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## Addressing gender-based violence and harassment in a work health and safety framework

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# ► Addressing gender-based violence and harassment in a work health and safety framework

Author / Rachel Cox





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## Abstract

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This report looks at the implications of addressing gender-based violence and harassment (GBVH) under a work health and safety (WHS) framework. It describes the characteristics of gender-responsive WHS approaches to prevention of violence and harassment, in particular with respect to risk assessment and other WHS prevention mechanisms. Integration of rights and obligations under equality and non-discrimination legislation and WHS legislation are considered, specifically with respect to responses to GBVH within organizations and access to remedies for workers who have been harmed by such behaviour. Parallel prevention duties incumbent on organizations are also considered.

The report concludes that addressing GBVH under a WHS framework allows for proactive, systematic, collective, inclusive and publicly enforceable approaches to prevention. As such, WHS regimes have the potential to offer the kind of progressive and transformational change needed to prevent GBVH at work and ensure that women's and other people's equality rights, as well as their health and safety, are respected. However, given historical and ongoing resistance to the idea that GBVH is a work-related risk, a legal obligation to conduct a gender-responsive risk assessment emerges as an important precondition for effective prevention.

## About the authors

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## Acronyms

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<b>AHRC</b>	Australian Human Rights Commission
<b>CEACR</b>	Committee of Experts on the Application of Conventions and Recommendations
<b>ETF</b>	European Transport Workers' Federation
<b>GBVH</b>	Gender-Based Violence and Harassment
<b>HSR</b>	Health and Safety Representative
<b>OSH</b>	Occupational Safety and Health
<b>PCBU</b>	Person Conducting a Business or Undertaking
<b>SWA</b>	Safe Work Australia
<b>TPVH</b>	Third-Party Violence and Harassment
<b>WHS</b>	Work Health and Safety

## Key findings

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- Addressing gender-based violence and harassment (GBVH) under a work health and safety (WHS) framework allows for proactive, systematic, collective, inclusive and publicly enforceable approaches to prevention.
- In keeping with the broad reach of ILO Convention No. 190, WHS regimes often extend the reach of protections beyond the traditional employment relationship.
- Historically, GBVH has not been considered a specific work-related risk under WHS legislation.
- Hence, until now, GBVH has rarely if ever been included in risk assessment, and WHS inspectorates have rarely if ever harnessed their inspection and enforcement powers to address it.
- Gender-responsive prevention of violence and harassment using WHS regimes must be constructed (not assumed) through a series of deliberate, considered, evidence-based and targeted actions.
- To date, however, efforts to centre prevention of GBVH as a WHS priority have met significant obstacles.
- A legal obligation to conduct a gender-responsive risk assessment emerges as an important precondition for effective prevention of GBVH.
- Addressing GBVH at work solely through complaints-based equality and non-discrimination legal frameworks, with no external monitoring or enforcement, has hampered the realization of the right to equality at work.
- In contrast, WHS regulatory regimes mandate organization-level “self-regulation” of health and safety, including the right to work free from violence and harassment, but – crucially – with external regulatory agency or government authority oversight.
- Given that gender inequality is the root cause of GBVH at work, equality and non-discrimination legislation and WHS regimes both contribute to the common goal of preventing GBVH.
- Interactions between these two kinds of regime must reinforce, rather than undermine, the protection that each regime is designed to offer.

## ► Introduction

The objective of this report is to provide an analysis of the implications of addressing gender-based violence and harassment (GBVH) in the world of work within occupational safety and health (OSH) frameworks, referred to in this report as work health and safety (WHS) frameworks.

The report describes the shift from relying, first and foremost, on complaints-based regimes associated with equality and non-discrimination legislation to address GBVH to a more upstream approach that relies not only on recourse for individual workers but also on concerted efforts to nip such violence and harassment in the bud by leveraging the prevention structures and mechanisms offered by WHS frameworks. The report first considers the potential of WHS regimes to contribute to ending GBVH in the world of work (section 1). Next, it sets out the main features of a gender-responsive WHS approach to prevention of violence and harassment (section 2), and then illustrates in greater detail their application to the risk assessment process with respect to GBVH (section 3). Finally, the report discusses the ways in which equality and non-discrimination legislation and WHS regimes interact with each other, setting out the need to ensure that preventive measures and recourse in case of violation of rights are mutually reinforcing (section 4).

This report is timely in that the ILO Violence and Harassment Convention, 2019 (No. 190), hereinafter C190, mandates prevention of GBVH in a WHS framework and has thus sparked a wave of interest in various WHS approaches to prevention of such violence (box 1).<sup>1</sup>

### ► Box 1. ILO Violence and Harassment Convention, 2019 (No. 190)

The adoption of ILO Convention No. 190 in 2019 marks a watershed in the struggle to establish the right of everyone to a world of work free from violence and harassment, as is emphasized in the ILO's guide to C190 (ILO 2021, 5):

Convention No. 190 brings together equality and non-discrimination with safety and health at work in one instrument, and places human dignity and respect at its core. The Convention recognizes that violence and harassment can constitute a human rights violation or abuse, and provides, for the first time, a single composite concept of violence and harassment (Art. 1). The Convention requires Member States to adopt an inclusive, integrated and gender-responsive approach to prevent and address such behaviours in the world of work (Art. 4(2)). This approach envisages action on prevention, protection, enforcement, remedies, guidance, training and awareness raising (Arts 4, 7–11), and takes into account third parties as both victims and perpetrators. In adopting this approach, Convention No. 190 requires States to recognize the different and complementary roles and functions of governments, employers and workers, and their respective organizations, taking into account the varying nature and extent of their respective responsibilities (Arts 4(3) and 9).

The Convention has a broad personal scope of protection (Article 2) and seeks to address violence and harassment that occurs “in the course of, linked with or arising out of work”, both in the formal and informal economy, and whether in the private or public sector (Article 3). The Convention has a strong focus on inclusivity (Arts 2 and 6) as well as accessibility (Arts 4(2), 9(d), 11(b)), and acknowledges that some groups and workers in certain sectors, occupations and work arrangements are especially vulnerable to violence and harassment (Arts 6 and 8). It embeds a strong gender-responsive perspective with a view to tackling root causes of discriminatory forms of violence and harassment.

<sup>1</sup> ILO Violence and Harassment Convention, 2019 (No. 190); see also Violence and Harassment Recommendation, 2019 (No. 206).

Also, in 2022, the 110th International Labour Conference adopted the Resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at work (ILO 2022d), recognizing the Occupational Safety and Health Convention, 1981 (No. 155), and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), as fundamental Conventions alongside the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and others.<sup>2</sup> Thus, the right to a working environment free from GBVH, as both a work-related hazard and a form of discrimination, can now be seen as a facet of several fundamental principles and rights at work.<sup>3</sup>

C190 describes violence and harassment as referring to “a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm” (Art. 1.1(a)). It then affirms that the term “violence and harassment” includes GBVH, which is defined as “violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately” (Art. 1.1(b)).<sup>4</sup>

GBVH includes a spectrum of behaviours. In C190 the term GBVH explicitly includes “sexual harassment”, which generally covers a range of behaviours, both sexualized and non-sexualized. The latter are sometimes referred to as “sex-based”, “gender-based” or “hostile work environment” harassment.<sup>5</sup> In keeping with the emphasis placed on sexual harassment in the C190 definition, this report focuses on sexual harassment as one of the most prevalent (as well as one of the most studied) forms of GBVH in the world of work.

An additional manifestation of GBVH is domestic violence, also known as intimate partner violence or family violence (C190, Preamble, Art. 10; R206, Paras 4 and 18). Domestic violence can intrude into the world of work with potentially dramatic consequences for the targeted worker

<sup>2</sup> Including the Conventions on freedom of association (C87), the effective recognition of the right to collective bargaining (C154), the elimination of all forms of forced or compulsory labour (C105) and the effective abolition of child labour (C182). See above.

<sup>3</sup> The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) considers sexual harassment to be a serious form of sex discrimination falling within the scope of C111; this illustrates how prevention of GBVH is situated at the crossroads of WHS and equality rights (General Observation (CEACR) – adopted 2002, published 91st ILC session (2003), Discrimination (Employment and Occupation) Convention, 1958 (No. 111)). It is also noteworthy that the latter part of the definition of GBVH in C190 – “violence and harassment ... affecting persons of a particular sex or gender disproportionately” – is reminiscent of the notion of indirect discrimination.

<sup>4</sup> C190 itself contains no definition of “gender”. According to the ILO *Guide on Convention No. 190 and Recommendation No. 206*, the reference to “sex or gender” refers to “the biological functions and characteristics that differentiate men from women (that is, sex) and the sociological differences between men and women that are learned and changeable over time (that is, gender)” (ILO 2021, 12). It should be noted that the guide's disclaimer states that “[t]he ILO Constitution confers no special competence upon the Office to give an authoritative interpretation of instruments adopted by the International Labour Conference and the opinions expressed in this publication are without prejudice to any position that the ILO's supervisory bodies might take with respect to their subject matter” (ILO 2021, iv). Several countries have broader definitions of GBVH and consider violence and harassment targeting people of diverse sexual and gender orientations as GBVH. For example, South Africa's *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace* (2022) addresses gender-based harassment and states that “all forms of harassment against women, men and LGBTQIA+ and vulnerable persons in the workplace is an abuse of power” (South Africa, Department of Employment and Labour 2022, 19). Safe Work Australia's *Sexual and Gender-based Harassment: Code of Practice* (2023) states that “[g]endered violence is a broad term that captures any behaviour directed at any person or that affects a person because of their sex, gender or sexuality, or because they do not adhere to socially prescribed gender roles. For example, this includes violence targeted at someone because they identify as lesbian, gay, bisexual, transgender, intersex, queer or asexual (LGBTIQ+)” (SWA 2023, 40). In the ILO's *Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ+) Persons in the World of Work: A Learning Guide*, gender is defined as “the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for individuals based on the sex they were assigned at birth. Gender is fluid and changes with time and cultures; for example, what is considered masculine and feminine evolves” (ILO 2022c, 69); see page 45 of the *Learning Guide* for application of the principles of C190 to LGBTIQ+ workers.

<sup>5</sup> The Guide on Convention No. 190 and Recommendation No. 206 (ILO 2021, 12) states that:

As a serious manifestation of sex discrimination and a violation of human rights, sexual harassment has been addressed prior to the adoption of Convention No. 190 within the context of the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Within that framework, and according to the 2002 General Observation of the ILO CEACR, definitions of sexual harassment contain the following two key elements:

- Quid pro quo – Any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job; or
- Hostile work environment – Conduct that creates an intimidating, hostile or humiliating working environment for the recipient.

as well as for other people in the work environment (Cox and Ederer 2021). Domestic violence is the subject of distinct provisions in C190 in terms of the role of Member States and employers' obligations.<sup>6</sup> It is linked to prevention of other forms of GBVH because of its deep roots in gender inequality as well as, on a practical level, in terms of risk assessment (R206, Para. 18(d)).

All types of GBVH are WHS hazards because they create risks to the health and safety of the workers exposed to them and can lead to psychological (mental) or physical harm. Most countries have WHS regimes (Cooney et al. 2023, 28 ff.) and, as outlined in sections 1.1 and 1.2 below, most WHS statutes include a general duty on an employer or a person who conducts a business to ensure, so far as is reasonably practicable, the health and safety of workers. The general duty includes taking steps to eliminate or minimize the risk of GBVH. Importantly, it requires employers and persons conducting a business to take a proactive, preventive approach that goes beyond addressing individual harmful behaviours.

In terms of methodology, in order to identify promising practices, this report looks at two countries known for their progressive legislation in terms of prevention of harassment and bullying at work: Belgium and Australia. Other examples of promising practices are drawn from the literature review, while two countries (South Africa and El Salvador) are taken from the 2024 ILO report *Preventing and Addressing Violence and Harassment in the World of Work through Occupational Safety and Health Measures* (ILO 2024). The countries examined provide a variety of examples of how GBVH is or could be addressed within WHS regimes but are not necessarily representative of any broader trends.

Finally, to explain some of the terminology used in this document, it should be noted that WHS legislation in various countries imposes the main duty to ensure health and safety on "employers", "persons who conduct a business or undertaking", "self-employed persons", and so on. Instead of such expressions, this document uses the term "organization" to refer to the entity that conducts the business and engages workers to carry out its activities. The term "legislation" includes statutes (for example, South Africa's Occupational Health and Safety Act or El Salvador's Ley General de Prevención de Riesgos en los lugares de trabajo<sup>7</sup>) and regulations (subordinate legislation made under the statute, such as royal decrees in Belgium or WHS regulations in Canadian jurisdictions). The term "guidance material" is used to refer to guidance provided by WHS regulatory bodies or government authorities to facilitate compliance by organizations and to assist WHS inspectors and the courts in determining whether organizations have complied, while the term "tools" is used to refer to infographics, checklists, matrices for risk assessment, and other such devices. Unless otherwise specified, the term "legal framework" refers to the legislation (statutes and underpinning regulations) that establishes legal obligations, as well as to guidance material and tools that facilitate compliance by organizations.

<sup>6</sup> C190's Preamble states that "domestic violence can affect employment, productivity and health and safety, and that governments, employers' and workers' organizations and labour market institutions *can help, as part of other measures*, to recognize, respond to and address the impacts of domestic violence" (emphasis added). Art. 10(f) requires Member States to "recognize the effects of domestic violence and, so far as is reasonably practicable, mitigate its impact in the world of work". R206, Para. 18 lists appropriate measures to this end, including leave for workers who are victims/survivors (Para. 18(a)) and flexible work arrangements (Para. 18(b)), and also "the inclusion of domestic violence in workplace risk assessments" (Para. 18(d)). See, on the intimate relationship between issues of domestic violence and other forms of GBVH in the campaign for C190, Pillinger, Runge and King (2022).

<sup>7</sup> In English, General Law on Risk Prevention in Places of Work.

## ► 1 The implications of addressing GBVH within a preventive WHS framework<sup>8</sup>

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The shift from relying primarily on complaints-based regimes, associated with equality and non-discrimination legislation, to building a more upstream approach based on primary prevention of GBVH involves leveraging the structures and mechanisms offered by WHS frameworks. Specifically, addressing GBVH under a WHS framework allows proactive, systematic, collective, inclusive and publicly enforceable approaches to prevention. Immediate, positive and proactive duties require organizations to take systematic measures to ensure health and safety; these include identifying hazards such as GBVH, assessing the risks posed to workers, and taking action to control these risks, including addressing underlying causal factors. This section considers the implications of addressing GBVH within a WHS framework, drawing attention both to its promise and to adaptations needed to realize its potential.

