However, the importance of recognising the financial and reputational risks that sexual harassment poses to companies has been acknowledged by the Australasian Centre for Corporate Responsibility.¹¹⁹

VI The Sentencing of Complaint Files

The ultimate step in the privatisation of sexual harassment complaints entails the official destruction of complaint files. The appraisal of closed files and their destruction — or 'sentencing', to give the process its Orwellian technical term — has resulted in the widespread disposal of public sector records since the late 20th century. The National Archives of Australia defines sentencing as 'the process of matching an agency's information to a relevant records authority to establish the

¹¹⁴ Daniel Hemel and Dorothy S Lund, 'Sexual Harassment and Corporate Law' (2018) 118(6) *Columbia Law Review* 1583.

¹¹⁵ Zhai (n 73) 445–7. See also *ibid*.

¹¹⁶ *City of Monroe Employees' Retirement System v Murdoch* (Del Ch, CA No 2017-0833-AGB, 20 November 2017).

¹¹⁷ Jonathan Stempel, '21st Century Fox in \$90 Million Settlement Tied to Sexual Harassment Scandal', *Reuters* (online, 21 November 2017) <<https://www.reuters.com/article/us-fox-settlement-idUSKBN1DK2NI>>.

¹¹⁸ Zhai (n 73) 445–6.

¹¹⁹ Daisy Gardener, 'Sexual Harassment As Material Risk: An Investor Briefing Paper' (Australasian Centre for Corporate Responsibility, 2021).

value of information and the minimum period it must be kept for'.¹²⁰ The destruction of files is believed to be economically rational because of the cost of storage. Hence, unless retention can be shown to be in the public interest under the *Archives Act 1983* (Cth) ('*Archives Act*'),¹²¹ closed complaint files are normally destroyed after a specified period — usually three years. The reality is that every file cannot be kept, for there are thousands of shelf kilometres of government records. The extent of Commonwealth Government records alone retained by the National Archives of Australia is overwhelming as published statistics reveal.¹²² While digitisation has caused record keeping to become 'increasingly location-less',¹²³ issues pertaining to access, privacy and cost are still acute. Even if everything were kept in the cloud, David Rosenthal estimates that this would consume more than the entire GWP (Gross World Product) for a year.¹²⁴

Despite the pragmatic approach towards record destruction, the action is at odds with the idea that society's collective memory should be preserved and that transparency is a public value that is attracting increased interest in equality discourse.¹²⁵ The *Archives Act* specifies general principles for the retention and disposal of public records.¹²⁶ Because the role of archivists is to safeguard public records, there is an ever-present tension between the desire for retention and the imperative to cull. In addition to the physical space required, there is also the question of personnel with the necessary expertise to manage records in an orderly way. The issue has been the subject of Australian Law Reform Commission review on several occasions,¹²⁷ as well as being the subject of extensive debate between archivists and historians.¹²⁸

Closed files dealing with sexual harassment are caught up in the process of sentencing. It is not suggested that the files should be available to all through open access, but the question is whether de-identified records, or at least a selection of

¹²⁰ 'Appraisal and Sentencing', *National Archives of Australia* (Web Page, 2022)

<<https://www.naa.gov.au/information-management/disposing-information/appraisal-and-sentencing>>.

¹²¹ For a detailed analysis of the Act, see Kim Rubenstein, 'Erring on the Side of Destruction? Administrative Law Principles and Disposal Practices under the *Archives Act 1983* (Cth)' (1997) 4(2) *Australian Journal of Administrative Law* 78. Rubenstein is critical of the inadequacy of the legislative framework relating to the retention and preservation of records.

¹²² '[T]he archives still holds about 450 kms of records (450 kms is the approximate equivalent of about 4.5 billion pages or say 22.5 million books). Of this amount about 255 kms (say 2.5 billion pages or approximately 12 million books) is currently appraised as being national archives (ie as being of permanent value)': National Archives of Australia and National Archives of Australia Advisory Council, *Annual Report, 1998–99* (Report No 262, 1999) 19.

¹²³ Barbara Reed, 'Reinventing Access' (2014) 42(2) *Archives and Manuscripts* 123, 123.

¹²⁴ Kate Cumming and Anne Picot, 'Reinvesting Appraisal' (2014) 42(2) *Archives and Manuscripts* 133, 139.

¹²⁵ Dominique Allen, Alysia Blackham and Margaret Thornton, 'Guest Editorial: Introduction to the Special Issue *Using Transparency To Achieve Equality*' (2021) 37(2) *Law in Context* 6, 7.

