



#MeToo is not over: sexual harassment claims to stay in the spotlight in 2019

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AT A GLANCE

- In the past year, sexual harassment claims are up in nearly every jurisdiction (NSW up 39%, Queensland up 11.4% and Federal up 19%).
- Claim numbers are likely to keep rising as research shows only 17% of people who experience sexual harassment at work in the last five years made a formal report or complaint.
- Australia's National Inquiry into Sexual Harassment in Australian Workplaces is likely to result in Human Rights Commission recommendations in mid-2019, increasing the spotlight on the issue.
- Claims are likely to continue to increase throughout 2019 with the potential for new claim types to emerge as legislators and regulators consider the results of the national inquiry.

Claims are up

It's official. Sexual harassment claims are up in nearly every jurisdiction. NSW has reported one of the highest jumps with a 39% increase over the 12 months to September 2018. Queensland reports an 11.4% increase while claims in the Federal arena rose by 19% in the 2018 financial year.

Given the incidence of sexual harassment remains severely under-reported, the potential for claim numbers to continue to rise is high. Research released by the Australian Human Rights Commission in September 2018 suggests only 17% of people who experienced sexual harassment at work in the last five years made a formal report or complaint.

While it's possible there is simply more harassment occurring in Australian workplaces than ever before, the increase in claims is more likely driven by heightened public awareness created by the #MeToo movement. The power of social media has given a voice to many who have not previously felt able to speak. Their message has been proliferated in a way not previously possible. Consider actress, Alyssa Milano's tweet on 15 October 2017 "*If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet*" – since then she's had 1.7 million replies from people in 85 countries. Facebook reported more than 12 million posts about #MeToo in less than 24 hours.

The first ever national sexual harassment inquiry

Australia has taken a lead on developing a response to the problem of sexual harassment. The Australian Human Rights Commission has been conducting a National Inquiry into Sexual Harassment in Australian Workplaces, led by Sex Discrimination Commissioner Kate Jenkins. The inquiry is a world-first and has already held public consultations in major cities and regional areas around the country. It follows a 2018 survey of 10,000 Australians to investigate the prevalence, nature and reporting of sexual harassment in Australian workplaces and the community more broadly (read our article about the survey results [here](#)). With the national inquiry due to conclude its public consultations in February 2019, expect to see some strong recommendations mid-year.

Possible recommendations

Unions NSW has already called for reform of the Fair Work Act through its August 2018 *Discussion Paper: Reforms to Sexual Harassment Laws*. Amendments to the work health and safety legislation are also possible, naming sexual harassment as a specific health and safety risk that employers have an obligation to prevent and manage.

Trends already emerging from the national inquiry suggest the recommendations could include:

- **The introduction of a specific duty in work health and safety legislation requiring businesses, officers and others to ensure workers are protected from sexual harassment.** This could mean criminal fines for businesses and officers who are found to have failed to protect a worker from sexual harassment.
- **A reduced ability to use non-disclosure or confidentiality agreements in the settlement of claims.** The Sex Discrimination Commissioner has already called on businesses to voluntarily waive non-disclosure agreements to allow more complainants to provide submissions to the national inquiry. This resulted in 13 major employers (including the Commonwealth Bank, Rio Tinto and Medibank) agreeing to a limited waiver of non-disclosure agreements relating to sexual harassment claims.
- **The introduction of a new claim or prohibition on sexual harassment in the Fair Work Act.** Currently, a sexual harassment claim is made under discrimination legislation either federally, or in one of the states or territories. Each piece of legislation has its own cost rules, meaning a sexual harassment claim is not necessarily in a "no-cost" jurisdiction. Making a claim available under the "no-cost" Fair Work Act or amending existing legislation could lower existing cost-barriers to entry for claimants.
- **An extension of the usual 12-month time limit to make a sexual harassment claim.**

The rise in claims, combined with the renewed focus on sexual harassment that will be generated when the national inquiry recommendations are handed down, is likely to cause businesses to increasingly take out and call on EPL cover. It is important that insurers and brokers closely monitor the changing sexual harassment landscape in 2019 given these developments, and the possible introduction of new types of claims. Those insurers and brokers that can respond quickly to the changing EPL market and offer tailored solutions will be best placed to assist their insureds and manage the emerging risks.

Need to know more?

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