### 1.1. Immediate, positive and proactive duties

In the past, sexual harassment and other forms of GBVH have been addressed through complaints-based regimes, which prohibit the behaviour in question but then place the responsibility to report and prove the wrongdoing on the shoulders of the target of GBVH. These regimes have failed to make satisfactory inroads into eradicating sexual harassment and other forms of GBVH at work (Smith 2023; Cortina and Areguin 2021, 299; Schultz 2018; Smith, Schleiger and Elphick 2019; de los Reyes 2023; Hellum 2023; McDonald et al. 2011).

In contrast, under a WHS regime, employers and other duty holders must proactively take reasonably practicable measures to prevent workers<sup>9</sup> from being exposed to the risk of GBVH (see section 1.2 below). Importantly, this helps to counter the erroneous but widespread perception that sexual harassment and other forms of GBVH are private matters and foregrounds organizational, environmental and industry risk factors (Davies and Munro 2013, 19–20; MacKinnon 1979, 58–59; Chen 2019, 53). It requires the organization to act before any GBVH occurs. For example, in New South Wales, Australia, the initial focus of the WHS regulator's GBVH strategy is sexual harassment. Its guidance material states that an organization's general duty entails:

taking steps to eliminate or minimise the risk of sexual harassment. To do this, businesses must take a proactive, preventive approach also known as a “positive” duty. It requires more than addressing the individual harmful behaviours. It also requires reducing gender inequality and addressing the underlying causes and contributing workplace factors known to increase the risk of sexual harassment occurring. (Safe Work NSW 2023, 11)

### 1.2. Systematic risk management

C190 stipulates that legislation and regulations made thereunder require that, “so far as is reasonably practicable”, organizations should “take into account violence and harassment and associated psychosocial risks in the management of occupational safety and health” (Art. 9(b)).

<sup>8</sup> Addressing GBVH through WHS also has implications for WHS regimes: for example, a potential renewal of WHS through greater involvement of equality-seeking groups and competition for scarce resources, to name but two. Because of space restrictions, I have limited my comments to the implications of mobilizing the WHS regime for prevention of GBVH.

<sup>9</sup> And sometimes others: see section 1.3.2 below.

The principle of prevention is at the core of WHS regimes.<sup>10</sup> At the heart of the WHS approach to prevention is *systematic* management of risks for health and safety:

[T]he concept and practical application of *risk assessments* is fundamental. This involves a methodical process of identifying hazards at work (anything that has the potential to have a detrimental effect on safety and health), considering the risk of harm and then acting to eliminate or, if that is not reasonably practicable, minimise the risk ... [Such assessments] also involve specifying who is responsible for implementing the measures, the time frames and a review process. (Cooney et al. 2023, 18)

The hierarchy of hazard controls specifies that, if reasonably practicable,<sup>11</sup> risks should be eliminated. If they cannot be eliminated, they should be minimized or controlled (for an example, see box 2).

► **Box 2. Controlling the risk of GBVH: A case study from Australia**

The following case study is included in guidance for employers on tackling work-related GBVH issued by the workplace health and safety regulator in Victoria, Australia.

Sandy is a young supermarket employee. The policy at her work is that employees have to park at the far end of the carpark because the close parks are for customers. Evening shifts finish at midnight and she usually walks to her car alone. She has been harassed a few times and is frightened about walking alone in the car park at night.

The supermarket's work systems mean that Sandy and her coworkers can be made more vulnerable. A few changes to workplace practices can improve this. For instance, ensuring that the car park is well lit, and that staff walk to their cars at night in pairs, or move their cars close to the workplace at a certain time, can reduce or eliminate some of these risks and incidents of gendered violence.

**Source:** WorkSafe Victoria (2022).

### 1.3. Extending the reach of WHS protections beyond the traditional employment relationship

One important feature of WHS regimes is that, in keeping with the broad scope of C190,<sup>12</sup> they often extend the reach of WHS protections beyond the traditional employment relationship. Whereas most labour and employment laws confine their protections to “employees”, or at best employees and “dependent contractors”, in some countries the duty imposed on organizations to ensure health and safety seeks to protect a wide range of “workers” (not just employees) and persons who are not workers but may be affected by work activities (Cooney et al. 2023, 28 ff.). In this sense, addressing GBVH through WHS frameworks is at the cutting edge of extending the benefit of much-needed preventive measures to workers who are in fissured (vertically dis-integrated), precarious or insecure work arrangements, and to persons who are not workers but are exposed to risks to their health and safety from work activities.<sup>13</sup>

<sup>10</sup> ILO Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), Art. 1(d).

<sup>11</sup> Or other similar qualifier. In France and some other jurisdictions, the employer has a performance duty to ensure health and safety (*obligation de sécurité*).

<sup>12</sup> On this aspect of C190, see box 1 above. One of the methods of applying C190 is “by extending or adapting existing occupational safety and health measures to cover violence and harassment” (Art. 12).

<sup>13</sup> While anti-discrimination and equality legislations may prohibit GBVH towards these workers, they do not mandate systematic management of the risk of GBVH in the way that WHS regimes do.



The South African and the Belgian WHS regimes provide examples of broad definitions of workers and of work providers. Moreover, both the Australian and the South African WHS frameworks contain provisions that protect persons who are not employees. These examples are described in greater detail below.

### 1.3.1. Broadening the definition of worker and work provider

South Africa's Occupational Health and Safety (OHS) Act (1993) aims to "provide for the health and safety of persons at work", with work defined as "work as an employee or as a self-employed person".<sup>14</sup> The OHS Act is complemented by the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (adopted under the Employment Equity Act), in which the term "employees" includes applicants for employment and volunteers.<sup>15</sup>

The Belgian *Loi sur le bien-être au travail* (1996) states that persons who, outside an employment relationship, perform work under the authority of another person, are considered to be workers, as are students carrying out work in the course of training or studies. According to the law, workers and employers are defined as follows:<sup>16</sup>

Pour l'application de la présente loi sont assimilés:

1° aux travailleurs:

- a) les personnes qui, autrement qu'en vertu d'un contrat de travail, exécutent des prestations de travail sous l'autorité d'une autre personne;
- b) les personnes qui suivent une formation professionnelle dont le programme de formation prévoit une forme de travail qui est effectué ou non dans l'établissement de formation;
- c) les personnes liées par un contrat d'apprentissage;
- d) les stagiaires;
- e) les élèves et les étudiants qui suivent des études pour lesquelles le programme d'étude prévoit une forme de travail qui est effectué dans l'établissement d'enseignement;

2° aux employeurs: les personnes qui occupent les personnes visées au 1°. <sup>17</sup>

<sup>14</sup> South Africa, *Occupational Health and Safety Act No. 85 of 1993*, section 1(1)(liv).

<sup>15</sup> South Africa, *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (2022)*, section 2.1. According to the Code (section 7.5.2):

A wide range of employees work in situations which bring them into contact with clients or the public where there is significant risk of harassment, including violence. In these circumstances the employer must institute measures consistent with the OHSA [Occupational Health and Safety Act, 1993] to ensure protection for employees against harassment and violence. This would be particularly significant in sectors such as hospitality, security, policing or criminal justice operations, frontline and first responder emergency services, or in situations where money or prescription drugs are handled.

<sup>16</sup> Belgium, *Loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail*, Ch. 1.2.1.

<sup>17</sup> Author's translation:

For the purposes of this Act, the following are considered to be:

1° workers:

- a. persons who, other than under a contract of employment, perform work under the authority of another person;
- b. persons undergoing professional training whose training programme provides for a form of work which may or may not be carried out in the training establishment;
- c. persons bound by an apprenticeship contract;
- d. interns;
- e. pupils and students engaged in studies for which the study programme provides for a form of work which is carried out in the educational establishment;

2° employers: persons who give work to the persons referred to in 1°.



### 1.3.2. Extending WHS protections to persons who are not employees

WHS legislation may require businesses or undertakings, and often workers as well, to see that the health and safety of persons at or near the workplace are not endangered. For example, under South Africa's OHS Act, employers have a duty to conduct their undertaking "in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in [their] employment who may be directly affected by [their] activities are not thereby exposed to hazards to their health or safety" (section 9(1)).<sup>18</sup>

Under Quebec (Canada)'s OHS Act, a worker must see that they do not endanger the health, safety, or physical or mental well-being of other persons at or near their workplace.<sup>19</sup> This type of provision is applicable, for example, to roofers, who must ensure that passers-by are not struck by objects falling from the roof. Other examples of protected persons include visitors to workplaces, passengers, detainees, students or pupils, shoppers in shopping centres, and patients and their families in medical facilities.

In relation to the informal economy, C190 requires ratifying countries to "recogniz[e] the important role of public authorities in the case of informal economy workers" (Art. 8(a)) and to "tak[e] measures to effectively protect such persons" (Art. 8(c)).<sup>20</sup> The ILO *Guide on Convention No. 190* explains that:

This provision was introduced to address the fact that many informal economy workers, particularly those who work in public spaces, such as street vendors and waste pickers, face violence and harassment from public authorities in the form of confiscation of goods, demand for sexual favours or forceful dispersion. (ILO 2021, 44)

To the extent that the staff members of public authorities are workers within the meaning of WHS legislation, there is an opportunity to address prevention of GBVH towards informal economy workers. First, as the South African and Quebec examples above show, WHS legislation may provide for protection of the health and safety of "members of the public" at or near the workplace, which would include street vendors and waste pickers. In this example, the places of work of the public authorities' staff members include the public spaces in which they carry out their duties. Second, any organizational tolerance of sexual harassment or other forms of GBVH towards the public is a risk factor for GBVH *within* the workforce and must be controlled by the business or undertaking.

The extension of WHS protections to all kinds of workers and "other persons" is illustrated by the harmonized Australian WHS acts.<sup>21</sup> Within the broad scope of these acts, the primary duty to ensure health and safety, "so far as is reasonably practicable", is owed by a "person conducting a business or undertaking" (PCBU) to all "workers" who are engaged, or to be engaged, by the PCBU, or whose activities are influenced or directed by the PCBU, and to "other persons" – that is, to persons who are not workers but who are "put at risk from work carried out as part of the business or undertaking" (section 19). A "worker" is defined as a person who "carries out work in any capacity for a person conducting a business or undertaking" (section 7(1)). Examples of

<sup>18</sup> Self-employed persons have a similar duty (section 9(2)).

<sup>19</sup> Quebec (Canada), [Act respecting Occupational Health and Safety](#), RLQ S-2.1, section 49(3): "A worker must ... see that he does not endanger the health, safety or physical or mental well-being of other persons at or near his workplace". See also Victoria (Australia), [Occupational Health and Safety Act \(2004\)](#), as well as the WHS acts of the other Australian states. Canada's federal WHS legislation protects only workers, not members of the public; however, employers have certain duties towards any person who enters a workplace: see [Canada Labour Code](#), RSC 1985, C. L-2, sections 125(1)(w) and (z.14).

<sup>20</sup> In the same vein, C187 provides that "the national system for occupational safety and health shall include ... support mechanisms for a progressive improvement of occupational safety and health conditions ... in the informal economy" (Art. 4(3)(h)). Furthermore, the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), calls for an integrated framework that addresses "the promotion of equality and the limitation of all forms of discrimination and violence, including gender-based violence, at the workplace" (Para. 11(f)).

<sup>21</sup> In 2010 Australia drafted a Model Work Health and Safety Bill, which has been adopted and enacted by the federal government, two territory governments, and all state governments apart from Victoria. The [latest version of the WHS bill](#), dated November 2023, includes various amendments made since its initial drafting.

workers include persons who work as an employee; a contractor or subcontractor; an employee of a contractor or subcontractor; an employee of a labour hire company who has been assigned to work in the person's business or undertaking; an outworker; an apprentice or trainee; a student gaining work experience; or a volunteer (section 7(2)).

## 1.4. Broad definition of the “workplace”

WHS regimes typically have a definition of the workplace that is wider than the traditional physical and fixed workplace; in principle, it encompasses “all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer”.<sup>22</sup> This broad definition is crucial to the effective preventive regulation of GBVH, as violence against women often occurs at the margin of work – for example, at work-related social events, training activities and conferences, or while waiting for a lift home from work. Fatal domestic violence attacks may occur in the carpark at work or at the building entrance (Cox with collaboration of Desmarais and Roy 2019). GBVH may even take place away from work, yet remain work-related – for example, unwelcome solicitations of sexual relations on social media by managers or other work colleagues outside work hours.

## 1.5. Officer duties and other forms of liability

A key element of effective sexual harassment policies is senior management's commitment to addressing sexual harassment within the organization, as well as to broader gender equality goals and, by extension, to GBVH prevention policies (Zippel 2003; McDonald and Charlesworth 2019). Various consequences associated with a breach of WHS legislation, including potential financial penalties, associated reputational damage, and diminished capacity in public tendering, act as powerful motivators for management to prevent sexual harassment and other forms of GBVH.

In some countries, potential officer liability for contraventions of the WHS legislation is a further source of motivation to ensure that prevention of GBVH is carried out effectively. In the United Kingdom, for example, the Health and Safety etc. at Work Act 1974 attributes criminal liability to an officer (for example, any director, manager or secretary of the body corporate) for a WHS offence committed by the body corporate if the body corporate's offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, the body corporate.<sup>23</sup> This is an example of the attributed liability of officers.

A different approach is to be found in the harmonized Australian WHS acts, which impose a duty on each officer of a person conducting a business or undertaking (PCBU) to exercise due diligence to ensure that the PCBU complies with its duties under the WHS Act.<sup>24</sup> Broadly speaking, due diligence has two aspects: it requires each company secretary, director and senior manager, first, to have extensive knowledge of the operations of the company and of the WHS risks

<sup>22</sup> ILO Occupational Safety and Health Convention, 1981 (No. 155), Art. 3(c). Further, “[t]he Protocol of 2002 to the Occupational Safety and Health Convention, 1981, calls for information on measures taken regarding occupational accidents, diseases and other injuries to health, which arise ‘in the course of or in connection with work’ (Preamble (e))” (ILO 2021, 21). Specifically, C190 applies to violence and harassment “occurring in the course of, linked with or arising out of work” including “(a) in the workplace, including public and private spaces where they are a place of work; (b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; (c) during work-related trips, travel, training, events or social activities; (d) through work-related communications, including those enabled by information and communication technologies; (e) in employer-provided accommodation; and (f) when commuting to and from work” (Art. 3).

<sup>23</sup> United Kingdom, *Health and Safety etc. at Work Act 1974*, section 37.

