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Ms Libby Mettam MLA  
Chair  
Community Development and Justice Standing Committee  
Legislative Assembly, Parliament House  
4 Harvest Terrace  
WEST PERTH WA 6005

Dear Ms Mettam

**Inquiry into sexual harassment against women in the FIFO mining industry**

As the Commissioner for Equal Opportunity in Western Australia I am pleased to provide the Community Development and Justice Standing Committee with the attached submission in response to the above inquiry.

Under the *Equal Opportunity Act 1984* (the Act) alongside endeavouring to conciliate complaints of discrimination on the grounds covered by the Act and delivering education and training to inform the community of their rights and responsibilities, it is also my role to examine how to best eliminate discriminatory policies and practices, including sexual harassment, in workplaces.

Yours sincerely

Dr John Byrne  
**Commissioner for Equal Opportunity**

13 August 2021  
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## **Submission from the Equal Opportunity Commission to the Inquiry into sexual harassment against women in the FIFO mining industry**

### **About this Submission**

The Equal Opportunity Commission (the Commission) is responsible for the administration of the *Equal Opportunity Act 1984 (WA)* (the Act). The main objects of the Act are to promote equality of opportunity in Western Australia (WA) and to provide remedies in respect of discrimination on the grounds of sex, marital status, pregnancy, sexual orientation, family responsibility or family status, race, religious or political conviction, impairment, age, or publication of details on the Fines Enforcement Registrar's website, or involving sexual or racial harassment or, and in certain cases, on gender history grounds.

The Commissioner for Equal Opportunity (the Commissioner) is an independent statutory officer with the power to investigate and endeavour to conciliate complaints of discrimination based on one or more of the grounds covered in the Act.

While the Act is applicable to many areas of public life, the area of work (including applications, employment, contract workers and professional organisations) has always been the most significant in terms of numbers of complaints received by the Commission.

Complaints must be lodged to the Commission in writing and can be written in the complainant's first language. The Commissioner accepts complaints about incidents that have occurred up to 12 months prior to the lodgement of the complaints, however, the Commissioner may consider accepting an out of time complaint if the complainant can demonstrate there is good cause for lodging the complaint outside the 12-month time limit. If a complaint is not conciliated by the Commission and has not been dismissed by the Commissioner, it is referred to the State Administrative Tribunal for determination with assistance from the Commissioner.

Laws alone do not eliminate discrimination, intolerance, and prejudice in our community. Therefore, the functions of the Commission include examining discriminatory policies and practices that continue to exist in the community and workforce. It aims to inform and educate everyone in WA about their rights and obligations under the Act and seeks to enhance understanding of the principles of equal opportunity by delivering community events, education and training sessions, seminars, workshops, and publications.

This submission provides insights into sexual harassment enquiries and complaints in employment lodged with the Commission. The Act requires the Commissioner and staff respect the privacy of parties to a complaint, and no identifying information is provided in this submission. What can be provided is statistics about complaints and summaries of our experience from enquiries and complaints.

The National Sex Discrimination Commissioner at the Australian Human Rights Commission (AHRC), Kate Jenkins, led the National Inquiry into Sexual Harassment in Australian Workplaces. In March 2020 Ms Jenkins released the report *Respect@Work*, which presented the pervasiveness of sexual harassment in the

Australian workforce, its nature and drivers, and recommended measures to address and prevent it. Within WA this Commission assisted the AHRC with stakeholder consultation visits during the inquiry and with promotion of Respect@Work once the report was released. I commend the report and its recommendations to the Community Development and Justice Standing Committee.

**i. Is there a clear understanding of the prevalence, nature, outcomes and reporting of sexual harassment in FIFO workplaces?**

In WA sexual harassment is unlawful in several areas of public life including employment and accommodation. Employment includes related contexts such as social functions attended by employees.

Section 24 of the Act defines sexual harassment as an unwelcome sexual advance, or an unwelcome request for sexual favours or unwelcome conduct of a sexual nature. The Commission regularly receives complaints of sexual harassment. In 2020-21 the Commission received 564 complaints and 62.6% of these were allegations of discrimination experienced in workplaces. Among these complaints of workplace discrimination, sexual harassment was the top ground at 20.3%. Sexual harassment was also the top ground for all complaints by people under 35 years of age for all areas.

