



Law Council
OF AUSTRALIA

Office of the President

26 February 2019

Kate Jenkins
Sex Discrimination Commissioner
Australian Human Rights Commission
Level 3, 175 Pitt St
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By email: SH.Inquiry@humanrights.gov.au; [REDACTED]

Dear Commissioner

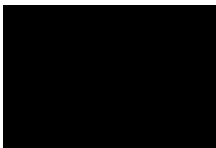
Australian Human Rights Commission National Inquiry into Sexual Harassment in Australian Workplaces

The Law Council of Australia (**Law Council**) is grateful for the opportunity to provide a submission to the Australian Human Rights Commission (**AHRC**) in relation to its National Inquiry into Sexual Harassment in Australian Workplaces (**the National Inquiry**). Please find the Law Council's submission **attached**.

The Law Council acknowledges the assistance of its Equal Opportunity Committee, the Law Society of New South Wales, the Victorian Bar, the Queensland Law Society, the Law Society of Western Australia, the Law Institute of Victoria, and the New South Wales Bar Association, for assistance in the preparation of this submission, as well as Law Firms Australia for providing content under the heading 'Existing Measures and Good Practice'. The Law Council also acknowledges the International Bar Association, the Law Society of South Australia and the Women Lawyers Association of the ACT for generously providing survey results for use in this submission.

Please contact Dr Natasha Molt, Director of Policy, on [REDACTED] [REDACTED] [REDACTED] or at [REDACTED] in the first instance, if you require further information or clarification.

Yours sincerely



Arthur Moses SC
President



Law Council
OF AUSTRALIA

National Inquiry into Sexual Harassment in Australian Workplaces

Australian Human Rights Commission

26 February 2019

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia is grateful to its Equal Opportunity Committee, the Law Society of New South Wales, the Victorian Bar, the Queensland Law Society, the Law Society of Western Australia, the Law Institute of Victoria, and the New South Wales Bar Association, for assistance in the preparation of this submission. The Law Council also thanks Law Firms Australia for providing input into the content under the heading 'Existing Measures and Good Practice'. The Law Council acknowledges the generosity of the International Bar Association, the Women Lawyers Association of the ACT and the Law Society of South Australia, in providing the results of their own surveys on sexual harassment in the legal profession to the Law Council for use in this submission. Finally, the Law Council extends a warm acknowledgment to the scholars and advocates who have been working in this space for decades, and whose research was enormously helpful in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**the Law Council**) welcomes the opportunity to make a submission to the Australian Human Rights Commission (**the AHRC**) in relation to its *National Inquiry into Sexual Harassment in Australian Workplaces* (**the National Inquiry**).
2. The timing of the National Inquiry is significant. Over the past year, sexual harassment has received significant media and social media attention, driven largely by the #MeToo movement and its focus on high-profile offenders.
3. The Law Council recognises that sexual harassment in Australian workplaces is pervasive and damaging. In 2018, the AHRC found that 23% of Australian women and 16% of Australian men had experienced workplace sexual harassment in the past year.¹ Similar statistics were recorded in 2004,² 2008³ and 2012.⁴
4. The legal profession is no different. All available statistics, as well as anecdotal evidence, suggest that sexual harassment within the Australian legal profession is a prevalent and persistent problem. In 2013, the Law Council conducted the *National Attrition and Re-engagement Study* (**the NARS**) to investigate the progression, attrition, and re-engagement rates of male and female lawyers, obtain qualitative and quantitative data, and identify gendered trends within the profession.⁵ The NARS remains one of the most comprehensive studies of the Australian legal profession. It is often cited in discussions relating to discrimination, bullying and harassment. The NARS found that approximately one in four women experienced sexual harassment in their legal workplace.⁶ More recent studies suggest that these rates may be even higher.
5. The Law Council believes that every person who works in the legal profession is entitled to feel safe and to be treated with fairness, dignity and respect. Sexual harassment is both unlawful and entirely unacceptable.
6. The Law Council is committed to ensuring a diverse and inclusive profession which facilitates a positive experience for all members and which thereby delivers quality services and justice. The Law Council considers diversity as crucial to the sustainability of the profession as a whole. Studies show that diversity and equality in representation positively influence factors such as performance, quality, innovation, risk reduction, and client satisfaction.⁷ The attrition rate of women lawyers is high, and experiences of sexual harassment are a key reason why women leave the law. This is damaging and costly – for individuals, for firms, and for the current and future standing of the legal profession.
7. The Law Council's position is that sexual harassment must be addressed through cultural and structural change, as well as law reform.

