Sexual harassment

The limits of legislation

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Exec summary

In light of #MeToo and a global rise in understanding on sexual harassment, individuals are increasingly seeking recourse for their own experiences.

As it stands, the state legislation that governs sexual harassment claims caps compensation in 50 per cent of jurisdictions, while 50 per cent do not. The other legal pathway, through the Federal Court, does not have a cap either.

This report seeks to explain why these caps are out of date and should be repealed.

In this report you will find that reporting of sexual harassment is increasing and that while incomes have increased since the caps were instituted, in the late 1970s and early 1980s, the caps on compensation have not.

The report also explains the difference between the state-based tribunals and the Federal Court system, and why removing caps on sexual harassment at the state-level can help improve access to justice for victims.

The question facing lawmakers is simple: should there be caps on sexual harassment claims?

In a time when awareness and reporting of sexual harassment is increasing, it seems difficult to justify caps on compensation.

Though not all victims seek financial compensation, but having the option on the table, especially when being adjudicated by a judicial officer, provides victims with greater choice and alleviates pressure in the early stages of taking action.

These are largely heritage aspects of the law, and out of step with contemporary claims and expectations.

Recommendation:

> *State-based caps on sexual harassment should be removed.*
>
> > *EG Removing section 108(2)(a) of the Anti-Discrimination Act 1977 (NSW) and section 127(i) of the Equal Opportunity Act 1984 (WA).*

Key outtakes

- Three states and one territory have caps on compensation for sexual harassment enshrined in law.

- Equally, three states and one territory do not have caps on compensation for sexual harassment in law.

    - In NSW the cap is highest at $100,000, while Tasmania's is the lowest at $25,000.

- Pursuing a sexual harassment claim through the Federal Court, via the Fair Work or Human Rights commissions, does not have a cap on compensation available.

- Laws which instituted caps were designed in the 1970s and 80s, and generally pegged the maximum to district/county courts.

    - 2018 average weekly earnings, the typical test for compensation in sexual harassment claims, have grown by nine times for men and almost eight times for women what they were in 1977.

- Sexual harassment reporting in 2018 is broadly on an upswing.

    - The Human Rights Commission's National Survey on Sexual Harassment found that 71% of Australians have been sexually harassed at some point in their lifetimes.

    - The West Australian Equal Opportunity Commission had double the amount of enquiries regarding sexual harassment in its latest annual report than in the year prior.

By removing caps on compensation for sexual harassment, states will enable greater choice to victims to choose their pathway for recourse. This will also help alleviate the pressures on the Federal Court.

Removing the caps on sexual harassment claims through the state-based processes, enables greater choice to victims and state-based administrative tribunals are generally considered to be faster and more open to self-represented litigants, whereby at the Federal Court, and through conciliation, there tends to be a greater reliance on lawyers.

What caps exist on sexual harassment?

For people seeking recourse to include sexual harassment through state administrative tribunals, three states and one territory have caps on sexual harassment compensation while another three states and one territory do not.

State	Cap*
NSW	$100,000
Vic	None
QLD	None
WA	$40,000
SA	None
Tas	$25,000
NT	$60,000
ACT	None

*Per legislation or on advice from relevant human rights commission.

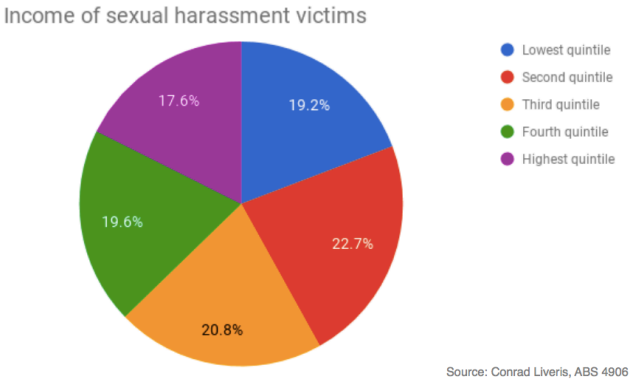
The existing caps were, largely, set in place during the development of the original laws, which occurred mostly in the 1970s and 1980s. The tribunals and commissions originally hearing these claims were pegged to be at the same level as district/county courts. When the Anti-Discrimination Act in New South Wales was enacted in 1977 the District Court had a maximum over claims of up to $100,000, in 2018 it has a maximum of $750,000; the same situation occurs in Western Australia for the District Court when its Equal Opportunity Act was enact in 1984, and its District Court has a maximum claim in 2018 of $750,000.

Having a cap of compensation limits the options facing victims who seek redress, as it forces them to consider the gravity of their case and the potential compensation in the first instance rather than find the judicial forum which best fits their needs.

The governing Federal acts, the Sex Discrimination Act (1984) and Fair Work Act (2009), do not prescribe maximums for compensation claims. Nor is there a maximum if victims take the private conciliation route.

Compensation caps generally, and specifically when based on heritage laws, can hamper opportunities for recourse. They also fail to align with contemporary legal arrangements.