¹²⁶ See, eg, National Archives of Australia, *Records Disposal Authority: Human Rights and Equal Opportunity Commission*, Job No 2003/00211156 (2003). This protocol was unchanged when the AHRC replaced HREOC: see National Archives of Australia, *Agency-Specific Records Authorities* (2022).

¹²⁷ See, eg, Australian Law Reform Commission, *Information Destruction and Retention Requirements* (Report No 108, May 2008).

¹²⁸ *Ibid* 432 [10.49].

them, should be available to third parties for legitimate purposes, such as research and policy formulation. It would nevertheless seem that de-identifying complaint files is likely to be regarded as too time-consuming for an agency with limited funds, as it would require someone with appropriate expertise scrutinising every page and redacting identifiable information; destruction is deemed to be quicker and easier, in which case confidentiality is unequivocal and permanent. When the writer set out some years ago to undertake a longitudinal study of anti-discrimination complaint handling in Australia through an analysis of selected de-identified files, the President of HREOC advised that the files for the years sought (every 10th year from the commencement of the legislation) had been destroyed.¹²⁹ The destruction of thousands of files meant that the proposed research project had to be abandoned. Inquiries to the National Archives of Australia in an endeavour to establish what complaint files it held proved to be equally futile.¹³⁰

While a longitudinal study of sexual harassment complaint files could be illuminating in documenting trends in the development of the law and changing public attitudes, such a study is precluded by the process of sentencing. In addition, the task of applying archives disposal authority is not believed to be accorded a high priority, as it is sometimes assigned to a junior officer or outsourced.¹³¹ In such instances, the process is likely to be perfunctory and ad hoc in view of the thousands of complaints lodged each year.¹³²

The pragmatic approach towards sentencing means that it is difficult to weigh up and determine the nature of the public interest when confronted by large numbers of files, as the scales invariably tip in favour of bureaucratisation. Since confidentiality is a major dimension at each step of the complaint-handling process, as I have shown, in addition to being a preeminent rationale for sentencing, nothing need ever be known about the nature of a complaint — that is, when it was lodged, who the parties were, whether the complaint was resolved and, if so, on what terms. Furthermore, any longitudinal study, such as the identification of practices from a particular period and a comparison with other periods, states, territories or overseas jurisdictions is also precluded.

Freedom of information ('FOI'), or public access to government, is a key element of the modernisation of our age. FOI acts as a counterpoint to state secrecy that characterises both complaint handling and the sentencing of files. The collision of these values means that we become enmeshed in a state of 'information

¹²⁹ Letter from Hon John von Doussa QC, President, Human Rights and Equal Opportunity Commission to Professor Margaret Thornton, 11 February 2008 (on file with the author).

¹³⁰ Twomey recounts how the records she sought for research purposes were not released until seven years after she applied for them and after her book had been published: see Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018). See also Jill Rowbotham, 'Archive's "Culture" of Secrecy a Scandal', *The Australian* (Sydney, 1 May 2019) 31.

¹³¹ Paul Macpherson, 'Improving Access for the Public to the Collection of the National Archives of Australia' (2000) 31(2) *Australian Academic and Research Libraries* 79, 81; National Archives of Australia, *Using Contractors for Records Sentencing* (2005).

¹³² The AHRC received 3,113 complaints in 2020–21, some of which covered multiple grounds: see AHRC, *Complaint Statistics* (n 16).

asymmetry',¹³³ with the impetus both to destroy public records in accordance with the sentencing mandate, on the one hand, and to preserve them in accordance with FOI, on the other. Once we go beneath the surface, we see that there is much more than just another anti-discrimination file taking up space, for what has been permanently destroyed is not only one dimension of the trajectory of the discriminatory harm, but also an intimate record of the pain and suffering of survivors. The personal accounts in the complaint files attest to their trauma, which is otherwise rendered invisible. Bureaucratisation, like legalism more generally, tends to slough off the affective and the personal. While records exist in the form of annual reports, they tend to reduce the personal narratives of trauma to bald, generalisable statistics; the confidentiality and secrecy of complaint-handling have been supplemented by sentencing and destruction. These methods serve not only to eradicate all evidence of the dynamic trends in sexual harassment from the public record, but they also serve to blanch complaints of their subjectivity and particularity regardless of gender, LGBTIQ+ status, race, disability or age. As these characteristics are dealt with as discrete within the federal legislative framework, only the complaint files themselves could properly reveal the significance of intersectionality between grounds, a relationship where, it has been recognised, our understanding is underdeveloped in the Australian context.¹³⁴ In addition, valuable insights regarding the issue of class, which is central to many instances of sexual harassment in the workplace,¹³⁵ albeit not an operable ground in Australian anti-discrimination legislation,¹³⁶ could be documented in the files or extrapolated from them. However, all details are permanently excised unless, perchance, the rare instance proceeds to a public hearing.