¹ Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (2018).

² Human Rights and Equal Opportunity Commission, *20 Years On: The Challenges Continue ... ; Sexual Harassment in the Australian Workplace* (2004).

³ Australian Human Rights Commission, *Sexual Harassment: Serious Business; Results of the 2008 Sexual Harassment National Telephone Survey* (2008).

⁴ Australian Human Rights Commission, *Working without Fear: Results of the Sexual Harassment National Telephone Survey* (2012).

⁵ Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014).

⁶ *Ibid* 32, 76.

⁷ See, eg, Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014) 81-82.

8. Accordingly, this submission is presented in two main parts, 'The Current Legal Framework' and 'Sexual Harassment in the Legal Profession', and addresses the following Terms of Reference:
- The current legal framework with respect to sexual harassment;
 - The drivers of workplace sexual harassment, including whether: some workplace characteristics and practices are more likely to increase the risk of sexual harassment; some individuals are more likely to experience sexual harassment due to particular characteristics including gender, age, sexual orientation, culturally or linguistically diverse background, Aboriginal and/or Torres Strait Islander status, or disability;
 - The impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers compensation claims, employee turnover and absenteeism;
 - Existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally; and
 - Recommendations to address sexual harassment in Australian workplaces.
9. In the first part, the Law Council draws attention to the shortcomings and inconsistencies between federal, state and territory legislation with respect to the prohibitions on sexual harassment. The *Sex Discrimination Act 1984* (Cth) is now narrower than many state and territory anti-discrimination statutes with respect to who is protected from workplace sexual harassment and the obligations on individuals and employers to prevent sexual harassment. The Commonwealth, the Northern Territory and Queensland have a lower threshold than other jurisdictions in determining the reasonableness of a person being offended, humiliated or intimidated by certain conduct, requiring only 'possibility'. The *Equal Opportunity Act 1984* (WA) is the only piece of legislation that maintains the requirement that a person must have suffered actual or believed disadvantage in order to satisfy the definition of sexual harassment. Both the *Equal Opportunity Act 1984* (WA) and the *Anti-Discrimination Act 1977* (NSW) include a statutory cap on damages not found in other jurisdictions. Where other statutes are silent, the *Equal Opportunity Act 2010* (Vic) places a positive duty on persons to eliminate sexual harassment and the *Human Rights Act 2005* (ACT) gives own-initiative powers to its commission. Beyond these major inconsistencies are many minor inconsistencies in wording and operation. The Law Council is concerned that such inconsistencies impact the accessibility of the legislative regime for ordinary Australians, and make a difficult area of the law even more difficult to justify, explain and message, thereby compromising access to justice as well as public awareness raising efforts. The Law Council supports consolidating sexual harassment provisions across jurisdictions, in a manner which enshrines best practice rather than the lowest common denominator. The Law Council considers that the current legal framework could be simpler, firmer and more effective in eliminating, preventing and responding to sexual harassment. Eight years ago, amendments to the federal legislation failed to adopt two significant recommendations: a general prohibition against sexual harassment in all areas of public life and a positive duty on persons to eliminate sexual harassment. At the time, the AHRC supported these two recommendations. The Law Council continues to support these two recommendations in 2019.
10. In the second part, the Law Council emphasises that cultural and structural change is as important as law reform in addressing the nature and prevalence of sexual harassment, including within the legal profession. Law is a traditional, hierarchical, and male-dominated profession, and it is the position of the Law Council that these factors drive the rates of sexual harassment within the profession. Lawyers who have experienced