ABS data shows that there is little difference based on income of victims of sexual harassment, and 2018 incomes when compared to those in the 1970s and 1980s are dramatically higher. The average weekly earnings in 1977, for a male, as the measure then was, was $183.60; in 2018 it is $1677.10, and for women $1433.40. Or a 813.45 per cent increase for men, or 680.71 per cent for women (assuming $183.60).



In general, people seeking recourse for sexual harassment do not take action in the first instance. It normally takes multiple instances and sustain harassment for individuals to come forward and merely explore their options for action, let alone compensation.

Sexual harassment reporting in 2018

The past year has seen a greater reporting and enquiry to state and federal human rights commissions about sexual harassment, with individuals seeking to understand the technical definition of sexual harassment.

This increased inquiry is resulting in an, in general, increased rate of reporting.

71% of Australians have been sexually harassed at some point in their lifetimes.

More than four in five (85%) Australian women and over half (56%) of Australian men over the age of 15 have been sexually harassed at some point in their lifetimes.

State and Federal agencies have reported a general upswing in complaints year-on-year.

State	Complaints 2016/17*	Complaints 2017/18*
National	2,046	1,939
NSW	396	Unavailable
Vic	371	Unavailable
QLD	78	78
WA	24	48
SA	33	Unavailable
Tas	14	Unavailable
NT	33	Unavailable
ACT	13	18
*Per annual reports where available		

Additionally, in the most recent annual report from the Australian Human Rights Commission saw an increase in sexual harassment report; as did their recent National Survey on Sexual Harassment in Australian Workplaces (national survey).

The national survey found that the most common forms of sexual harassment experienced were:

- Offensive sexually suggestive comments or jokes, reported by two thirds of (59%) women and one quarter (26%) of men;
- Inappropriate physical contact: reported by just over half of women (54%) and one quarter (23%) of men; and,
- Unwelcome touching, hugging, cornering or kissing: just over half of women (51%) and one in five (21%) men.

Almost two-thirds (64%) of workplace sexual harassment in the past five years was perpetrated by a single perpetrator

Where there was a single perpetrator, more than one in four cases (27%) involved a co-worker at the same level as the victim. Where there were multiple perpetrators, more than one in three cases (35%) involved at least one co-worker at the same level as the victim.

More than half of workplace sexual harassment (52%) occurred at the victim's workstation or where they work. One-quarter of incidents (26%) happened in a social area for employees

A substantial proportion (40%) of workplace sexual harassment incidents were witnessed by at least one other person, and in the majority of cases (69%) the witness did not try to intervene

The most common negative consequence of workplace sexual harassment was an impact on mental health or stress (36%). In general, women were more likely than men to experience negative consequences as a result of workplace sexual harassment.

Recourse pathways

People seeking recourse for sexual harassment and discrimination have two different legal pathways.

1. State tribunals
   Individuals can make complaints either directly to state human rights commissions or through the administrative tribunal.

   In general, this begins with a conciliation before moving on to mediation or a hearing at the tribunal.

2. Federal Court, via Human Rights or Fair Work commissions
   Individuals can make complaints through either the Fair Work Commission or the Human Rights Commission. After initial conferences/conciliations to clarify issues and find solutions, if there is no agreement it then proceeds to the Federal Court.

Why not just go through the Federal Court?

The creation of state-based tribunals was to make it more amenable for individuals to make their case without a lawyer, to offer an alternative to the traditional courtroom. Some were designed, specifically, to address access to justice concerns. Allowing a process for dispute resolution through a judicial body without a lawyer reduces costs for individuals.

They are, in effect, less expensive, less intimidating and more accessible than the Federal Court.

Additionally, the Federal Court has well reported delays and demands on its time. Some cases have taken up to and surpassing four years for resolution. Whereby tribunals have more efficient processes to resolve disputes.

Also the cost of going to a tribunal, especially without a lawyer, is lower than that of the Federal Court. Some jurisdictions have no fees for equal opportunity/human rights cases at tribunals.

A note on conciliations

Private conciliations, outside of commissions and tribunals, between individuals can net significantly more impactful outcomes and expedite the process.

However, these rely on keen negotiation skills and can often include non-disclosure clauses.

Sources

ABS: 4906

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Equal Opportunity Act 1984 (SA)

Anti-Discrimination Act 1992 (NT)

Discrimination Act 1991 (ACT)

Along with private consultation with lawyers, academics and sexual harassment experts.

Disclosure:
“Sexual harassment: the limits of legislation” was prepared in October 2018.

The report has been conducted in private consultation and review with experts in employment, sexual harassment and human rights law. Every effort has been made to ensure the data and evidence analysed is accurate at the time of completion.

The author, Conrad Liveris, is a corporate adviser on workplaces and risk. Considered one of Australia’s leading employment and workplace experts, he works closely with decision-makers across sectors on a range of HR, management and economic issues. He is alumni of the US State Department and the UN, and is an Associate Fellow of the Royal Commonwealth Society, London. He completed his Bachelor of Arts at the University of Notre Dame Australia, a Master of Commerce at Curtin University and has received scholarships for management education at the Governance Institute of Australia and the University of California, Los Angeles.