VII Conclusion

It has been suggested elsewhere that #MeToo has led to a groundswell movement away from a narrow focus on corporate liability and the minimisation of reputational damage to creating a workplace culture that is physically and psychologically safe for all.¹³⁷ In contrast, this article has argued that the historic emphasis on confidentiality has persisted through the legal complaints system and been resistant to contemporary demands for greater transparency, including the concerted efforts of #MeToo. While the legal framework for addressing sexual harassment in Australia differs from that of the United States, where a somewhat higher proportion of cases proceed to litigation, similar criticisms nevertheless apply in regard to the

¹³³ The phrase is attributed to Nobel Prize economist, Joseph Stiglitz: see Rick Snell and Peter Sebina, 'Information Flows: The Real Art of Information Management and Freedom of Information' (2007) 35(1) *Archives and Manuscripts* 54, 64.

¹³⁴ Karen O'Connell, 'Can Law Address Intersectional Sexual Harassment? The Case of Claimants with Personality Disorders' (2019) 8(4) *Laws* 34; Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 84.

¹³⁵ See, eg, Kingsford Legal Centre (n 47).

¹³⁶ Margaret Thornton, 'Social Status: The Last Bastion of Discrimination' (2018) 19(1) *Anti-Discrimination Law Review* 5.

¹³⁷ Clayton Utz, *Sexual Harassment in the Workplace* (Report, August 2021).

inadequacy of the law.¹³⁸ The flaws that inhere within the Australian framework are embedded in the conciliation model of dispute resolution and are exacerbated by the movement away from HREOC's former quasi-judicial no-costs role to a costs regime that has encouraged complainants to opt for informal settlements that are confidential. We know that sexual harassment in the workplace is widespread, as revealed by the *Respect@Work* report and multiple other studies, but the detail is scant. The secrecy inherent in the individual complaint-based system, particularly in conciliation and NDAs, to say nothing of sentencing, has played a key role in keeping the substance and extent of sexual harassment out of the public eye. The occasional case that has come to public attention has usually been because of the identity of a prominent harasser, which has encouraged the view that sexual harassment is an aberration rather than a manifestation of the systemic undervaluation of women at work.

The limitations of the formal complaint system, particularly the protection of harassers, has resulted in a state of affairs where formal complaints are rarely lodged, despite the prevalence of sexual harassment.¹³⁹ A 2018 study by the US Equal Employment Opportunity Commission found similarly that, on average, anywhere from 87% to 94% of individuals subjected to sexual harassment did not file a formal complaint.¹⁴⁰ Instead, survivors preferred to access 'Whisper Networks' or 'Courts of Public Opinion'.¹⁴¹ In other words, they took advantage of the 'microphone' that #MeToo gave them to share their experiences and relate the lasting effects of sexual harassment.¹⁴² While transparency is the political leitmotif of our times,¹⁴³ it is 'a radical expectation in equality law',¹⁴⁴ for it is precluded at each stage of a discrimination complaint, as this article has argued.

Despite the prevailing rhetoric of transparency, speaking out is not without its hazards, for the possibility of a defamation action being instituted by the alleged harasser represents a significant deterrent.¹⁴⁵ Prominent Australian actor, Geoffrey Rush, won a defamation case against media group Nationwide News in 2020 and was awarded a record \$2.9 million in damages,¹⁴⁶ an amount many times the paltry

¹³⁸ Deborah Turkenheimer, 'Beyond #MeToo' (2019) 94(5) *New York University Law Review* 1146, 1150.

¹³⁹ *Respect@Work* (n 7) 14.

¹⁴⁰ Turkenheimer (n 138) 1165.

¹⁴¹ *Ibid* 1184.

¹⁴² Tippet (n 52) 242.

¹⁴³ Dominique Allen, 'Collecting, Sharing and Utilising Data to Inform Decision-Making and Utilising Equality' (2021) 37(2) *Law in Context* 88.

¹⁴⁴ Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency' (2021) 37(2) *Law in Context* 98.

¹⁴⁵ For an analysis of defamation law in the context of gendered harm, see Michelle Harradine, 'Defamation Law and Epistemic Harm in the #MeToo Era' (2022) 48(1) *Australian Feminist Law Journal* 31.