<sup>24</sup> Australia, *Model Work Health and Safety Bill*, section 27. This is an immediate, positive and proactive duty in that an officer can breach their section 27 duty, even in circumstances where the PCBU has not breached or been found guilty of an offence under the WHS Act.

(including GBVH) faced by all persons who carry out work in any capacity for the company, and second, to take steps to ensure that the company complies with the WHS Act (section 27(5)).<sup>25</sup>

## 1.6. The worker's duty

In several countries the WHS statute imposes a duty on employees (or workers) to exercise reasonable care for the health and safety of other persons. This duty would clearly encompass GBVH. For example, in Belgium, under the *Loi sur le bien-être au travail* (Art. 6):

Il incombe à chaque travailleur de prendre soin, selon ses possibilités, de sa sécurité et de sa santé ainsi que de celles des autres personnes concernées du fait de ses actes ou des omissions au travail, conformément à sa formation et aux instructions de son employeur.

A cet effet, les travailleurs doivent en particulier... participer positivement à la politique de prévention mise en oeuvre dans le cadre de la protection des travailleurs contre la violence et le harcèlement moral ou sexuel au travail, s'abstenir de tout acte de violence ou de harcèlement moral ou sexuel au travail ...<sup>26</sup>

This type of provision often has a broad reach, because supervisors and even senior managers will usually be “employees” or “workers”, and thus have the same duty to exercise care for the health and safety of other persons.

## 1.7. Promoting compliance

A common component of European WHS regimes is that they require organizations to employ or engage WHS experts in order to discharge what can be complex obligations in the WHS statutes.<sup>27</sup> The term “prevention services” describes the range of professional support for WHS available to employers from within or from outside their work organizations. In Europe, it refers to a wide range of institutional forms, ranging from large multidisciplinary services to single individuals (Walters et al. 2022) (see box 3). Outside Europe, WHS statutes in some countries require organizations to employ or engage WHS experts to assist them in implementing the risk management and other processes that are necessary to ensure the health and safety of workers and others.

<sup>25</sup> This will include taking steps to ensure that the company has sufficient resources to institutionalize systematic WHS management in order to ensure the health and safety of workers and others affected by the work of the company.

<sup>26</sup> Author's translation:

It is the responsibility of each worker to take care, to the best of their ability, of their own safety and health, as well as that of other persons affected by their acts or omissions at work, in accordance with their training and the instructions of their employer.

To this end, workers must in particular ... participate positively in the prevention policy implemented as part of the protection of workers against violence and moral or sexual harassment at work, refrain from any act of violence or moral or sexual harassment at work ...

<sup>27</sup> See, for example, European Union, [Council Directive of 12 June 1989](#), Art. 7. Furthermore, the Occupational Safety and Health Recommendation, 1981 (No. 164), provides that: “As necessary in regard to the activities of the undertaking and practicable in regard to size, provision should be made for ... recourse to specialists to advise on particular occupational safety or health problems or supervise the application of measures to meet them” (Para. 13(b)).

► **Box 3. The role of the prevention adviser in Belgium**

In Belgium, under the *Loi sur le bien-être au travail* (Art. 32(1)), the prevention adviser appointed by the employer is expected to be specialized in the psychosocial aspects of work, including violence and moral and sexual harassment:

L'employeur décide ... si les missions qui sont attribuées au conseiller en prévention par le présent chapitre seront exécutées par le service interne pour la prévention et la protection au travail ou par le service externe pour la prévention et la protection au travail.

S'il confie les missions au service interne pour la prévention et la protection au travail, il désigne, après avoir reçu l'accord préalable de tous les membres représentant les travailleurs au sein du comité, un conseiller en prévention spécialisé dans les aspects psycho-sociaux du travail dont la violence et le harcèlement moral ou sexuel au travail.

[Author's translation:

The employer shall decide ... whether the mandates assigned to the prevention adviser by this chapter are to be performed by the internal service for prevention and protection at work or by the external service for prevention and protection at work.

If they entrust the mandates to the internal service for prevention and protection at work, they shall appoint, after having obtained the prior agreement of all the members representing the workers on the committee, a prevention adviser specializing in the psychosocial aspects of work, including violence and moral or sexual harassment at work.]

## 1.8. Worker representation, consultation and other forms of participation

Worker representation, consultation and participation is an integral part of WHS.<sup>28</sup> These mechanisms assist managers in developing better approaches to WHS, as workers have intimate knowledge of the risks to which they are exposed and of the measures that could control these exposures. There is clear research evidence, from a number of countries, on the positive effects of collective worker participation on WHS.<sup>29</sup>

As Belinda Smith states: "Consultation should be a central component of efforts to prevent harassment and inequality for instrumental reasons of correctly identifying the risks within an organisation and developing an effective response, as well as symbolic reasons of promoting participation" (Smith 2023, 164).

<sup>28</sup> See ILO Occupational Safety and Health Convention, 1981 (No. 155), Arts 13, 19 and 20. As Cooney et al. (2023) explain: "[T]he ILO's OSH instruments, and in particular the fundamental Conventions No. 155 and No. 187, provide that the national policies, systems and programmes referred to in those Conventions need to be formulated 'in consultation with the most representative organisations of employers and workers'" (page 20). See also C187, Art. 4(2)(d); and [Promotional Framework for Occupational Safety and Health Recommendation, 2006 \(No. 197\)](#), Para. 10. Unfortunately, "mechanisms for tripartite collaboration, especially at the workplace level, are not a universal feature of OSH systems" (Cooney et al. 2023, 53).

<sup>29</sup> The research shows that participatory mechanisms that allow higher levels of worker involvement are better than those that provide for more limited involvement; for an overview of these research findings, see Walters and Nichols (2007). International research supports the argument that joint arrangements involving employer representatives and worker and trade union representation in organizations are associated with better objective WHS outcomes (such as injury rates or exposure to hazards) than situations where representative worker participation is absent. Other studies provide more indirect evidence of the impact of worker representation on WHS management practices, suggesting that participatory arrangements in WHS lead to improved WHS management practices and compliance with WHS regulatory standards. For a summary of this evidence, see Walters and Nichols (2007, Ch. 2) and Walters (2006). Most of the relevant studies have been conducted in Australia, Canada, Norway, Sweden and the United Kingdom.

### 1.8.1. Workers' participation in risk assessment

To effectively catalyse systemic institutional changes to prevent sexual harassment and other forms of GBVH, the role of workers in identifying hazards and control measures is crucial.<sup>30</sup> The risk assessment process opens up channels for workers to reveal the situations where they or others are at risk (including repeat offender perpetrators or sexual harassment involving social media that might otherwise escape an organization's attention). If done properly, a risk assessment process for GBVH will involve consulting all workers, including shift workers, agency workers, and workers with precarious migratory status.

### 1.8.2. Workers' participation in policy development

Worker consultation in the risk assessment process is one form of worker participation. Another form of participation is in the development and adoption of policies on sexual harassment. C190 refers to the need for organizations to "adopt and implement, in consultation with workers and their representatives, a workplace policy on violence and harassment" (Art. 9).<sup>31</sup>

To date, sexual harassment policies based on the "three Ps" (prohibition, policy and procedure) have not been effective, often serving to protect organizations from liability rather than to facilitate prevention and reporting of sexual harassment (Cox and Brodeur 2020; Roscigno 2011; Parker 1999; Charlesworth 2002). For policies on sexual harassment and other forms of GBVH to be more effective, they should be developed through consultation with all workers, rather than implemented "top-down" (Thomas 2004; Dougherty and Hode 2016). Mechanisms for representative worker participation offer the possibility of a bottom-up or co-constructed prevention policy for GBVH,<sup>32</sup> including establishing a crucial common understanding of what behaviour constitutes GBVH in each work environment (Thomas 2004). WHS mechanisms for worker representation thus allow for collectivization of issues of GBVH and a workers' voice, where workers in situations of vulnerability to GBVH can appeal to other workers to bring forward their concerns.

That said, in order for organizations and their workers to harness the benefits of worker representation and consultation to eliminate GBVH, they need to understand the preconditions for effective worker participation in WHS (Walters and Nichols 2007, Ch. 5) and to adapt WHS institutions and processes to address GBVH. For example, in the processes to determine how many health and safety representatives (HSRs) there should be within the organization and to elect HSRs, there should be a focus on ensuring that arrangements to elect HSRs take into account the importance of addressing GBVH and that women and other people skilled in, and committed to, eliminating GBVH are elected as HSRs.<sup>33</sup>

## 1.9. Empowering workers to prevent GBVH

Some WHS statutes enable workers, or sometimes their representatives, to take direct measures to prevent GBVH. The most common measure is the right to refuse to carry out work that represents a serious danger to themselves (or to others, depending on the regime), which is a form of worker participation. The right to refuse dangerous work is a cornerstone of WHS regimes guaranteed by C155, a fundamental ILO Convention on health and safety at work.<sup>34</sup> Typically,

<sup>30</sup> See, for example, Weil (2008, 20), Walters (2006) and Gunningham (2008); see also Harter et al. (2020).

<sup>31</sup> According to R206, ratifying countries "should, as appropriate, specify in laws and regulations that workers and their representatives should take part in the design, implementation and monitoring of the workplace policy referred to in Article 9(a) of the Convention" (Para. 7).

<sup>32</sup> In contrast, in terms of WHS, direct participation by means of individual non-unionized employees engaging with managers appears to have little effect on WHS.

<sup>33</sup> In this context, the emerging literature on knowledge activism is important; see section 3.2.2.2 below.

<sup>34</sup> According to C155, workers have the right to remove themselves from a work situation which they have "reasonable justification to believe presents an imminent and serious danger to [their] life or health" without being subject to reprisals (Art. 13; see also Art. 19(f)).

when an individual worker exercises their right to refuse, workplace actors (usually an HSR and an employer representative) then try to resolve the situation to the worker's satisfaction. If they are unable to do so, the regulatory agency or government authority may be called in to rapidly decide whether the worker must carry out the work in question and/or to determine the corrective measures the organization must take to eliminate the danger. Subject to good faith, the worker is usually protected from reprisal action by the organization.

GBVH can represent the type of serious danger envisaged by the provisions on the right to refuse. For example, grave psychological injury may result from persistent and egregious sexual harassment, and this is particularly true when management refuses to acknowledge the harassment or to intervene to stop it. Similarly, when workers are subjected to repeated vexatious conduct, including unwanted physical touching in a sexual manner, and anticipate that they will soon be targeted by even more harmful forms of sexual assault, they may be entitled to refuse to work.

This form of the right to refuse to perform dangerous work is an individual right. For example, in a unionized work environment, this can represent an important safeguard for women and gender-nonconforming individuals whose safety or health is threatened by GBVH and whose concerns may not be heard by a male-dominated workers' association or by their employer.

The right-to-refuse provisions enable targets of GBVH to remain at work while their concerns regarding the danger of GBVH are addressed. Yet, in almost all legal frameworks,<sup>35</sup> targets of unendurable GBVH will have to leave work before they have any hope of redress. Even though there are several precedents in the case law, a 2023 report on the legal framework for sexual harassment at work in Quebec, Canada, recommended that the Quebec OHS Act be amended to *explicitly* state that the right to refuse to perform dangerous work can be exercised in a context of sexual violence, as targets are often not aware of this right (and neither, sometimes, are workers' associations) (Cox, Gesualdi-Fecteau and Laflamme 2023, 209).

In some countries, HSRs can exercise what effectively amount to enforcement powers. In Australia, for example, as part of a WHS issue resolution process, HSRs have the power to direct that a worker who is exposed to an immediate, imminent and serious risk to their health and safety should cease work. An HSR may also issue a "provisional improvement notice" if they have a "reasonable belief" that their organization, or a person within the organization, is contravening a provision of the WHS Act, and can require that the contravention be remedied. Both of these powers enable worker representatives to address GBVH risks (Johnstone and Tooma 2022, 198 ff.).

## 1.10. Regulatory agency and its inspectorate: Monitoring compliance and enforcement

As a recent ILO working paper pointed out, "Policies, systems and programmes designed to promote workplace health and safety (and labour laws generally) will be radically undermined if there are not adequate enforcement systems in place" (Cooney et al. 2023, 21). Most WHS regulatory regimes<sup>36</sup> mandate organization-level "self-regulation" of health and safety, but, crucially, this is backed up by external regulatory agency or government authority oversight of compliance, with standards set by the WHS statute and the regulations made thereunder. Thus, if primary prevention measures or response measures (referred to as secondary and tertiary prevention) are lacking, any person – including an individual worker or, more often, a worker representative

<sup>35</sup> One exception is the federal Australian [Fair Work Act 2009](#), under which a stop sexual harassment order may be issued if the Fair Work Commission believes that sexual harassment has occurred and is likely to continue to occur. However, this is the exception that proves the rule, as the delay before a hearing means that, by the time of the hearing, the worker has often left the job. Consequently, the worker's application will be rejected, as the fact that they have left work means that technically the harassment will not continue. See, among other decisions to the same effect, Fair Work Commission, [Mrs Chin Lien Chen Jao v. OF Resource Recovery Pty Ltd, Mr Kiernan Cook \(SH2023/19\)](#), 5 October 2023.

<sup>36</sup> In particular, those that have adopted a modern "general duty" and/or "process standard" approach to standard-setting.



– can contact the regulatory body and request that they conduct an inspection to ensure that an organization is complying with its legal obligations.

WHS inspectorates typically have broad powers to enter and inspect workplaces.<sup>37</sup> Inspections can also be initiated at the instigation of the regulator (for example, in executing a campaign to address a particular hazard); in response to reports of injury, illness or death at work; or in response to a complaint.

WHS inspectorates also usually have significant enforcement powers, most of which are well suited to primary prevention. In addition to informal enforcement measures such as advice, education, persuasion or warnings, sanction could include the power to issue statutory notices. These might require a duty holder to comply with a provision of the WHS statute within a specified time; require an organization to engage the services of a WHS health service or consultant; impose an infringement notice (sometimes called on-the-spot fines, penalty notices or tickets) on an organization or individual; or stop dangerous work until the hazard has been eliminated.