The Commission accepts complaints of sexual harassment that involve incidents of sexual assault, and in such cases, encourages complainants to lodge sexual assault allegations with the Police. The outcome of reporting sexual assault to the Police may include criminal conviction of the offender, and compensation for loss of income and/or physical and psychological damages may come from criminal injuries compensation. However, there must be a criminal conviction to be eligible for that type of compensation, and that can be very difficult to achieve in many cases. A complaint to the Commission however, can result in compensation and other remedies.

While most sexual harassment complaints received by the Commission come from women, about 20% are made by men. Sexual harassment complaints by males are more likely to involve bullying, however bullying is a significant factor in complaints of sexual harassment by both males and females. Grooming and predatory behaviours by the alleged harasser are more likely to be factors in complaints by females.

For complaints by both males and females, the alleged harasser is usually a male. It is very rare for the Commission to receive a complaint that alleges sexual harassment by a female.

According to Respect@Work, one in three people in the workforce report experiencing sexual harassment in the workplace in the past five years, indicating that it is pervasive. The mining industry is ranked as one of five industries with the highest prevalence of workplace sexual harassment. The report found that 40% of workers in the mining industry experienced sexual harassment in the past five years, which is considerably higher than the prevalence of 31% across all industries.

A significant number of people in the mining industry who have been sexually harassed reported their harasser was a colleague at the same level (48%) compared to people across all industries (30%). In 2018-2019, while women were 16% of the workforce in the mining industry, they made up 74% of the people who reported experiencing sexual harassment at work. Compared to their male counterparts in the mining industry, women were far more likely to experience sexual harassment at work. These findings suggest an imbalance in the gender ratio in the mining industry contributes to the high rate of sexual harassment in the industry.

Mining is one of many industries that has a high proportion of male employees, with other examples being emergency services, warehousing and construction. The experience of the Commission is a disproportionate number of complaints of sexual harassment come from female employees in male-dominated industries.

On the other hand, in workplaces which have a high proportion of female employees, examples being primary schools, childcare and aged care, it is rare to receive allegations of sexual harassment from employees of either sex and those few complaints received do not usually involve sexual assault or inappropriate physical contact.

Workplace cultures in male-dominated industries often value the characteristics traditionally attributed to masculinity and underpin behaviours that devalue the contributions and roles taken up by women. The University of Sydney's Women Work and Leadership Research Group identified women who work in male-dominated industries commonly experience a 'gender-based disrespect' at work.

The Commission notes the prevalence of sexual harassment in the mining industry is comparable to that of other male-dominated industries, with all needing to do more to prevent and address sexual harassment in their workplaces.

The Commission has observed a difference between the nature of allegations of sexual harassment determined by the size of the organisation. Large organisations usually have an effective human resource management function, a code of conduct, induction process, training programs and often several people involved in selection of new employees. These factors reduce the risk of sexual harassers grooming employees, although where employees operate at remote locations and worksites behaviour is more difficult to regulate. Smaller organisations where owners and managers are autonomous can lead to unchecked predatory behaviour.

The nature of sexual harassment experienced at workplaces is often complex and as stated in the Respect@Work report "each victim's experience of workplace sexual harassment is unique and influenced by a range of factors." The Commission receives complaints of workplace sexual harassment experienced in various forms. Some of the commonly experienced forms include:

- Unwelcome touching, hugging or other forms of physical contact
- Inappropriate questions about private life or sexually suggestive comments about body or physical appearance
- Inappropriate staring, watching, or leering

- Display of sexually explicit materials
- Cyber sexual harassment using social media, messages, and other forms of technology to send explicit materials or inappropriate phone calls.

The Respect@Work report notes women in some industries, including the mining industry, are also exposed to sexual harassment in the form of posters and magazines displayed in common areas. Explicit or pornographic materials in the workplace are not only used to sexually harass but also to perpetuate a work culture that allows sexual harassment to flourish. Such materials reinforce the sexualisation and objectification of women and contribute to a culture that disrespects women and influences the way in which males interact with female colleagues.