workplace sexual harassment have had to grapple with the risk of negative repercussions to their personal and professional reputations should they report bad behaviour by colleagues. This has contributed to a culture of silence and a lack of information, which is only now being broken. While the Law Council believes that there is currently widespread and genuine support across the legal profession for action to be taken to address sexual harassment, and numerous sections of the legal profession have already implemented certain measures, more needs to be done.

11. Accordingly, the Law Council welcomes the National Inquiry and notes that promoting engagement and collaboration by the legal profession with this work is a Presidential Priority for the Law Council in 2019.
12. The Law Council hopes that the AHRC will take up the information provided in this submission in its Final Report.
13. It will be essential for all levels of government to carefully consider, and respond to, the Sex Discrimination Commissioner's conclusions and recommendations when the Final Report is released.
14. This submission sets out preliminary recommendations of the Law Council. The Law Council awaits publication of the Sex Discrimination Commissioner's Final Report, and the subsequent views of its Constituent Bodies, before making final recommendations.

The Current Legal Framework

Legislation

16. Laws prohibiting sexual harassment exist at both the federal level and at each state and territory level in Australia.
- *Sex Discrimination Act 1984* (Cth);
 - *Discrimination Act 1991* (ACT);
 - *Anti-Discrimination Act 1977* (NSW);
 - *Anti-Discrimination Act* (NT);
 - *Anti-Discrimination Act 1991* (Qld);
 - *Equal Opportunity Act 1984* (SA);
 - *Anti-Discrimination Act 1998* (Tas);
 - *Equal Opportunity Act 2010* (Vic); and
 - *Equal Opportunity Act 1984* (WA).
17. These laws operate concurrently.⁸ Where an unlawful act of sexual harassment has occurred under federal law and under a state or territory law, a person may choose to pursue action in either jurisdiction.⁹

Sex Discrimination Act 1984 (Cth)

18. The *Sex Discrimination Act 1984* (Cth) (**the SDA**) applies at the federal level. Sexual harassment is specifically addressed in Part II, Division 3, of the SDA.
19. Section 28A defines sexual harassment as an unwelcome sexual advance,¹⁰ an unwelcome request for sexual favours,¹¹ or other unwelcome conduct of a sexual nature,¹² in circumstances where a reasonable person 'would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.¹³

28A Meaning of sexual harassment

(1) *For the purposes of this Division, a person sexually harasses another person (the person harassed) if:*

(a) *the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed;*
or

(b) *engages in other unwelcome conduct of a sexual nature in relation to the person harassed;*

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

⁸ *Sex Discrimination Act 1984* (Cth) s 10(3).

⁹ *Ibid* s 10(4).

¹⁰ *Ibid* s 28A(1)(a).

¹¹ *Ibid* s 28A(1)(a).

¹² *Ibid* s 28A(1)(b).

¹³ *Ibid* s 28A(1).

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- (c) any disability of the person harassed;
- (d) any other relevant circumstance.

(2) In this section:

conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

20. Sections 28B–28L make sexual harassment unlawful in certain areas of public life.¹⁴
21. To put this in the most basic terms, a sexual harassment complaint at the federal level requires the following elements:
 - sexual and unwelcome conduct;
 - which in the eyes of a reasonable person has the possibility of offending, humiliating or intimidating the person to whom it is directed;
 - occurring in a certain area of public life, such as in certain employment relationships and situations.
22. Division 3 is not subject to any of the exemptions in Division 4 of the SDA.¹⁵ These exemptions apply to specific areas of the prohibitions against sex discrimination, not sexual harassment.¹⁶
23. Like any legislation, the SDA may be broadened or circumscribed by the decisions of the judges who interpret and apply it. To date, judicial interpretation of the SDA's sexual harassment provisions has tended to broaden their effect.¹⁷
24. There have also been positive legislative reforms, including the *Sex Discrimination and other Legislation Amendment Act 1992* (Cth) and *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth), which have strengthened protections for Australians.¹⁸
25. The following provides a critical overview of the elements of sexual harassment under federal law. This is not intended as a complete summary of the legislation, but as highlighting major points of interest to the National Inquiry. For a more comprehensive overview of the federal law on discrimination, sex discrimination and sexual harassment, including case law, the reader is directed to see, for example, Neil Rees et al, *Australian*