## 1.11. Legal proceedings, financial penalties and non-pecuniary sanctions

WHS regimes are aimed at ongoing prevention of work-related injury, ill health and death. In several instances, workers targeted by sexual assault, sexual harassment or sexual bullying at work have committed suicide or attempted to commit suicide as a result.<sup>38</sup>

An essential part of the WHS regime is that organizations and individuals who fail to comply with the WHS statute and regulations or who fail to prevent psychological or physical injury to workers are subject to sanctions for breaches that have exposed workers and others to risk of injury, disease or death. Typically, a breach of the legislation can occur even if no one has been injured (that is, the duties imposed on business organizations to ensure health and safety are inchoate offences). In many countries, the regulator may initiate legal proceedings against duty holders for serious breaches of the WHS legislation, which might result in the imposition, in most countries, of criminal sanctions or, in some countries, of civil sanctions. Sanctions might include financial penalties (in some countries, the maximum penalty can be as high as US\$10 million) and imprisonment for individuals.

Usually the purpose of financial sanctions is to deter the offender from further offending (specific deterrence) or to deter others from offending (general deterrence), where the purpose of deterrence is to make the cost of offending greater than the benefit.<sup>39</sup>

<sup>37</sup> See, for example, South Africa, Occupational Health and Safety Act No. 85 of 1993, section 28; Denmark, [Working Environment Act](#), last amended 2021 (No. 2062 of 16 November 2021), section 76; and Spain, [Law 31/1995 on the Prevention of Occupational Hazards](#), section 40.

<sup>38</sup> For example, in 2006, in Victoria, Australia, harassment of a 19-year-old waitress, Brodie Panlock, led to her suicide: She was subject to persistent bullying that included abusive comments to the effect that she was worthless. She was also physically covered with chocolate sauce, was spat upon and had fish oil placed in her bag. The bullying persisted for over a year and was exacerbated by the fact that she was infatuated with, and had had a prior intimate relationship with, one of her tormentors. (O'Rourke and Antioch 2016, 7)

The company was charged under OHS legislation for failing to provide and maintain a safe and healthy working environment and was convicted and fined 110,000 Australian dollars. The prosecution of Brodie Panlock's employer and the perpetrators of the harassment (her colleagues) offers an example of prosecution under the general duty provisions of OHS legislation.

<sup>39</sup> The weaknesses of financial penalties include the absence of a specific demand that the offender rectify the breach that led to the prosecution; the offender's ability, in many circumstances, to pass on the cost of the penalty to its consumers, clients or employees; and the inadequacy of fines to deter very large and well-resourced organizations. In some countries, these weaknesses are addressed by empowering courts to impose non-pecuniary sanctions. These include, for example, the court ordering that the offence be publicized by displaying its judgment at the gates of the workplace or by publishing it in a newspaper (Australia, Belgium, France and the Netherlands), on the regulator's website (Portugal) or in the State gazette (Spain). See EU-OSHA (2021, 123–124, 137).

## 1.12. Limits to non-disclosure agreements

Addressing GBVH in a WHS framework also has implications for non-disclosure agreements.<sup>40</sup> WHS regimes protect the fundamental right to life, security and dignity of human beings when they are at work. They are public order laws, generally of the strongest type of public order. As such, they have precedence over contractual agreements.

When perpetrators' employment is terminated, or when litigation between a target and perpetrator is ended by an agreement to settle, the settlement will often include a non-disclosure clause whereby the parties agree not to disclose the facts leading to the dispute. Perpetrators may then find new employment in the same field but with another organization.<sup>41</sup> In Canada, for example, litigation has occurred when a new victim reproaches the perpetrator's previous employer for putting them in danger by not disclosing the reason for terminating the perpetrator's previous employment; litigation has also arisen when a perpetrator has sued their previous employer (or former colleague) for revealing the reason for terminating the perpetrator's previous employment to protect potential future victims (Macfarlane 2020; Gray 2021).<sup>42</sup>

Because WHS laws usually have precedence over contractual arrangements, if a worker (and, in some cases, a member of the public) is currently exposed to a risk because of the perpetrator's presence in a new work environment, disclosure of the situation is not only protected by the WHS regime but mandated by it.

## 1.13. Balancing privacy of third parties against risk to workers

Workers, particularly in education, social services and health care, may be confronted with denial of information about the level of dangerousness of the individuals – students, patients, clients, etc. – with whom they work. With the “right to know” (about the risks to which a worker is exposed) as a pillar of the WHS regime, in some situations the public order nature of WHS legislation allows for balancing of third parties' right to privacy against workers' right to know the risks to which they are exposed, even if this means revealing sensitive information to them about the people they take care of.

## 1.14. Institutional capacity

Finally, addressing GBVH in a WHS framework raises questions about institutional capacity. It is known from the literature on health equity frameworks that “safety and health institutions have evolved to better meet the needs of workers from the cultural majority or normative group more than those from other social groups” (Flynn et al. 2021, 349). Feminist institutionalists have also documented how organizations produce gender differences through their structures and everyday practices (Milward, Mukhopadhyay and Wong 2015, 77). These insights contribute to understanding how, for decades, many WHS institutions have refused or omitted to address GBVH at work, even though it is clearly a serious work-related risk, in particular for women and gender-nonconforming people.

<sup>40</sup> Australia's *Sexual and Gender-based Harassment: Code of Practice* states that: “Confidentiality clauses in settlement agreements should not be used in a way that creates a WHS risk and must not be used in a way that prevents identification and management of risks to WHS” (SWA 2023, 35). For guidance, the Code refers organizations to the Australian Human Rights Commission's *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* (AHRC 2022).

<sup>41</sup> Hence, such agreements are sometimes called “pass the trash” agreements.

<sup>42</sup> See also Ontario Superior Court of Justice, *MacFarlane v. Canadian Universities Reciprocal Insurance Exchange*, 2019 ONSC 4631 (for the facts related therein).



At the same time, these insights are revealing about the need to ensure that prevention of GBVH avoids disproportionately helping members of socially privileged groups (Flynn et al. 2021).<sup>43</sup> Having underlined the considerable potential of WHS regimes in this respect, addressing GBVH within a WHS framework today implies taking stock of WHS institutions' present capacity to recognize and respond to GBVH as a serious risk for workers' health and safety with its attendant organizational and industry-level risk factors, and in turn, to offer guidance to workplace actors on doing so at a local level.<sup>44</sup> This is particularly salient in a context where WHS regimes are under-resourced and overtaxed by the proliferation of nonstandard work arrangements, as the COVID-19 pandemic recently demonstrated.<sup>45</sup>

This said, in the fight against GBVH in all walks of life, increased involvement of men has been identified as one way to broaden the struggle. In the past, men have often been overrepresented as HSRs (Messing 1998). In most countries, addressing GBVH in a WHS framework is likely to have the effect of involving more men in prevention efforts.

The lack of institutional capacity in the past underlines the importance today of legally mandated gender-responsiveness in WHS violence and harassment prevention programmes. The following two sections offer a more detailed discussion of this issue.

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<sup>43</sup> See also Cooney et al. (2023, 53): "Even those systems with strong collaborative arrangements need to consider how they can be more inclusive of non-regular employees."

<sup>44</sup> On the significant challenges in terms of institutional capacity for WHS regimes, see Smith (2023, 164–165).

<sup>45</sup> "Many countries reported a long-term decrease in resources allocated to OSH inspectors. There are also examples of inadequate enforcement powers and poor enforcement strategies, although in other countries, especially in East Asia, enforcement powers have recently been strengthened" (Cooney et al. 2023, 21).

## ► 2 Characteristics of a gender-responsive WHS approach to prevention of violence and harassment

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Over the last century, GBVH has not been understood to be within the ambit of WHS legislation (section 2.1).<sup>46</sup> Today, the need to deliberately build gender-responsive prevention of violence and harassment into WHS regimes is rooted in the portrait of the historical reluctance to consider GBVH as a work-related risk (section 2.2).

### 2.1. Historical and ongoing exclusion of GBVH from the ambit of WHS regimes

Traditionally, WHS regimes have focused on risks of physical injuries associated with men's work rather than on disease or the chronic strain injuries typically associated with women's work.<sup>47</sup> Indeed, only in recent decades has mental as well as physical health been included in WHS.

As regimes concerned with health and safety at work evolve from a technical and medical model of occupation safety and health (OSH) to a biopsychosocial model of work health and safety (WHS), risks characterized by their social dimension such as GBVH have come to the fore (Flynn et al. 2021). But even though psychosocial risks, including the risks of GBVH, fall within the scope of protection of the general-duty provisions at the heart of most countries' current WHS legislation, there is a common perception that GBVH is not a "WHS issue".<sup>48</sup>

Several factors are at play in the ill-founded but pervasive and persistent perception that GBVH is not – despite overwhelming evidence to the contrary – a work-related risk. These factors include:

- deeply engrained beliefs about violence and harassment of women being located in the private sphere and thus not constituting a legitimate subject of public regulation;
- the fact that, in addressing GBVH in industrialized countries, the focus has been on anti-discrimination laws promoting individual complaints-based regimes as a response to sexual harassment at work;
- in the case of third-party violence and harassment (TPVH) in sectors where women are predominant, such as health care, social services and teaching, the erroneous belief that women's supposedly innate nurturing capacities negate any harm to them as workers due to GBVH caused by those whom they are caring for and educating;
- in male-dominated jobs, the belief that GBVH directed towards women – and other people not conforming to masculinist and heteronormative norms – comes with the choice to work in a male-dominated sector; and
- the tenacious idea that victims of GBVH are weak and vulnerable, and therefore that men cannot be victims of GBVH.

<sup>46</sup> In the mid- to late 19th and early 20th centuries, in the industrialized world, part of the impetus for adoption of WHS legislation was the protection of women and children from long working hours. In fact, the "embodiment" of workers – the beginning of their treatment as human beings rather than as machines or commodities – is linked to protective legislation with respect to women workers. Thus, it is not really accurate to affirm that, historically, WHS legislation has not taken gender considerations into account.

<sup>47</sup> Yet mental health is specifically covered in C155 (Art. 3(e)). See also, on this topic, Messing (1998).

<sup>48</sup> For example, Belinda Smith writes that, in Australia, "the WHS regime has been very slow even to acknowledge that sexual harassment is a workplace hazard covered by the WHS laws, so it will take some time yet to develop sufficient agency awareness, skills and resources to be well-positioned to enable and enforce compliance in this regard" (Smith 2023, 164).

These factors combine with the fact that most WHS inspectorates and regulators are under-resourced and still largely focused on physical hazards; and that workers and their associations already struggle to have work-related risks (most recently, the risks associated with COVID-19) adequately addressed.

The upshot of this portrait of the historical and ongoing exclusion of GBVH from WHS regimes is that gender-responsive prevention of violence and harassment using such regimes must be constructed (not assumed) through a series of deliberate, considered, evidence-based and targeted actions.

## 2.2. The need to construct gender-responsive prevention of violence and harassment

If the need for gender-responsive prevention of violence and harassment is clear, the question, then, is how best to achieve this. There is a dearth of empirical studies about effective prevention approaches to GBVH within a WHS framework. This finding must be understood in the context of the cycle of policy design. Typically, the stages of regulatory policy design include understanding the phenomena to be regulated, and their dynamics; determining the legal framework (here, laws and regulations); developing policies to implement the legal framework; analysing whether the policies have been implemented as intended; and then, and only then, studying the effectiveness of implementation of the legal framework using the policies developed in specific contexts.<sup>49</sup>

Explicit inclusion of GBVH in the legislative framework of WHS is relatively new, as witnessed by the adoption of C190 in June 2019. And even when sexual harassment or other forms of GBVH have been formally recognized as WHS issues, WHS inspectorates have neglected to harness their inspection and enforcement powers to address them.<sup>50</sup> Policies aimed at implementing a WHS framework for the prevention of GBVH are gradually emerging; by and large, it is too early for implementation studies.

In terms of guidance material, in January 2021 the federal WHS agency Safe Work Australia published its first national guidelines on *Preventing Workplace Sexual Harassment* (SWA 2021), followed in December 2023 by *Sexual and Gender-based Harassment: Code of Practice* (SWA 2023). In November 2022 WorkSafe Victoria, historically a frontrunner in WHS as well as in gender equality initiatives, published *Work-related Gendered Violence including Sexual harassment: A Guide for Employers* (WorkSafe Victoria 2022). In Europe, in November 2020 the European Transport Workers' Federation (ETF) produced helpful guidance for the transport sector entitled *Addressing Violence and Harassment against Women in the World of Work* (ETF 2020) (see box 4). Otherwise, prevention of sexual harassment and other forms of GBVH is often subsumed in gender-neutral risk management frameworks for psychosocial risks (in Europe and in Quebec) or for violence and aggressive behaviour in general (in Canada in federal law and common-law provincial jurisdictions, and in the USA).

<sup>49</sup> Straying from this order involves running the risk that empirical research results will reveal problems with the effectiveness of the legislation but fail to identify to what extent these problems result from inadequacies in the diagnosis of the problems to be addressed by regulation; weaknesses in the legal framework itself; deficiencies in the policies developed to implement the legal framework; or inadequate implementation at the local level, thus undermining the usefulness of the legislation for purposes of public policy or law reform.

<sup>50</sup> Stewart et al. (2024, para. 18.147); see also Smith (2023, 164–165) and Cox, Gesualdi-Fecteau and Laflamme (2023).

► **Box 4. Discrimination, abuse of power relations, and gender, cultural and social norms that support violence and harassment**

The guidance issued by the European Transport Workers' Federation (ETF 2020) identifies five steps to be followed in a risk assessment to prevent violence and harassment of women transport workers. Considering discrimination, abuse of power relations, and gender, cultural and social norms that support violence and harassment, Step 3 asks (pages 31–32):

Have risks of violence and harassment, including from managers, colleagues and third-parties, been assessed for their impact on women workers arising from:

- Gender inequalities leading to sexist attitudes and unconscious bias in the workplace; cultural and social norms foster violence and harassment, leading to disrespect from customers and passengers.
- Discrimination, including multiple discrimination e.g. gender, sexual orientation, gender identity, race, religion, age.
- Risks to a woman's reproductive and sexual health e.g. provision of toilets and female facilities on transport routes or ships, awareness about menstruation/period dignity, lack of job security after maternity leave.
- Gender power differences/male dominated workplaces and lack of diversity and/or gender-balance in the workplace, and low numbers of women in senior and leadership positions.
- Persistent gender inequalities e.g. women employed in lower valued, insecure, temporary and lower paid jobs; gender pay gap exists and no action taken to reduce the gender pay gap.
- Work culture reflects a "male" toxic culture, where sexism and racism are common; where it is considered OK for jokes and banter to be sexualised.
- Work culture devalues and belittles women or other groups that do not conform to social norms of masculinity and heteronormativity (i.e. where heterosexuality and relations between opposite sex couples is the norm), affecting LGBTI people.
- A culture where "high value" employees are protected (e.g. because they are in senior and influencing positions).
- Workers and managers have not received training or guidance or leadership on what is acceptable behaviour in the workplace.