The Respect@Work report also noted the average number of harassers per incident was higher in the mining industry at three harassers compared with the average of 1.7 across all industries. A significantly high rate of sexual harassment in male-dominated industries is experienced in common areas or social occasions and the behaviour is more likely to be witnessed by someone.

Despite workplace harassment being common in the Australian workforce, data shows that most experiences go unreported. The Respect@Work report found that 81% of people who have experienced workplace harassment in the past five years did not lodge a formal complaint. A range of barriers prevent people from reporting sexual harassment at work, including:

- A significant psychological and emotional impact on employee's health as a result of experiencing sexual harassment
- Fear of victimisation including job loss or denial of opportunities or promotion
- Lack of trust their complaint will be effectively managed
- Workplace culture that condones or excuses sexual harassment
- Lack of employment security – minority groups are more likely to be in temporary positions and therefore at higher risk of sexual harassment
- Inadequate support infrastructure from management and/or leadership.

ii. **Do existing workplace characteristics and practices – including but not limited to workplace cultures, rosters, drug and alcohol policies and recruitment practices – adequately protect against sexual harassment?**

Under the Act employers are required to take reasonable steps to prevent sexual harassment at work. However, sexual harassment continues to occur at work. This may be partly due to a lack of awareness of what constitutes sexual harassment as well as individuals having different perceptions of what constitutes sexual harassment.

Workplace culture plays a crucial role in determining whether complainants feel supported and comfortable to report inappropriate behaviour they might experience. Therefore, fostering a workplace that regularly educates its employees on what sexual harassment is, encourages taking collective action to change workplace culture to eliminate sexual harassment, supports reporting misconduct and provides

the assistance complainants need, is central in protection against sexual harassment.

Organisational policies and procedures often assign those who experience sexual harassment the responsibility of challenging inappropriate behaviour. When complainants report such behaviour, the procedures for investigating claims are frequently slow, time-consuming, and inefficient, deterring people from reporting. There have been incidents where complainants reported a harasser to human resources but had to continue working in proximity to the alleged harasser. In addition, many choose to remain silent rather than enduring the trauma of having to repeatedly recall incidents or tell their story.

In most industries employees are generally not in contact outside of working hours, apart from attending workplace social functions. However, in the mining industry, FIFO work obliges employees to live with each other outside of working hours and places a greater responsibility on the employer, as the provider of accommodation, for the afterhours behaviour of employees. The recent media reports of sexual harassment and sexual assault among FIFO workers must be of concern to mining companies and site operators, given the outcomes of such behaviour includes harm to individual employees, lower morale, productivity and retention rates, as well as reputational damage and compensation claims arising from vicarious liability.

Complaints received by the Commission across all industries indicate workplace social functions (whether at the workplace itself or an external venue) are one of the most frequent settings for allegations of sexual harassment, particularly where alcohol is available. Media reports of sexual harassment by FIFO workers seem to highlight alcohol consumption influences sexual harassment.

In dealing with discrimination complaints involving employment, the Commission has identified several characteristics and practices that may discourage workers from reporting discrimination and sexual harassment. Most of these issues are not unique to the mining industry.

The practice of employing workers, at least initially, through third parties or 'labour hire companies' using fixed-term contracts, or engaging contractors who employ people as subcontractors creates an uncertainty about ongoing employment. Under such conditions workers are often reluctant to raise issues due to a fear as a result they will not be offered contract renewals or more long-term positions. In addition, it may be possible mine site management companies ban or remove workers from mine sites who lodge or wish to lodge complaints, and as a result they cease to be employees.

Appropriate responses and outcomes to reports of sexual harassment are significant in protecting a workplace against sexual harassment, and include:

- Supervisors neither trivialising or dismissing verbal reports from workers, instead taking them seriously and encouraging lodgement of formal complaints in accordance with the organisation's policies and procedures.
- Consistency of outcomes without leniency towards offending employees due to specialised skills, seniority or other factors.

**iii. Are current legislation, regulations, policies and practices adequate for FIFO workplaces in Western Australia?**

The National Inquiry into Sexual Harassment in Australian Workplaces found many aspects of legislation, regulation, policies and practices that are inadequate in countering sexual harassment in all workplaces throughout Australia.