¹⁴ Ibid ss 28B–28L. For example, sexual harassment is unlawful in the course of employment, partnerships, registered organisations, educational institutions, goods, services and facilities, provision of accommodation, clubs, etc.

¹⁵ Ibid pt II div 4.

¹⁶ See, eg, *Sex Discrimination Act 1984* (Cth) s 37(1)(a), which exempts religious bodies from having to adhere to the sex discrimination proscriptions in the appointment of members of a religious order.

¹⁷ Catherine Van der Winden, 'Combatting Sexual Harassment in the Workplace: Policy vs Legislative Reform' (2014) 12 *Canberra Law Review* 204, 212.

¹⁸ Ibid; Beth Gaze, 'The *Sex Discrimination Act* After Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27 *University of New South Wales Law Journal* 914, 917.

Anti-Discrimination and Equal Opportunity Law (Federation Press, 3rd ed, 2018); Australian Human Rights Commission, *Federal Discrimination Law* (2016) <<https://www.humanrights.gov.au/ourwork/legal/publications/federal-discrimination-law-2016>>; Australian Human Rights Commission, *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* (2008); Catherine Van der Winden, 'Combating Sexual Harassment in the Workplace: Policy vs Legislative Reform' (2014) 12 *Canberra Law Review* 204.

Sexual Conduct

26. The first element of sexual harassment is sexual conduct. Section 28A of the SDA requires that the alleged conduct, no matter its type, have the characteristic of being 'sexual'.
27. Some commentators have described section 28A as being a provision of broad operation. This is true in the sense that section 28A does not exhaustively define what types of sexual conduct might amount to sexual harassment providing that the other elements of the definition are met. Under paragraph 28A(1)(b), the definition of sexual harassment is extended beyond the specific types of sexual conduct mentioned in paragraph 28A(1)(a) to include 'other ... conduct of a sexual nature'.¹⁹ Subsection 28A(2) then provides a non-exhaustive definition of 'conduct of a sexual nature' – confirming that 'other conduct of a sexual nature' really means 'any other conduct of a sexual nature'.²⁰ The term 'includes' but is not limited to 'making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing'.²¹
28. In this respect, section 28A has allowed judges and other decision-makers to recognise that sexual conduct can manifest in different ways – physically, verbally or in writing; as different types of behaviours; and, importantly, as a single, isolated incident as well as ongoing, persistent behaviour.²² The latter point was first established in *Hall v Sheiban*,²³ and has since been applied in numerous other sexual harassment cases.²⁴
29. Sexual conduct has been found to include:
 - staring or leering;
 - whistling;
 - displaying or sending sexually explicit material, images,²⁵ objects,²⁶ or toys;
 - sexually suggestive questions, comments or jokes;²⁷
 - questions about a person's sexual activities;²⁸

¹⁹ *Sex Discrimination Act 1984* (Cth) s 28A(1)(b).

²⁰ *Ibid* s 28A(2).

²¹ *Ibid* s 28A(2).

²² See also Kate Eastman, Sophie Callan and Aditi Rao, 'Crossing the Line: Behaviour that Gets Barristers into Trouble' [2017] (Summer) *Bar News: Journal of the New South Wales Bar Association* 38, 38; Catherine Van der Winden, 'Combating Sexual Harassment in the Workplace: Policy vs Legislative Reform' (2014) 12 *Canberra Law Review* 204, 212; Australian Human Rights Commission, *Federal Discrimination Law* (2016) <<https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>> 139.