¹⁴⁶ *Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432. See also Michael McGowan, 'Geoffrey Rush to Receive Record \$2.9 Million Damages in Daily Telegraph Defamation Case', *The Guardian* (online, 23 May 2019) <<https://www.theguardian.com/film/2019/may/23/daily-telegraph-loses-bid-to-have-judge-removed-in-geoffrey-rush-case>>.

sum received by the typical survivor of sexual harassment.¹⁴⁷ Eryn Jean Norvill, the actor who made the complaint to the theatre company management, expressly stated that she did not want to go public with the complaint, but was called as a witness for the defendant publisher. This is a paradigmatic case involving an older male harasser and a young female survivor, where *his* reputation is invariably going to be assessed more highly than *hers*. This status differential is likely to inhibit her from complaining in the first place, as also occurred with the case involving former High Court judge Dyson Heydon and six young female associates he was found to have harassed, some of whom felt obliged to leave the law altogether as a result of their experience, whereas he was able to continue an illustrious career until retirement.¹⁴⁸

The fear of a defamation action entailing crippling damages and high legal costs effectively mutes the microphone and stifles the prospect of survivors speaking out publicly in the Australian context, where the laws regarding free speech have conventionally been stricter than those of the United States. The threat of defamation proceedings underscores once again the asymmetrical relationship between perpetrators and survivors of sexual harassment. However, concern at the way defamation laws may be used to discourage the reporting of criminal and unlawful behaviour has led Australian state and territory Attorneys-General to consult on revised national defamation laws and propose that allegations of personal conduct, including discrimination and sexual harassment, should be protected by absolute privilege.¹⁴⁹ This privilege, however, would not attach to publication in a news or social media outlet where reporting is most likely, as the proposal is restricted to complaints made to official bodies, such as human rights commissions, which are already arguably privileged.

Even though transparency and openness are contemporary norms, it is suggested that they cannot be realised in the sexual harassment context because their antonyms, secrecy and confidentiality, appear to have strengthened in tandem. The neoliberal turn has undoubtedly boosted the imperative in favour of employers and the role of the market through the privileging of profit maximisation and the normalisation of NDAs. While the appropriateness of the latter has been questioned apropos #MeToo, there has been no thoroughgoing inquiry into their desirability. It is regarded as incidental that sexual harassers themselves are also able to benefit from the cloak of confidentiality and evade repercussions, leaving them free to harass others. Furthermore, the sentencing of records appears to have closed off any

¹⁴⁷ Karen O'Connell, 'Geoffrey Rush's Victory in His Defamation Case Could Have a Chilling Effect on the #MeToo Movement', *The Conversation* (online, 11 April 2019) <<https://theconversation.com>>. Another actor, Craig McLachlan, who was alleged to have sexually harassed and bullied female performers, instituted defamation proceedings against two media outlets and one of his victims, following allegations against him, but subsequently withdrew the action: see Australian Associated Press, 'Craig McLachlan Drops Defamation Case against ABC, Fairfax and Christie Whelan Browne', *The Guardian* (online, 20 May 2022) <<https://www.theguardian.com/law/2022/may/20/craig-mclachlan-drops-defamation-case-against-abc-fairfax-and-christie-whelan-browne>>.

¹⁴⁸ Kiefel (n 6); Michelle Grattan, 'High Court Apologises for Dyson Heydon's Sexual Harassment of Six Associates', *The Conversation* (online, 22 June 2020) <<https://theconversation.com/high-court-apologises-for-dyson-heydons-sexual-harassment-of-six-associates-141215>>.

¹⁴⁹ See, eg. Department of Justice and Community Services (Vic), 'Review of the Model Defamation Provisions' (Consultation Paper, August 2022).

possibility of the interrogation of confidentiality at the end point of a complaint. While it is assumed that confidentiality is in the interests of the survivor, which it may be because of the humiliation and embarrassment associated with the harassment, it is always in the interests of the corporate employer because of the desire to protect its brand name.

Sexual harassment at work is very much at the forefront of the contemporary feminist law reform agenda, but the reforms that have been effected are characterised by unevenness following #MeToo, *Respect@Work* and 'Free and Equal', because powerful corporatist and masculinist interests continue to be privileged over the interests of the largely feminised survivors. As only a tiny percentage of those who are harassed lodge a complaint¹⁵⁰ — a minuscule proportion of which proceed beyond the conciliation stage to a public hearing — few survivors of sexual harassment have the opportunity to speak publicly. For the majority, their stories are entombed in silence forever through the sentencing of their complaint files. The benefit of their experience is thereby denied to other survivors, while the harassers themselves remain theoretically free to harass others. This is the result of the privatisation and secrecy that remains deeply embedded within each stage of the individual complaint-based process of anti-discrimination legislation.

¹⁵⁰ AHRC, *Time for Respect* (n 4).