Respect@Work includes recommendations to improve legislation, policies and practices.

The recommendation organisations have greater power to terminate the employment of employees who have sexually harassed another employee is particularly important. The Commission receives complaints about employees who are serial harassers, which may become apparent due either to complaints from a succession of victims, or during investigation of the complaint when the employer discloses an awareness of the employee being a serial harasser and a lack of confidence regarding their ability to discontinue the offender's employment.

The Commission welcomes the current review of the *Equal Opportunity Act 1984* being conducted by the Law Reform Commission of WA (LRCWA). The review process will include release of a discussion paper by the LRCWA and a period of public consultation.

There are several changes the Commission strongly recommends should be made to the Act.

The Commission prepared a report in 2007 recommending the Act be amended to align with more recent anti-discrimination legislation in other Australian jurisdictions. Two of the recommendations mentioned included the updating of the elements necessary to prove discrimination and harassment and a reversal of the evidentiary onus of proof, so a respondent would need to prove their actions and omissions were not discriminatory.

Unlike the Federal legislation, the WA Act currently contains an obligation on the complainant to show they were disadvantaged or believed they would be disadvantaged if they objected to or refused the advance or request. This is a particularly difficult test given the prevalence of adverse behaviour coming from colleagues at the same level.

The Commission looks forward to this review taking place so the community, stakeholders and the Commission itself can put forward views, comments, and recommendations for a better, modernised Act.

**iv. What actions are being taken by industry and government to improve the situation and are there any examples of good practice?**

The Commission notes with approval steps being taken by the mining industry, particularly regarding restrictions on alcohol.

The Commission has the following suggestions for good practice.

***Appointment of female leaders***

It is noticeable that in male-dominated industries where a female is the CEO or occupies the most senior position the organisation's response to sexual harassment is more effective. Examples are the recent action by the female Chief Justice of the

High Court of Australia in response to allegations of sexual harassment by a former member of the court, and the current response to the FIFO sexual harassment issue by Fortescue Metals Group Limited, which has a female CEO.

Male-dominated industries should strive for gender equity in senior positions as an important mechanism to reduce sexual harassment.

### ***Employment of more female workers***

As noted above, organisations that are less male-dominated experience less sexual harassment. Employers can encourage and assist the recruitment of females into traditionally male-dominated occupations by not only enhancing their reputations as employers of choice for women but through active statutory measures, most notably section 31 of the Act, and section 7D of the *Sex Discrimination Act 1984*.

These provisions enable employers and contractors to implement measures for the purpose of achieving substantive equality between men and women in the workplace, for example, selecting vacancies to be filled by women only, providing on-the-job training and mentoring for women, and through scholarships and other incentives that encourage girls and women to consider a career in the mining and resources industry.

### ***Ensure sexual harassment complaints are managed by people with appropriate skills and experience***

It is worth noting most of the complaints of sexual harassment made to the Commission have first been made to the employer and not resolved.

Management of sexual harassment complaints by a practitioner with appropriate skills and experience is a key factor in achieving the best possible outcome. Given organisations recruit and entrust the management of various aspects of their operations to professionals with specific training, qualifications, skills and experience, the human resource function, including management of sexual harassment, should be no different. While the volume of complaints may initially appear insufficient to justify a dedicated resource, the tendency not to report, as noted above, should be taken into consideration.

### ***Review FIFO accommodation and after-hours services***

The mining industry may already have reviewed how accommodation and service operate but if not, it is suggested they do so in consultation with FIFO workers, particularly women.

There may well be a cost, but it is necessary cost with significant benefits. The very existence of this inquiry into sexual harassment against women in FIFO industries seems to point to the need to review how women are accommodated and access services when not on duty in the workplace.

### ***Encourage by-standers to intervene***

As noted above, sexual harassment between colleagues at the same level is more common in the mining industry and there is often another person who observes the harassment. Intervention of by-standers is known to be effective for all forms of harassment, including racial harassment. A focus on by-stander training and

promotion of by-stander intervention in both the workplace and the mining camp is likely to be effective at reducing sexual harassment.