²³ *Hall v Sheiban* (1989) 20 FCR 217; *Hall v A & A Sheiban* [1989] EOC 92-250, 77, 389 (Lockhart J).

²⁴ See *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91; *Leslie v Graham* [2002] FCA 32.

²⁵ See *Poniatowska v Hickinbotham* [2009] FCA 680.

²⁶ See *Johanson v Blackledge* [2001] FMCA 6.

²⁷ See *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91; *San v Dirluck Pty Ltd* [2005] FMCA 750.

²⁸ See *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81; *San v Dirluck Pty Ltd* [2005] FMCA 750.

- comments about a person's body;²⁹
 - invitations to start a relationship;³⁰
 - invitations with sexual implications, such as invitations to attend a private residence,³¹ or sit as a model;³²
 - propositions for sex;³³ and
 - touching, groping, hugging, or kissing.³⁴
30. The use of technology as a tool to sexually harass has also been able to be recognised under the current definition. Section 25 of the *Acts Interpretation Act 1901* (Cth) explicitly states that references to 'writing' should be interpreted as including 'any mode of representing or reproducing words, figures, drawing or symbols in a visible form'.³⁵ In *Kraus v Menzie*, coarse jokes and sexually explicit images sent by text message were held to constitute sexual conduct.³⁶ In the earlier case of *Poniatowska v Hickinbotham*, the court found that sexual conduct includes the sending of emails and text messages requesting a sexual relationship.³⁷
31. Despite these advantages of the current definition, the Law Council considers that a simpler definition is both possible and preferable. It is important to emphasise that the intricacies of subsection 28A(1) mean that, in practice, the operation of the provision is more complicated than the above analysis relays, and that this decreases the accessibility of the law for ordinary Australians. The Law Council considers that subsection 28A(1) has the following flaws in relation to sexual conduct.
32. First, subsection 28A(1) needlessly splits the definition of sexual conduct into two parts. This split is unnecessary given that the function of paragraph 28A(1)(b) is to extend paragraph 28A(1)(a) in a non-exhaustive manner. It is probable that removing the entirety of paragraph 28A(1)(a) along with the word 'other' in paragraph 28(1)(b) would achieve the same operation. Paragraph 28A(1)(a) includes the terms 'sexual advance' and 'request for sexual favours'. These are narrow terms, which describe specific types of sexual conduct. Being narrow, they are limited in application and are susceptible to legal argument, which has meant that clients rarely rely on paragraph 28A(1)(a) independent of paragraph 28A(1)(b). There is also an argument that paragraph 28A(1)(a) enshrines an outdated concept of sexual harassment unfamiliar to ordinary Australians; 'advances' and 'favours', for example, are words rarely heard in general public discourse. For these reasons, the Law Council considers that paragraph 28A(1)(a) has little practical usage of its own accord. The two-pronged approach of subsection 28A(1) makes the definition of sexual harassment verbose, intricate and outdated, and more difficult for ordinary Australians to understand.
33. Second, the application of subsection 28A(1) is limited by the words 'to the person harassed' in paragraph 28A(1)(a) and 'in relation to the person harassed' in paragraph 28A(1)(b). This limitation challenges the construction of the provision as broad. The Law

²⁹ See *Poniatowska v Hickinbotham* [2009] FCA 680.

³⁰ See *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81; *Poniatowska v Hickinbotham* [2009] FCA 680.

³¹ See *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91; *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81.

³² See *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91.

³³ See *Ewin v Vergara (No 3)* [2013] FCA 1311.

³⁴ See *Elliot v Nanda* (2001) 111 FCR 240; *Poniatowska v Hickinbotham* [2009] FCA 680; *Kraus v Menzie* [2012] FCA 3, [53].

³⁵ *Acts Interpretation Act 1901* (Cth) s 25.