Guidance on complaints policies for sexual harassment produced by human rights institutions has often, unfortunately, monopolized the regulatory space for addressing sexual harassment. The result has been longstanding neglect of primary prevention of sexual harassment and other forms of GBVH – hence the importance of C190 in moving risk assessment to the fore.

Perhaps the most useful guidance on how to transform a WHS regulatory regime to address GBVH risks is the Respect at Work Strategy released in October 2023 by the Australian WHS regulator SafeWork New South Wales, a four-year plan for "the prevention of gender-based harmful behaviours across NSW workplaces, with an initial focus on sexual harassment" (SafeWork NSW 2023, 4). To lead implementation of the plan, SafeWork NSW has established "a dedicated team focused on addressing gender-based harmful workplace behaviours" (page 8) – one of the first initiatives of its kind. The strategy focuses on high-risk industries – namely, accommodation and food services (hospitality), healthcare, retail and construction. Each of its planned activities is

associated with one or more of four Strategic Outcomes: Educate, Capability, Action and Effective Regulation. Most importantly, the plan is based on a “Theory of Change” that “communicates the relationships between the Strategic Outcomes, and highlights the mechanisms to explain why a key activity is expected to achieve a particular Outcome” (page 22).

In the past, a theory of change has been conspicuously absent from most interventions on GBVH. This helps explain why, for example, so many interventions on sexual harassment have failed to produce their stated outcome. Typically, policies on sexual harassment prohibit sexual harassment, and in case that is not sufficient, they set out a complaints process in the event of individual occurrences. However, they fail to recognize either the ubiquitousness of sexual harassment or its deep roots in gender inequality, and they do not propose any concerted plan of action to stop it occurring.<sup>51</sup> In contrast, R206 specifies that, in the course of the risk assessment mandated by C190 (Art. 9(c)), “Particular attention should be paid to the hazards and risks that ... arise from discrimination, abuse of power relations, and gender, cultural and social norms that support violence and harassment” (Para. 8(c)). Given that GBVH is historically rooted and a deep structural issue in countries around the world, a theory of change is an essential component of any gender-responsive strategy to ensure a sound and rational relationship between actions proposed or undertaken to prevent GBVH and the desired outcome of transformation of the status quo.<sup>52</sup>

### 2.2.1. Linking actions with outcomes to provoke change

The WHS regime itself offers one very specific way of linking actions with outcomes to provoke change, in the form of a risk assessment process that includes a worksite analysis to assess hazards. Risk assessment should consider the industry, environmental and individual risk factors for sexual harassment and GBVH. Indeed, if gender inequality is the root cause of GBVH, in each organization there is a specific constellation of industry-level environmental and individual factors that increase the risk and drive the occurrence of sexual harassment and other forms of GBVH. For an example of some of the drivers of sexual harassment at work, see box 5.

#### ► Box 5. Drivers of sexual harassment at work

While recognizing the role of gender inequality as a root cause, SafeWork New South Wales lists factors that increase the risk and occurrence of sexual harassment (SafeWork NSW 2023, 11). These include:

- poor workplace cultures where inappropriate and disrespectful behaviours are accepted
- highly hierarchical workplaces
- limited understanding of the nature and causes of sexual harassment
- work that involves a high-level of contact with third parties (customers, clients and patients)
- barriers to reporting or where reports are not taken seriously
- isolated or remote work
- lack of confidence and trust in the workplace policies and processes
- male-dominated industries
- irresponsible use of alcohol or drugs

<sup>51</sup> See generally, on this point, Smith (2023, 152–153).

<sup>52</sup> It should be noted that, according to the ILO *Guide on Convention No. 190*, the principle of gender-responsiveness involves “intentionally employing gender considerations to affect the design, development, implementation and results of programmes and strategies, policies, laws and regulations” (ILO 2021, 13).

- lack of diversity.

A more extensive discussion of the drivers and causes of sexual and gender-based harassment is given in Safe Work Australia's Code of Practice (SWA 2023, 17). For a synopsis, see the checklist in WorkSafe Victoria (2022, 10).

### 2.2.2. Construction of knowledge about GBVH

In December 2023 Safe Work Australia produced a well-researched and comprehensive 42-page model Code of Practice on sexual and gender-based harassment (SWA 2023). The Code applies to a wide range of gender-based harmful behaviours, including sexual harassment, sex- or gender-based harassment, hostile working environments, discrimination, gendered violence, misgendering or deadnaming, and intersectional harassment.<sup>53</sup> The Code states that:

Some workers may be at greater risk because of their sex, gender, sexuality, age, race, migration status, disability and literacy. The risk of experiencing harm rises when a person faces multiple forms of harassment or discrimination. Workers who experience multiple forms of harassment and discrimination may be less likely to report sexual harassment concerns or incidents. (SWA 2023, 20)

In this vein, construction of knowledge about GBVH in the world of work is ongoing. Local knowledge is everything. The “how” and the “who” are as important as the “what”. Thus, it is crucial to involve and consult people belonging to groups at risk – young women, women living with a disability, migrant women, racialized women, people of diverse gender and sexual orientation, etc. – at all stages of risk assessment. Not only are these groups at high risk of being targeted, but the systemic obstacles they face in obtaining employment in the first place may also make them even more reluctant to report GBVH than other targets. In particular, the increased risk and particular manifestations of GBVH for women in precarious or insecure employment (for example, agency, casual, migrant and gig workers) or for women working in contractual chains (including supply chains and franchise arrangements) are often overlooked, so these groups of women, among other people at risk, should be involved in the risk assessment process.

<sup>53</sup> These terms are defined in the Code of Practice as follows (SWA 2023, 40):

**Gendered violence**

Gendered violence is a broad term that captures any behaviour directed at any person or that affects a person because of their sex, gender or sexuality, or because they do not adhere to socially prescribed gender roles. For example, this includes violence targeted at someone because they identify as lesbian, gay, bisexual, transgender, intersex, queer or asexual (LGBTIQ+).

Socially prescribed gender roles are society's traditional ideas about how men and women should look or act, what characteristics they should have, or their roles in the workplace, home or public life.

**Misgendering or deadnaming**

Purposely misgendering, focusing on a person's birth-assigned sex or purposely deadnaming a person (deadnaming means using a person's former name without their consent) can be a form of discrimination or harassment if it is done in a manner that indicates hostility.

**Intersectional harassment**

Intersectional harassment is when someone experiences harassment or discrimination based on multiple aspects of their identity, such as their race, gender, disability, sexual orientation, or social class.

### 2.2.3. Gender-responsive and inclusive approaches to consultation of workers

As to *who* should be involved in risk assessment, the Safe Work Australia Code of Practice states:

You should consider whether your consultation mechanisms are accessible to all workers, particularly those who may be at greater risk of sexual and gender-based harassment, and whether you need additional consultation mechanisms to ensure workers have a range of ways they can choose to contribute their views and concerns. (SWA 2023, 12)

According to the Code (pages 7–8), “Factors which may increase the likelihood of a worker experiencing sexual or gender-based harassment” include that they are new to the workforce; under 30 years of age; LGBTIQ+ workers or workers who do not conform to traditional gender stereotypes; Aboriginal or Torres Strait Islander workers; workers with a disability; workers from culturally and linguistically diverse backgrounds; migrant workers or workers holding temporary visas; and workers in insecure working arrangements (such as casual or labour hire).

El Salvador’s WHS regime has a provision that recognizes each worker’s right to effective equality of opportunity and treatment in the performance of their work, in so far as it is possible, taking into account conflict between each worker’s family and professional responsibilities. Interestingly, this right also applies with respect to their participation in the WHS regime. This gender-responsive and inclusive approach to consultation of workers is particularly important with respect to prevention of GBVH.<sup>54</sup>

### 2.2.4. Gender-responsive and inclusive approaches to risk identification and control

Turning to the question of *how*, the experience of targets of sexual harassment is that it is notoriously difficult to speak up about or report on sexual harassment. Because sexual harassment and other forms of GBVH are risks that are not as readily identified as traditional WHS risks, a gender-responsive approach to risk identification should consider a range of approaches such as:

- safety walks, audits and mapping
- anonymous worker surveys<sup>55</sup>
- focus group discussion
- consultation with health and safety representatives and WHS committees
- participatory research.

<sup>54</sup> El Salvador, [Decreto Legislativo núm. 254 que dicta la Ley General de Prevención de Riesgos en los lugares de trabajo](#), 21.01.2010, Diario Oficial (Separata), 2010-05-05, núm. 82, Art. 3(7):

Todo trabajador y trabajadora tendrá derecho a la igualdad efectiva de oportunidades y de trato en el desempeño de su trabajo, sin ser objeto de discriminación y en la medida de lo posible, sin conflicto entre sus responsabilidades familiares y profesionales, esto incluye, entre otros aspectos, tomar en cuenta sus necesidades en lo que concierne a su participación en los organismos que se crean para la aplicación de la presente ley.

[Translation by DeepL.com (free version), revised by author:

Every worker shall have the right to effective equality of opportunity and treatment in the performance of their work, without being subject to discrimination and, as far as possible, without conflict between their family and professional responsibilities; this includes, among other aspects, taking into account their needs with regard to their participation in the bodies created for the implementation of this law.]

<sup>55</sup> See, for example, the online Belgian CHAT (Combat Harassment Tool) survey. According to the survey website, CHAT consists of an online questionnaire completed anonymously by a minimum of 15 employees. Based on this questionnaire, the employer receives a report which identifies the presence of violence, bullying and inappropriate sexual behaviour. Risk factors for such unwanted behaviour, the type of possible perpetrator and any resulting burnout symptoms are also addressed. The CHAT survey tool was designed at KU Leuven to offer organizations a rapid and informal basis on which to discuss and address undesirable behaviour at work. More information on the survey is available (in Dutch) on the CHAT website.



The Safe Work Australia Code of Practice adds to this list of consultation mechanisms: “culturally safe consultation mechanisms to suit your workplace” and “translated materials to meet the language needs of workers and interpreters to support consultation” (SWA 2023, 12).

In order to be gender-responsive, surveys on well-being or problematic behaviours at work should include specific questions on inappropriate sexualized behaviour at work (VEOHRC 2022, 16), and all workers should be asked to respond to the survey. Surveys should not ask respondents to identify themselves as having experienced “sexual harassment” as such: research has consistently shown that targets will answer “no” to questions expressed in such terms, but will answer “yes” if surveyed on *descriptions* of behaviours that constitute sexual harassment (Wood 1994; McDonald 2011).

Finally, the number of formal reports of sexual harassment is by no means an accurate record of the incidence of sexual harassment. As Safe Work Australia advises organizations (SWA 2023, 18):

You should not rely only on formal reports as a lack of reports does not mean that sexual harassment is not happening. ... It may simply mean that people are not reporting sexual harassment because they do not know how, do not feel it is serious enough or do not feel safe and supported to do so.

To illustrate how risk identification should be conducted, the Safe Work Australia Code advises organizations to consult workers; collect and review data and information; consider work tasks and the design of work; consider the physical work environment (see box 6); observe and consider work and behaviours; consider workforce structure, demographics and culture; and have a reporting mechanism and encourage reporting (SWA 2023, 14–19).

► **Box 6. Considering the physical work environment to identify risks of GBVH**

Under the heading “Consider the physical work environment”, the Safe Work Australia Code of Practice offers the following advice (SWA 2023, 16):

Walk through and assess the physical work environment to identify areas where there may be greater risks. For example:

- Are there areas with limited natural surveillance or inadequate lighting (e.g. store-rooms, stairwells or facilities for workers such as laundries and gyms)?
- Are there areas that restrict movement (e.g. where workers would need to touch each other to move past) or prevent workers maintaining their personal space?
- Are workers working in isolated areas away from other workers or with limited access to help and support (e.g. in patients’ or clients’ homes)?
- Are there posters or pictures on display that may make workers uncomfortable, constitute sexual or gender-based harassment, or create a culture that makes harassment more likely (e.g. involving sexism, harmful gender stereotypes, sexual innuendo, objectification or nudity)?
- Are workers in close proximity to clients, customers, or other third parties, including the public? Are amenities, such as bathrooms, in an isolated location or do workers share amenities with customers?
- Are workers required to change clothing or shower at work? If so, are there risks associated with the facilities provided?
- Are workers working from home or other locations which may allow covert sexual and gender-based harassment to occur online or through phone communication?



- Are there any risks associated with worker accommodation (e.g. is it secure, does it provide adequate privacy and are workers required to use communal facilities such as showers and laundries)?
- Consider the online working environment if relevant and how work is conducted using technology. Consider the risks of sexual and gender-based harassment occurring through the use of technology such as phone, email and online platforms.

To control risks, Safe Work Australia proposes looking at the interaction of psychosocial hazards; the design of work, including job demands and tasks; systems of work, including how work is managed, organized and supported; the design, layout and environmental conditions of the workplace; worker accommodation; plant (machinery, equipment, appliances, tools), structures and substances used at work; the way workers interact with each other and other persons at work; and the information, training, instruction and supervision provided to workers regarding GBVH (SWA 2023, 22–32).

Safe Work Australia's Code of Practice also offers advice on investigating and responding to reports. It notes that an "investigation may itself introduce WHS risks" and proposes that organizations take a trauma-informed approach, meaning that "workplace systems recognise and acknowledge that worker experience of trauma may impact how those experiencing trauma from sexual and gender-based harassment or with a history of trauma interact with systems and processes" (SWA 2023, 35).

When a previous risk assessment has already been carried out, it is important to ensure that the risk of GBVH, including GBVH from third parties (clients, passengers, patients, students, etc.), has been considered. In male-dominated work environments, women and other gender-non-conforming people may be exposed to a hostile work environment; a previous risk assessment may have overlooked this risk, particularly if there are few or no women employed.

Furthermore, organizational change may affect exposure to the risk of GBVH. In the transport sector, the European Transport Workers' Federation points out that "[c]hanges in work organisation where ticket collection or checking is carried out alone rather than in pairs makes women particularly vulnerable to sexist remarks and sexual assault, and this is particularly the case for black and minority ethnic women" (ETF 2020, 7).

Organizational inertia with respect to well-known manifestations of gender inequality may also be an indicator of increased likelihood of exposure to GBVH. For example, when a gender pay gap exists and no action is taken to remedy it, this may indicate that women are systematically devalued and thus put at greater risk of GBVH.