³⁶ *Kraus v Menzie* [2012] FCA 3, [79]-[80].

³⁷ *Poniatowska v Hickinbotham* [2009] FCA 680, [100]-[112].

Council has heard from legal practitioners who describe the difficulty that certain clients have in fitting behaviour they have been exposed to in the workplace inside these parameters.

34. A third and related problem lies in interpreting what is included in sexual conduct and whether this fits with contemporary understandings of the problem of sexual harassment. 'Sexual' is not defined in the SDA, and assistance must be sought from the case law. There is some authority that conduct which does not appear sexual when considered in isolation may nevertheless amount to sexual conduct due to extenuating circumstances.³⁸ So it was held in *Shiels v James*³⁹ that 'incidents relating to the flicking of elastic bands at the applicant were of a sexual nature as they formed part of a broader pattern of sexual conduct'.⁴⁰ However, the word remains problematic. As distinguished academics Gail Mason and Anna Chapman explain:

*Although attempts have been made by tribunals and agencies to more precisely delineate, in an inclusive manner, the meaning of 'conduct of a sexual nature', the boundaries remain unclear. This is particularly so in relation to determining whether unwelcome behaviour had a sexual element or implication in it, or whether it might be more accurately categorised as bullying or harassment that is not sexual in nature.*⁴¹

35. The authors then reference the following concern, which the Law Council has also heard from lawyers who practise in the sexual harassment space:

*Whilst the most serious forms of sexual harassment may be readily recognised ... '[I]f] less overt acts' may still be 'resistant to compression within the legal form'; that is, some sexual harassment 'may be so subtle and insidious that it is accepted as part of the organisational culture ...'*⁴²

36. The authors note that commentators:

*... picking up on earlier feminist arguments that sexual harassment is a question of power and not sex ... suggest that legislative definitions should emphasise, not the sexual nature of the behaviour but, rather, the way that the behaviour contributes to the maintenance of gender power relations.*⁴³

37. Mason and Chapman caution that:

*... conduct that is a consequence of a person's sex, yet not strictly of a sexual nature, may fall outside the sexual harassment provisions.*⁴⁴

38. The Law Council has heard similar arguments from lawyers practising in the sexual harassment space – which appear to be borne out in the surveys – that people do not

³⁸ Australian Human Rights Commission, *Federal Discrimination Law* (2016), 140 <<https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>>.

³⁹ *Shiels v James* [2000] FMCA 2.

⁴⁰ Australian Human Rights Commission, *Federal Discrimination Law* (2016), 140 <<https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>>, citing *Shiels v James* [2000] FMCA 2, [72].

⁴¹ Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and Its Critiques' (2003) 31 *Federal Law Review* 195, 212.

⁴² Ibid quoting Margaret Thornton, 'Feminism and the Contradictions of Law Reform' (1991) 19 *International Journal of the Sociology of Law* 453, 466.

⁴³ Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and Its Critiques' (2003) 31 *Federal Law Review* 195, 214.

⁴⁴ Ibid 214–215.

understand what sexual conduct includes; and, indeed, that clarity can only come from attending court.

39. The Law Council supports a definition drafted in simpler terms, which would increase the accessibility of the law for all Australians. This is important for both bringing a sexual harassment complaint, and for seeking to prevent sexual harassment, as it makes the messaging of what is and is not sexual harassment easier to understand and communicate. Simplifying the definition of sexual harassment is considered further in paragraphs [53]–[56], [64]–[75] and [92]–[95].
40. The Law Institute of Victoria also recommends amending the definition of sexual harassment to specifically include online sexual harassment and the use of technology and social media to perpetrate sexual harassment. This may already be recognised by the courts, but including it in the legislation would provide greater clarity to the public and recognise the new ubiquity of technology in our daily lives. The Queensland Law Society notes that technology might promote heightened forms of sexually harassing behaviours, perhaps because the perceived anonymity or secrecy encourages perpetrators to engage in behaviour they may not display in a face-to-face setting. The Law Council would likely support such an amendment. However, the Law Council cautions against drafting any reference to technology too narrowly, as sexual harassment manifests in a myriad of behaviours, and technology advances rapidly – for example, experts are currently warning about a new form of video manipulation, which creates hyper-realistic images known as ‘deep fakes’, and the potential this has for harassment, blackmail and revenge porn.⁴⁵
41. The Law Council considers that the ability for interpretation to evolve as factors such as public attitudes and technology evolve is a particular advantage of legislation drafted in broad terms.