It should also be noted that the same risks may have different or heightened effects on women (and sometimes on people who are sexually or gender-diverse) as opposed to men. For example, while working alone, particularly at night, constitutes a risk factor for violence for all workers, there is an increased risk of GBVH especially for young women workers. In the retail sector, an investigation into prevention of sexual harassment at Bakers' Delight (and its franchises) in Victoria, Australia, concluded that prevention measures should include "ensuring that there are two staff working at all times, typically with an 18-year-old or older person working the closing shift" (VEOHRC 2022, 16).<sup>56</sup> Safe Work Australia reports that "attendance at conferences, excursions and social events as part of work duties, including overnight travel" is a known hazard for women workers (SWA 2023, 16). In the transport sector, "night shifts in isolated areas may result in women becoming more vulnerable when travelling to and from work" (ETF 2020, 12).

<sup>56</sup> The investigation conducted by the Victorian Equal Opportunity and Human Rights Commission was into prevention of sexual harassment. However, its findings are relevant to prevention within a WHS framework.

Finally, in general, women are less accepting than men of sexualized behaviour such as sexual banter, displaying pornographic material or exhibiting graphic photos on mobile phones. Women also tend to regard inappropriate sexualized behaviour as more serious (Berdahl and Moore 2006; Nelson, Halpert and Cellar 2007). To capture exposure to risk for all workers, gender-responsive risk assessment should include women in all their diversity in the identification of risks and also take into account their perspective in the effective control of risks.

- In sum, to determine whether an existing or ongoing risk assessment responds to GBVH, it is necessary to ask the following questions:
- Does the risk assessment include the risk of GBVH, including third-party GBVH?
- Does the risk assessment consider that the same risks may have a different impact on men and women, as well as among different groups of women?
- Does the risk assessment consider that women may consider certain behaviours a risk when men do not?
- Have all workers, and in particular workers with precarious or insecure employment or in fissured work arrangements, been included in the risk assessment process?
- Has the risk assessment process been conducted using a variety of approaches to risk identification in such a way that workers feel safe disclosing the GBVH that they and others have experienced, as well as the situations where they feel at risk?
- Have all workers, and in particular workers with precarious or insecure employment or in fissured work arrangements, been included in determining the control measures that are appropriate to eliminate or reduce exposure to situations that put them at risk of GBVH?
- Have all workers, and in particular workers with precarious or insecure employment or in fissured work arrangements, been included in reviewing and revising the control measures adopted to prevent GBVH?
- Does a theory of change link measures to control risk factors and other planned actions and activities in a prevention plan with their desired outcome?
- Have gender inequality and gender norms – as well as the specific ways they are manifested within an organization (sex-segregated job titles and job duties, low diversity, overrepresentation of men in management positions, etc.) – been acknowledged as the root cause of GBVH?

## ► 3 Workplace risk assessment

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As previously explained, risk assessment is key to effective prevention. Specifically, the term “risk assessment” is understood here as referring to a process of *global* risk assessment and control throughout the organization, comprising the following five stages:<sup>57</sup>

1. Hazard identification
2. Risk assessment (evaluation of the seriousness of the risk and who might be harmed)
3. Implementation of solutions to eliminate or mitigate the risks
4. Monitoring
5. Review

### 3.1. The need for a provision in WHS law on gender-responsive risk assessment

Legal obligations are an important precondition for effective organizational action on prevention of GBVH (McDonald and Charlesworth 2019). While guidance material and tools are essential to inform organizational actors about how to carry out gender-responsive risk management, a precondition for their uptake in local WHS structures is that the law requires the organization to take action in this respect.

Empirical evidence suggests that guidance and tools on gender-responsiveness are insufficient to ensure uptake of a gender-responsive approach to risk assessment at the level of the organization, or even at the level of the regulator and inspectorate. A key lesson of the broad movement beginning in the 1980s to a more responsive approach to “regulation” has been that, in developing legal rules providing guidance to duty holders and in inspection and enforcement, regulators need to be “responsive” to the characteristics of regulated organizations, and especially to their motivations and efforts to comply. Virtuous organizations will comply voluntarily, and guidance can affirm and support their commitment and efforts to comply, and provide examples of better practice; “middle-of-the-road” firms need a push and a roadmap; and recalcitrant organizations need to be exhorted, perhaps even coerced, to comply by regulators who are able to use guidance to show what compliance entails, and to make judgements about the extent of compliance.

This approach is institutionalized in the general principles of contemporary WHS regimes: universally applicable and briefly stated general principles are promulgated in the legislation, and more detailed and flexible guidance material is developed for particular hazards and/or specific sectors. For gender-responsiveness to be considered a universally applicable principle, it should be enshrined in law. In society in general,

sexual violence against women is to a large extent condoned, normalised, denied and recast as acceptable, and rests on the assumption that men have sexual rights and privileges that allow submission of women and children. The net result is the social and cultural stereotyping, marginalisation and silencing of victims of [sexual violence]. (Mercer and Madsen 2015, 15)

<sup>57</sup> Based on EU-OSHA (2002, 2).

The subjugation of victims of sexual violence at work is further exacerbated by the fact that, in a work context, targets' capacity to flee GBVH by leaving their jobs is constrained by their reliance on their income.

Because of pervasive beliefs and stereotypes about the nature of GBVH and the people who are targeted by it, prevention of GBVH will be systematically marginalized and overshadowed by competing priorities – unless, that is, it is purposely centred as a priority. To date, without an explicit legal obligation to do so, efforts to centre gender as a priority have met significant obstacles. In some jurisdictions, such as those of Belgium and Quebec, Canada, prevention of GBVH can be found in legal frameworks to manage psychosocial risks, but preliminary evidence suggests that sexual harassment is often marginalized within such management frameworks (Cox, Gesualdi-Fecteau and Laflamme 2023, 192–227; Hellum 2023; Garcia, Hacourt and de Thomaz 2006, 42–44). In the same vein, it seems that significant measures are required to ensure that regulators prioritize GBVH in their implementation of these frameworks.

By way of illustration, in 2017 Belgium's WHS regulatory body published a 44-page guide to the prevention of psychosocial risks at work (SPF Emploi 2017). Sexual harassment is mentioned just twice, once as a behavioural symptom (*symptôme comportemental*) of *exposure* to psychosocial risks and once with moral harassment in a list of brief examples of how interpersonal relationships at work (*relations interpersonnelles au travail*) may produce negative impacts on health. Analysis of Quebec's regime came to similar conclusions, with sexual harassment subsumed within the notion of psychological harassment and no attention paid to identifying the industry, organizational and environmental risks specific to sexual harassment (Cox, Gesualdi-Fecteau and Laflamme 2023, 192–227).

Prevention of GBVH can also be located in general violence and harassment prevention policies, as is often the case in Canada and the United States. Again, preliminary evidence indicates that the gendered dimension of certain kinds of violence and harassment is often marginalized, buried or overshadowed in general policies on violence and harassment.<sup>58</sup>

The same challenges arise in measures to prevent third-party violence and harassment (TPVH). Women workers are often disproportionately affected by TPVH, yet in the past this type of violence has often been neglected by WHS regimes. The European social partners have called not only for specific guidance on TPVH but also for improved guidance on gender-responsiveness (Pillinger 2023, 11). Here again, without structured attempts to reverse the trend, prevention of GBVH is likely to be marginalized.

This paucity of guidance and tools dedicated to prevention of GBVH is an eloquent argument for the necessity of a legislative framework for gender-responsive risk assessment and control.<sup>59</sup>

### 3.2. Other important WHS mechanisms for preventing GBVH

Risk assessment is only one part of a WHS regulatory regime and, more specifically, systematic WHS management. All the characteristic features of a WHS regime described earlier can contribute to prevention of GBVH. In particular, WHS mechanisms that can contribute to prevention of

<sup>58</sup> There is a sole mention of sexual violence in Canada's [Work Place Harassment and Violence Prevention Regulations](#) (SOR/2020-130), in section 36 (on reporting). See Pillinger (2023).

<sup>59</sup> As described in section 2.2, there is one helpful example of a strategy to transform a WHS regulatory regime to address GBVH risks: the four-year plan recently launched by SafeWork New South Wales for “the prevention of gender-based harmful behaviours across NSW workplaces, with an initial focus on sexual harassment”, with its dedicated team focused on addressing gender-based harmful workplace behaviours; see SafeWork NSW (2023) and the associated webpage “[Respect at work](#)”.

GBVH and control of risks that arise from discrimination, abuse of gender power relations and gender norms at work include:

- Information
- training within organizations
- training of the inspectorate
- co-enforcement models (potentially).

These points are discussed in the following sections.

### 3.2.1. Information

Information about potential risks for sexual harassment and other forms of GBVH at work is a powerful tool. Given that part of the difficulty in preventing GBVH lies in the fact that it is taboo or, as some authors have described it, “unspeakable”, information on the risk of GBVH is extremely relevant to prevention.

Receiving authoritative information about the risk of GBVH normalizes the issue and suggests to workers, at least initially, that, if they are targeted by harmful GBVH behaviour, it is not their fault. It can also enable them to name the behaviour, increase their awareness of measures taken to reduce exposure to risk, and encourage them to participate in reviewing these measures.

Information on the risk of GBVH helps workers, or their representatives, to request prompt action by the organization early and, in this way, assists organizations in addressing offensive behaviour early. Reporting of sexual harassment and other forms of GBVH is notoriously difficult, yet crucial to its eradication. Information on how to react, how to report GBVH or who to talk to about it, as well as how to obtain support, is also important.

Finally, information pointing out that GBVH results from gender inequality and discrimination represents another way of recognizing the systemic nature of these phenomena and offers organizations an opportunity to take a stand against it.

### 3.2.2. Training within organizations

Training is an essential component of WHS regimes.<sup>60</sup> Organizations generally have a duty to train workers about the hazards to which they are exposed. WHS regimes generally propose specific training for health and safety representatives (HSRs) and for members of health and safety committees.

#### 3.2.2.1. Organizations’ duty to train workers on GBVH

In the case of organizations’ duty to provide training on GBVH, however, just as in the complaints-based regimes and organizational policies on sexual harassment of the past few decades, conventional sexual harassment training has generally proved to be dismally ineffective in actually diminishing sexually harassing behaviours at work. Moreover, if men or others react negatively (there is a backlash), particularly in male-dominated work environments, it can make things worse for potential targets, such as women and other people at risk (Cortina and Areguin 2021, 298; Cox, Gesualdi-Fecteau and Laflamme 2023).

<sup>60</sup> See, by analogy, Bluff (2019). See also C155, Art. 19(d) and C190, Art. 11(b).

Nevertheless, peer-to-peer training on prevention of GBVH is promising (see box 7), as is equipping bystanders to intervene to identify GBVH and support targets.<sup>61</sup> In general, participatory approaches to training on sexual harassment are more effective than top-down ones; again, such approaches are entirely compatible with the participatory approach associated with WHS.

► **Box 7. A worker-led peer education initiative in the California janitorial industry**

The Sweeping Change project is a “survivor- and worker-led peer education approach for confronting workplace sexual harassment” in the California janitorial industry. The project involves the participation of *promotoras* (female janitors acting as peer educators) and *compadres* (male janitors engaged in efforts to confront sexual harassment).

Collaborative research conducted on the project (West, Pinto and Wagner 2020) reported that:

(1) Sexual harassment has differential impact within this workforce. In particular, women janitors are more likely to experience unwanted sexual behavior than men; they are also much more likely to be targeted by supervisors and to switch jobs due to harassing behavior. (2) Silence around the issue is enforced by the behavior of supervisors, coworkers, and other actors, along with broader power dynamics and more diffuse elements of workplace culture. These conspire to create an environment in which those targeted report working in fear and grappling with trauma alone. (3) Many survivors do not trust existing channels for reporting and responding to sexual harassment. Building worker leadership and cultivating relationships of trust in confronting sexual harassment can help to break that silence and shift workplace practices and culture.

Hence, as the report explains, in 2019 the Janitor Survivor Empowerment Act (AB 547) was adopted:

This legislation requires that janitorial services vendors fulfill the employee training requirement by using specified organizations that provide qualified peer trainers. Further, it mandates the use of a training curriculum developed by the UC Berkeley Labor Occupational Health Program (LOHP) with the support of janitor *promotoras* and other members of the Ya Basta! Coalition; includes other provisions that set standards for these trainings; and stipulates additional regulations around subcontracting in the industry. (page 14)

The report notes that:

The peer education approach has been effective in tackling sensitive issues, as people often find it easier to relate to peer educators with shared background, culture, and language. The logic of what makes peer education approaches effective for healthcare also echoes principles that are familiar to the labor movement writ large – solidarity, mutual aid, and leadership development. (page 16)

### 3.2.2.2. Training of HSRs: A GBVH-centred approach to knowledge activism

Training of HSRs and members of health and safety committees is an important component of WHS. Training is vital to overcoming the historical tendency of WHS regimes to exclude GBVH as a work-related risk. In this context, the emerging concept of “knowledge activism” is particularly well suited to the feminist principles of agency and empowerment. In general, the most effective worker representatives (HSRs or health and safety committee members) are workers who actively, and independently of management, pursue specialized legal and technical knowledge and information, and use this knowledge to “identify hazards, to assess risk, and most significantly, to

<sup>61</sup> On the role of bystanders, see Hershcovis et al. (2021).



strategically and tactically achieve changes” (Hall et al. 2016a). They emphasize their role as proactive representatives of workers, independent of management, and adopt strategies that combine independent collection and use of knowledge to develop worker-centred understandings of working conditions in order to persuade and occasionally pressure management to achieve better WHS outcomes (Hall et al. 2016a, 2016b; Ollé-Espluga et al. 2014).

### 3.2.3. Training of the inspectorate

Sections 1.10 and 1.11 of this report described the vital role of the regulatory agency and its inspectorate in monitoring compliance with and enforcement of WHS obligations in organizations. It follows that inspectorates must be equipped to advise organizations and monitor their compliance with respect to GBVH. Indeed, R206 (Para. 20) states that:

Labour inspectors and officials of other competent authorities, as appropriate, should undergo gender-responsive training with a view to identifying and addressing violence and harassment in the world of work, including psychosocial hazards and risks, gender-based violence and harassment, and discrimination against particular groups of workers.

For many inspectors, this will be a new skill set, just as dealing with psychosocial risks was, and continues to be, in many Member States. The ILO has a unique role to play in terms of leadership and capacity-building in monitoring the gender-responsive component of prevention of violence and harassment.

The ILO recently produced *Guidelines on General Principles of Labour Inspection*, which give guidance to Member States on how to comply with the various ILO Conventions and Recommendations on labour inspection (ILO 2022b).<sup>62</sup> The *Guidelines* specify that all labour inspectors should be provided with significant training (section 4.4.6), in particular on the substance of WHS legal obligations and the requirements they are seeking to enforce; the extent of their legal powers and responsibilities; and how to deal and communicate with employers and workers. This guidance could be further developed to recommend specialist GBVH units within the WHS inspectorate, and GBVH training for all inspectors, with advanced training in inspection and investigation of GBVH issues for members of the specialist unit.

The ILO also recently produced a revised “Curriculum on Building Modern and Effective Labour Inspection Systems”, which draws upon the ILO’s experience in supporting inspector training needs in Member States to update previous capacity-building materials (ILO 2022a). In light of C190 and the Domestic Workers Convention, 2011 (No. 189), the curriculum adds new modules on non-discrimination (Module 13), [ensuring compliance with legislation on psychosocial risks](#) (Module 14), inspection actions to deal with psychosocial risks (Module 15), and compliance with legal provisions in the domestic work sector (Module 16). The introduction to the curriculum mentions new modules to address violence and harassment, but no other details are provided; presumably this material is included with the training on psychosocial risks.

<sup>62</sup> Section 4.4 of the document addresses the “training of labour inspectors” and specifies that each labour regulator should draw up and develop a training policy and programme based on a previous analysis of training needs and resulting in a training curriculum. It recommends that the labour inspectorate should have access to high-quality training facilities, “such as their own national school, or structural collaboration with universities and/or specialized institutions” (4.4.1). Member States must make adequate resources available for the design and implementation of budgeted national training programmes to upgrade technical skills and to enhance the soft skills necessary to work constructively with workers and employers in often difficult and stressful situations (4.4.2). The *Guidelines* propose that initial training should have both a theoretical and a practical component, and they specify that the minimum content of the theoretical training should include:

functions, powers and duties of inspectors; extensive knowledge covering the relevant technical and regulatory framework that falls under the mandate of the labour inspectorate; labour inspection and labour administration systems; developments in the labour market, including emerging trends and categories of workers; standard operating procedures; report writing; enforcement and sanctioning measures and procedure; interview skills; and conflict and stress management. (4.4.4)

The practical component should include visits, with a more experienced labour inspector, to workplaces in different sectors.

A siloed approach in which issues for women are sidelined in anti-discrimination regimes with lofty – and worthy – ideals but no monitoring or enforcement has hampered the realization of women's right to equality. And as was shown in section 2 above, in the absence of specific guidance on gender-responsiveness, prevention of sexual harassment and other forms of GBVH in psychosocial risk management frameworks has led to gaping omissions or serious neglect of the specific risk factors for GBVH.

In its new curriculum (ILO 2022a), the ILO should model treating GBVH as a work-related hazard in its own right, while at the same time recognizing how gender inequality is at the root of GBVH. Indeed, breaking down the legal and regulatory silos (equality and non-discrimination legislation, WHS, etc.) is a critical step towards realizing women's – and other at-risk people's – right to a world of work free from GBVH.

### 3.2.4. Co-enforcement models

Co-enforcement models in which women's and other community groups contribute to training and even response, for example, in cases of domestic violence illustrate how institutional capacity can be enriched by nontraditional WHS actors.

Domestic violence at work policies have often involved collaboration between women's shelters and organizations. Vodaphone's "Recognize, Respond and Refer" policy on domestic violence is an excellent example of this type of collaboration.<sup>63</sup> In Canada, Quebec's regulatory body also refers organizations to community resources for training and advice on prevention of domestic violence at work, as well for individual risk assessment in case of disclosure of a situation of domestic violence by an individual worker (Cox and Ederer 2021).

These types of initiatives could potentially be expanded to bring women's groups and other community groups into the workplace for training and information on a range of issues, including consent, sexual and gender diversity, and the intersections between sex discrimination and harassment and sexual harassment. This would help garner trust for institutional policies on GBVH and related topics.

<sup>63</sup> See Vodaphone (2020) and the associated webpage "[Domestic violence and abuse](#)".



## ► 4 Integration of equality and non-discrimination legislation and WHS legislation

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As discussed in section 2.2 above, gender inequality is the root cause of GBVH. In this sense, and from the perspective of *preventing* GBVH, equality and non-discrimination legislation (by promoting women and other people's equality rights) and WHS legislation (by eliminating at source risks for health and safety arising from GBVH) both contribute to the common goal of realizing gender equality.

El Salvador's legislation folds gender equality principles directly into its WHS regime.<sup>64</sup> Australia, meanwhile, has taken a dual approach, importing the positive duty to prevent harm that underpins WHS regimes into its Sex Discrimination Act and, at the same time, addressing GBVH within its general WHS regimes (Smith 2023, 162).<sup>65</sup> Following a similar dual approach, South Africa's Employment Equity Act states that harassment of any employee, including on the grounds of gender, sex or sexual orientation, is prohibited,<sup>66</sup> while also addressing violence and harassment in its Occupational Health and Safety Act. Issued under the Employment Equity Act, its Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace bridges the two regimes, indicating that employers should take "proactive and remedial steps to prevent all forms of harassment in the workplace", including "an assessment of the risk of harassment that employees are exposed to while performing their duties".<sup>67</sup>

That said, however, from the point of view of organizations and workers, equality and non-discrimination legislation and WHS legislation interact, often overlap, and may contain parallel but inconsistent obligations with respect to GBVH and its prevention. It is important to ensure that interactions between these two regimes – in conjunction with their interactions with other applicable legislation, including laws relating to employment standards and workers' compensation – reinforce, rather than undermine, the protection that each regime is designed to offer to workers at risk of GBVH. This is part of the integrated approach put forth by C190 as part of its Core Principles (Art. 4(2)).

The following sections examine some of the ways in which equality and non-discrimination legislation and WHS regimes interact (the list is not intended to be exhaustive).

<sup>64</sup> El Salvador, [Decreto Legislativo núm. 254 que dicta la Ley General de Prevención de Riesgos en los lugares de trabajo](#), 21.01.2010, Diario Oficial (Separata), 2010-05-05, núm. 82. Art. 2 sets out the first guiding principle of the WHS regime as follows:

Principio de igualdad: Todo trabajador y trabajadora tendrá derecho a la igualdad efectiva de oportunidades y de trato en el desempeño de su trabajo, sin ser objeto de discriminación por razón alguna.

[Author's translation:

Principle of equality: Every worker shall have the right to effective equality of opportunity and treatment in the performance of their work, without being subject to discrimination for any reason whatsoever.]

Art. 7 then explains that psychosocial risk is to be understood as:

Aquellos aspectos de la concepción, organización y gestión del trabajo así como de su contexto social y ambiental que tienen la potencialidad de causar daños, sociales o psicológicos en los trabajadores, tales como el manejo de las relaciones obrepatronales, el acoso sexual, la violencia contra las mujeres, la dificultad para compatibilizar el trabajo con las responsabilidades familiares, y toda forma de discriminación en sentido negativo.

[Author's translation:

Those aspects of the design, organization and management of work, as well as its social and environmental context, that have the potential to cause social or psychological harm to workers, such as the management of labour-management relations, sexual harassment, violence against women, difficulty in reconciling work and family responsibilities, and all forms of detrimental discrimination.]

<sup>65</sup> Australia, [Sex Discrimination Act 1984, amended 2021 and 2022](#).

<sup>66</sup> South Africa, [Employment Equity Act No. 55 of 1998](#), section 6(3).

<sup>67</sup> South Africa, Department of Employment and Labour (2022, section 8.1). For a more in-depth analysis of South Africa's approach, see ILO (2024, 50–51, 76–78).

## 4.1. Responding to GBVH

WHS regimes often suggest that adopting a policy on GBVH helps to “set clear expectations about behaviours at the workplace and during work-related activities. It can provide important information for workers, supervisors and managers” (SWA 2023, 29). A policy prohibiting GBVH at work and setting up a complaints procedure is a crucial step in establishing that certain kinds of behaviour are no longer accepted (Smith, Schleiger and Elphick 2019; Smith 2023). However, whereas WHS regimes aim to minimize the possibility that GBVH occurs (prevention), complaints policies aim to minimize the risk of harm from it once it has occurred (response).

Equality and non-discrimination legislation will often contain a requirement that the organization adopt a policy on sexual harassment, while WHS regimes (or employment standards regimes) will often require a reporting mechanism. In this sense, there is often overlap between the two.

Importantly, WHS prevention policies on GBVH should be developed in consultation with workers and their representatives.<sup>68</sup> In contrast, policies under equality and non-discrimination legislation are often developed by the organization, and if consultation of workers or their representatives does occur, it may be of a token kind, not actually contributing to the substance of the policy (and therefore its legitimacy).<sup>69</sup> Further, lessons from the past reveal that, by themselves, organizational policies on sexual harassment, often adopted at the behest of equality and non-discrimination legislation, are *not* effective in preventing sexual harassment (see section 1.8.2). Indeed, such policies can serve to deflect organizations’ responsibility when sexual harassment has occurred but not been reported (Cox and Brodeur 2020; Roscigno 2011). It is, therefore, important to avoid placing too much emphasis on policies on sexual harassment, especially if they are made in response to equality and non-discrimination legislation and with inadequate consultation, or are of the cookie-cutter “[Insert name of organization here]” variety. Nevertheless, referring to model policies developed by human rights agencies or other equality prevention groups can be helpful in coordinating efforts to develop a GBVH policy under WHS.

The broad definition of GBVH in C190 often means that a sexual harassment policy will have to be expanded to cover all forms of GBVH. In Australia the 2023 Code of Practice on Sexual and Gender-based Harassment (SWA 2023) covers a far broader scope of behaviour than the previous guidance material on preventing sexual harassment.<sup>70</sup> South Africa has adopted a different approach. In 2022 it adopted a global Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, which contains several pages of specific provisions both on sexual harassment and on racial, ethnic or social-origin harassment (South Africa, Department of Employment and Labour 2022). Although the Code is adopted under employment equity legislation, it refers to and offers guidance on the implementation of the Occupational Health and Safety Act. In any case, the main point is that the relevant policies cross-reference each other as well as the related guidance on psychosocial risk management.

In conclusion, policies on GBVH can be useful to express top-management commitment to eliminating GBVH, especially if they are developed after extensive consultation with workers, draw on the best model policies, and are not used by management to deflect legal responsibility or for cosmetic compliance purposes. However, it will be clear from earlier discussions (see sections 1.1 and 1.8.2 above) that even excellent GBVH policies on their own will not have much, if any, impact on reducing GBVH (Smith 2023, 152–153).

<sup>68</sup> C190 provides that laws and regulations should require employers to “adopt and implement, in consultation with workers and their representatives, a workplace policy on violence and harassment” (Art. 9(a)).

<sup>69</sup> For example, Belinda Smith remarks that the provisions of Australia’s Sex Discrimination Act that create a positive duty to prevent sexual harassment contain “no consultation obligations (on duty holders or of duty holders in developing standards)” (Smith 2023, 163–164). On the general inadequacy of organizational policies to protect women’s equality rights, see Marshall (2005, 141 ff.).

<sup>70</sup> Compare the previous guidelines (SWA 2021) with the definition of gender-based harmful behaviour given in footnote 53.

## 4.2. Parallel duties to prevent GBVH under equality and non-discrimination legislation

In several countries, equality and non-discrimination legislation has enacted a duty for organizations to prevent sexual harassment, usually in addition to the existing WHS legislation. This prompts the question: how do these two systems coexist? A good case study to examine this issue is provided by recent developments in Australia.

Most recently, notwithstanding the progressive nature of WHS regimes in Australia and Safe Work Australia's 2021 national guidance document *Preventing Workplace Sexual Harassment* (SWA 2021), in 2022 the Australian federal government imported several of the characteristic components of its WHS regime into the Sex Discrimination Act, creating a new "positive duty" for organizations to prevent sexual harassment, sex-based harassment and sex discrimination, as well as prohibiting victimization with respect to reporting of these forms of harassment and discrimination under the Act.<sup>71</sup>

Of the various laws dedicated to addressing sexual harassment or regarding equality and non-discrimination in general, Australia's Sex Discrimination Act probably now contains more of the distinctive features of a WHS regime (notably, a positive duty and a broad application to "persons conducting a business or undertaking" in relation to "workers", broadly defined) than any other human rights law. However, the Sex Discrimination Act still does not measure up to a WHS regime, because it does not include key elements of the WHS regulatory approach, namely:

- a global approach to all forms of GBVH, including domestic violence, harassment on the basis of sexual orientation, racist harassment of women workers (Welsh et al. 2006), violence and harassment affecting persons of a particular sex or gender disproportionately, as per the definition of GBVH in C190, etc.;
- intervention on hazards simply because they expose workers and others to risk of injury or ill-health, with no threshold requirement that the target categorize them as being related to sex or gender, as opposed to race, ethnic origin, disability, etc.;<sup>72</sup>
- speed of response, including the right to refuse to carry out duties made dangerous by GBVH;
- representative worker participation mechanisms (e.g. role for unions, requirement for worker consultation, provision for the election of worker representatives);
- protection from retaliatory measures, including a presumption in favour of the worker;
- inspection by a public inspectorate with a range of enforcement mechanisms and sanctions; and
- criminal prosecution with the possibility of significant financial penalties and non-pecuniary sanctions.

The Australian Human Rights Commission (AHRC) is the agency responsible for providing guidance and overseeing implementation of the new duty for organizations. Even with the announcement by the federal government of an injection of 5.8 million Australian dollars over four years for education and compliance activities related to the new duty (OHS Alert 2022), the budget for compliance monitoring and enforcement of the positive duty pales in comparison to the budgets of state WHS regulators, who also benefit from an economy of scale given their global monitoring and enforcement mandate.<sup>73</sup>

<sup>71</sup> Australia, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*, No. 85, 2022.

<sup>72</sup> The example of patient attendants or personal service workers, who are often targeted by violence and harassment at the intersection of race, ethnic origin and sex, comes to mind.

<sup>73</sup> To give just one example, in 2019–2020 Australia had a total of 1,221 WHS inspectors, who issued 47,269 improvement notices and 1,782 impingement notices (Johnstone and Tooma 2022, 226 and 336–337).

To fulfil its mandate to provide guidance, in August 2023 the AHRC produced a 108-page document containing *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act* (AHRC 2023). Standards are set for seven areas: Leadership, Culture, Knowledge, Risk management, Support, Reporting and response, and Monitoring, evaluation and transparency. Although its lengthy and detailed content echoes much of the WHS guidance on prevention of sexual harassment and other forms of GBVH, the AHRC document specifies that the Guidelines:

do not provide specific guidance on how organisations and businesses can comply with other related obligations, such as:

- obligations under work, health and safety (WHS) laws
- obligations under workplace or industrial relations laws, such as the Fair Work Act 2009 (Cth) (Fair Work Act)
- obligations under State or Territory anti-discrimination laws, including any equivalent or similar positive duty. (AHRC 2023, 12)

The AHRC Guidelines then enigmatically state that “it may be necessary for an organisation or business to take different or additional steps beyond those discussed in these Guidelines to comply with other relevant laws” (page 12). Without further elaboration, it simply affirms that:

Satisfying the positive duty in the Sex Discrimination Act, however, will not necessarily ensure that a “person conducting a business or undertaking” has met all of their WHS duties to ensure the health and safety of workers, in all of the ways that health and safety issues can arise.

Likewise, satisfying WHS duties may not equate to compliance with the positive duty under the Sex Discrimination Act (which can extend beyond conduct that presents an identifiable threat to health and safety).<sup>74</sup> (page 13)

Will a parallel regime based on a brand-new and confusingly expressed “positive duty” for organizations to prevent sexual harassment (Smith 2023, 163), rather than building capacity to reinforce the well-known “proactive duty” under WHS to prevent GBVH, improve the situation of workers at risk of being targeted by GBVH?

Several sectors at high risk for sexual harassment, such as food services and accommodation, retail and construction, are composed primarily of small and medium-sized businesses. Banking on the expertise of the AHRC on gender equality seems to have prevailed over an approach more responsive to the characteristics of the small and medium-sized businesses targeted by the new positive duty.

Adding yet more complexity to the legal landscape for GBVH, the federal Fair Work Act 2009 has also recently been amended to expressly prohibit sexual harassment and to empower the industrial relations tribunal, the Fair Work Commission, to make a “stop sexual harassment order” and to deal with disputes about sexual harassment through conciliation, mediation or making a recommendation or expressing an opinion.<sup>75</sup> Where a dispute cannot be resolved in these ways, and if the parties agree, the Commission may also be able to deal with the dispute by arbitration. If this happens, the Commission can make an order for compensation or lost wages, or one requiring a person to do something that is reasonable to remedy any loss or damage suffered. This adds a further layer to the two-tiered federal/state human rights framework and the WHS framework.

One preliminary conclusion from this analysis of Australia's federal framework for prevention of sexual harassment is that having more than one agency setting the standards for prevention of

<sup>74</sup> See also Smith (2023, 163–164) on the lack of “regulatory machinery” for giving content to the new duty.

<sup>75</sup> Australia, [Fair Work Act 2009 \(amended 2024\)](#).

GBVH does little to promote a clear and common understanding of what organizations need to do to eliminate sexual harassment or, indeed, to comply with their legal obligations.

### 4.3. Access to remedies for targets

The primary purpose of the preventive WHS regime is not to assign blame or repair the harm done to the targets of harassment, but rather to ensure that the work environment is rapidly made safe and healthy for all, including with respect to exposure to GBVH.<sup>76</sup> In contrast, equality and non-discrimination legislation is concerned, among other things, with deciding whether a person's equality rights have been violated and repairing the harm done to that person by the discriminatory behaviour of those responsible (vicariously or otherwise).<sup>77</sup> WHS regimes and equality and non-discrimination legislation thus play complementary, and sometimes sequential, roles.

Historically, equality and non-discrimination legislation was the site of struggle for the social and political recognition of sexual harassment and its nefarious role in women's inequality, as well as for explicit legal prohibition of this behaviour. Equality and non-discrimination legislation has thus played, and continues to play, an important role in the struggle for women's equality rights:

The important normative role played by these [anti-discrimination] laws should not be undervalued. They have arguably helped to establish the norm that discrimination and harassment are wrong, and they have afforded redress for some victims. They have played a significant role in addressing discriminatory language and reducing the most blatant forms of discrimination and harassment. (Smith, Schleiger and Elphick 2019, 2)

Furthermore, recourse under equality and non-discrimination legislation plays a crucial role in validating targets' experience of GBVH, publicly condemning those responsible, and in replacing lost income and compensating for other kinds of damages.

Within the overall regulatory network addressing GBVH at work, remedies and prevention play complementary roles. Targets (and others) are encouraged to report episodes of GBVH and gain confidence in reporting systems when complainants receive compensation for the harm suffered. Workers are more likely to address unwanted or offensive behaviour early when the same behaviour has been formally condemned by a tribunal or by the courts. In turn, organizations' motivation to prevent GBVH increases when they incur □ or witness other organizations incurring □ costs because of litigation, as well as suffering reputational damage.

To ensure that the complementary roles of the preventive WHS regime and recourse under equality and non-discrimination legislation are clear, policies on prevention of GBVH should clearly lay out the avenues of recourse available to targets with respect both to relevant equality and non-discrimination legislation and to any relevant employment standards legislation.<sup>78</sup> Information about complaints raising a question of GBVH that are lodged under equality and non-discrimination legislation (or under employment standards legislation) should also be communicated to WHS regulators (with appropriate anonymizing) so that the information can be aggregated and used strategically to prioritize and improve further prevention measures (Weil 2010).

<sup>76</sup> Certain WHS laws provide for remedial action. See, for example, the restoration orders available to courts under the harmonized Australian WHS Acts, discussed in section 1.3.2.

<sup>77</sup> Although several equality and non-discrimination laws provide for systemic remedies to address the systemic nature of discrimination, in practice, these are rarely ordered by tribunals and courts; see Cox, Gesualdi-Fecteau and Laflamme (2023, 180).

<sup>78</sup> An example of cross-referencing of duties, rights and recourse for GBVH under equality and non-discrimination legislation is provided in WHS guidance from the WHS regulator in Victoria, Australia (WorkSafe Victoria 2022, 17):

A complainant may wish to contact other agencies about their complaint. When dealing with the incident and discussing referral, it's very important to respect the complainant's desired outcome and preferred way of managing the complaint. If the complainant wishes, it may be appropriate for them to contact:

- Victorian Equal Opportunity and Human Rights Commission on complaints of sexual harassment or discrimination
- Victoria Police on matters that may be criminal offences.

In the Belgian system there is a law that sets out both a preventive approach and a process to provide remedies for harm from GBVH. A single statute, the *Loi sur le bien-être au travail*, sets out both the WHS prevention regime and avenues of recourse for targets of harassment or violence.<sup>79</sup> The law contains a section on prevention of psychosocial risks, including stress, violence, and moral and sexual harassment. Sexual harassment is defined as:

tout comportement non désiré à connotation sexuelle, s'exprimant physiquement, verbalement ou non verbalement, et qui a pour objet ou pour effet de porter atteinte à la dignité d'une personne, et en particulier, de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant. (Art. 32ter(3))<sup>80</sup>

However, the impact of a definition of sexual harassment based on sexualized, as opposed to sex-based, practices is limited, as the Belgian law also recognizes violence at work and moral harassment at work on prohibited grounds of discrimination, which is to say:

liés notamment à l'âge, à l'état civil, à la naissance, à la fortune, à la conviction religieuse ou philosophique, à la conviction politique, à la conviction syndicale, à la langue, à l'état de santé actuel ou futur, à un handicap, à une caractéristique physique ou génétique, à l'origine sociale, à la nationalité, à une prétendue race, à la couleur de peau, à l'ascendance, à l'origine nationale ou ethnique, au sexe, à l'orientation sexuelle, à l'identité de genre, à l'expression de genre, aux caractéristiques sexuelles, à la grossesse, à l'accouchement, à l'allaitement, à la maternité, à l'adoption, à la procréation médicalement assistée, au changement de sexe, à la paternité et à la comaternité. (Art. 32ter(2))<sup>81</sup>

Thus, a broad range of behaviours related to GBVH are covered.

Belgium's legal framework requires a specific risk assessment for violence and psychological and sexual harassment, and the law requires certain minimum preventive measures to control these risks. The law also sets out paths for targets to access the support of a trusted person (*personne de confiance*) and to trigger the intervention of the prevention adviser (*conseiller en prévention*) – a WHS expert internal or external to the organization who is specialized in the psychosocial aspects of work, including violence and psychological and sexual harassment.

The law provides for recourse against the individual perpetrator of the violence or harassment, including sexual harassment and other discriminatory behaviour, before a labour tribunal. If there is a breach of the prohibition on violence and harassment, the target is entitled to either real damages (as proven) or a minimum amount of compensation equivalent to three months' salary. However, if the behaviour is related to a prohibited ground of discrimination, or if the perpetrator was in a position of authority vis-à-vis the target, or the gravity of the facts so warrants, the minimum amount of compensation is six months' salary (Art. 32decies(1)).

Although recourse is before a labour tribunal, if the case involves violence or harassment on the grounds of sex, expertise in human rights can be introduced in the litigation process through the intervention of the *l'Institut pour l'égalité des femmes et des hommes*. Likewise, if the case involves racism, the *Centre interfédéral pour l'égalité des chances et la lutte contre le racisme et les discriminations* can obtain standing as an intervenor (Art. 32duodecies).

<sup>79</sup> Belgium, *Loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail*.

<sup>80</sup> Author's translation:

any unwanted behaviour of a sexual nature, expressed physically, verbally or non-verbally, which has the purpose or effect of violating of a person's dignity and in particular of creating an intimidating, hostile, degrading, humiliating or offensive environment.

<sup>81</sup> Author's translation:

including [grounds] related to age, civil status, birth, wealth, religious or philosophical conviction, political conviction, trade union conviction, language, current or future state of health, disability, physical or genetic characteristics, social origin, nationality, alleged race, skin colour, descent, national or ethnic origin, sex, sexual orientation, gender identity, gender expression, sexual characteristics, pregnancy, childbirth, breastfeeding, maternity, adoption, medically assisted procreation, gender reassignment, paternity and co-maternity.



In Belgium's guidance material, GBVH including sexual harassment is considered to be both a psychosocial risk and a form of violence.<sup>82</sup> However, as stated in section 3.1 above, and in spite of admonishments from previous studies of the Belgian regime (Garcia, Hacourt and de Thomaz 2006), the specificities of prevention of sexual harassment and other forms of GBVH are not foregrounded in this material. Nonetheless, the *Loi sur le bien-être au travail* offers some unique examples of how human rights expertise might be instilled into recourse under labour law, as well as a recognition that GBVH, as well as other discriminatory behaviour, is one way in which harm to targets is exacerbated. More to the point, the Belgian model illustrates how integrating prevention and recourse into a single law allows for a coherent approach that facilitates comprehension of the law by organizations and workers, sets out one clear set of standards for organizations, and thus avoids fragmentation that may end up hindering access to justice for targets through the sheer complexity of the legal landscape.

Countries vary enormously in terms of their legal, political, economic and social circumstances and contexts. It is not possible to import an apparently successful initiative from one jurisdiction into another and assume that it will be effective. Furthermore, as we are still largely at the stage of determining how the relevant legal framework can impact prevention in individual organizations, it is too early to document promising organization-level experiences in different countries in order to glean information about any core components of an effective legal framework.<sup>83</sup> Nonetheless, country examples help to illustrate the strengths and weaknesses of different legal frameworks and contribute to identifying any essential elements or principles for effective prevention of GBVH.

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<sup>82</sup> See SPF (2017) and the relevant pages on the SPF website: [Risques psychosociaux au travail](#) and, in particular, [Particularités concernant le traitement de la demande pour faits de violence, de harcèlement moral ou sexuel au travail](#).

<sup>83</sup> Some promising experiences exist, but they have evolved in specific contexts and, most importantly, are not the result of applying a particular legal framework.



## ► 5 Further considerations

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In cases of sexual harassment at work, in some countries (France and Belgium in Europe, for example, and in Canada (Quebec)), employment standards law on the right to a workplace free from psychological or moral harassment interacts with WHS regimes as much as, if not more than, equality and non-discrimination legislation, including with respect to prevention.<sup>84</sup> From a pragmatic point of view, employment standards law can be more advantageous than equality and non-discrimination legislation – for example, in terms of the costs of legal representation or the opportunity to file recourse in cases of illegal dismissal or wage theft, as well as sexual harassment. This report does not touch on the interface between WHS and employment standards. The integrated approach referred to in C190 (Art. 4(d)) should also include consideration of employment standards legislation and of labour law. Further research is needed to ensure that all the labour and employment regimes – including WHS – destined to protect workers come together to reinforce protections and facilitate the exercise of workers' rights. Such research should look at substantive law but also at procedural considerations (time limits, legal representation, costs, etc.) and processual ones (processing delays and hearing dates).

Also, when incidents of GBVH occur, addressing them within the collectivist framework of WHS raises questions about the right to privacy of the individual workers who have been victimized. C190 stipulates that Member States should take appropriate measures to “protect the privacy of those individuals involved and confidentiality, to the extent possible and as appropriate, and ensure that requirements for privacy and confidentiality are not misused” (Art. 10(c)). When it comes to responding to incidents of GBVH, this balancing of competing imperatives is an area of law that should be explored in order to paint a complete picture of the implications of addressing GBVH within a WHS framework.

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<sup>84</sup> See, for example, Numhauser-Henning and Laulom (2013); Cox and Brodeur (2020).

## ► Conclusion

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ILO Convention No. 187 mandates the development of a *culture* of prevention so that “a shared set of beliefs, attitudes, values and ways of behaving” contribute to a “conscious and continual search for improvement, where shared experiences from different contexts pave the way for progress” (ILO 2005, paras 29 and 33). In this vein, WHS regimes have the potential to offer the kind of progressive and transformational change needed to prevent GBVH at work and ensure that women and other people’s equality rights, as well as their health and safety, are respected.

Prevention of GBVH allows organizations to avoid reputational damage and the loss of productivity associated with a complaint of sexual harassment or other forms of GBVH.<sup>85</sup> It provides workers with a safer, healthier and more egalitarian work environment.

An initiative of the Gender, Equality and Diversity Branch of the ILO, the decision to develop a Convention on violence and harassment in general was contingent on inclusion of a strong gender-responsive approach within the Convention (Cox and Lippel 2020). To make good on the promise of a global but gender-responsive international standard on violence and harassment in the world of work, it is now essential to ensure, among other things, that the gender-responsive dimension of the WHS framework is bolstered by guidance and leadership on the part of the ILO. It is hoped that this report contributes to this worthy endeavour.

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<sup>85</sup> See, for example, Deloitte (2019).

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The International Labour Organization is the United Nations agency for the world of work. We bring together governments, employers and workers to improve the working lives of all people, driving a human-centred approach to the future of work through employment creation, rights at work, social protection and social dialogue.

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