Unwelcome Conduct

42. The conduct must be unwelcome as well as sexual. The term ‘unwelcome’ is not defined in the legislation, and guidance is sought from the case law.
43. According to the current weight of judicial authority, whether conduct is ‘unwelcome’ is a subjective test, based on the perspective of the person receiving the conduct.⁴⁶
44. The intention of the perpetrator and whether or not the conduct would have been welcome to other people or accepted by other people as a normal part of life is irrelevant.⁴⁷
45. Accordingly, the complainant in a sexual harassment case need only confirm in their evidence that they found the sexual conduct unwelcome. This is often accepted as obvious, for example, from words or actions,⁴⁸ the surrounding circumstances,⁴⁹ or documented evidence.⁵⁰ In both *Aldridge v Booth* and *Elliott v Nanda*, the young age, inexperience and vulnerability of the complainant was enough to establish that she found

⁴⁵ Donie O’Sullivan, ‘Lawmakers warn of ‘deepfake’ videos ahead of 2020 election’, CNN Business (January 28 2019) <<https://edition.cnn.com/2019/01/28/tech/deepfake-lawmakers/index.html>>.

⁴⁶ See *Aldridge v Booth* (1988) 80 ALR 1, 5; *Hall v Sheiban* (1989) 20 FCR 217, 247; *Kraus v Menzie* [2012] FCA 3; *Ewin v Vergara (No 3)* [2013] FCA 1311.

⁴⁷ See *Aldridge v Booth* (1988) 80 ALR 1; *Hall v Sheiban* (1989) 20 FCR 217.

⁴⁸ See *Daley v Barrington* [2003] FMCA 93; *Kraus v Menzie* [2012] FCA 3.

⁴⁹ See *Aldridge v Booth* (1988) 80 ALR 1; *Elliott v Nanda* (2001) 111 FCR 240; *San v Dirluck Pty Ltd* [2005] FMCA 750.

⁵⁰ See *Kraus v Menzie* [2012] FCA 3.

certain sexual conduct unwelcome.⁵¹ In other cases, some response on the part of the complainant may be necessary. In *Kraus v Menzie*, the court examined the complainant's replies to text messages, attitude in photographs, and response to gifts, overtures and massages, looking for words, tone, actions, or facial expressions, to support her claim that she found each unwelcome.⁵²

46. Some reasoning has appeared to blur the consideration of 'unwelcome' with the consideration of 'offended, humiliated or intimidated', and the subjective with the objective.
47. The Law Council wishes to emphasise its position that the element of 'unwelcome' should never regress back to the earlier case law, which required that the complainant tell the perpetrator the sexual conduct was unwelcome – thus effectively converting their subjective experience into objective evidence. It is arguable that a reticence to trust women – and, indeed, to trust the collective consciousness of women dismantling accepted gender narratives (such as the idea that it is normal and natural for men to pursue women) – underlay this reasoning.
48. In the early sexual harassment case of *O'Callaghan v Loder*, which was decided under a first version of the *Anti-Discrimination Act 1977* (NSW), prior to the enactment of the federal legislation, Mathews DCJ held that:

*There must also be a requirement that the recipient – in this case, Miss O'Callaghan – took some steps to make her attitude known to the employer.*⁵³

*If that activity was in fact unwelcome to Miss O'Callaghan (and that is not an easy finding to make in the light of her objective behaviour) did she adequately communicate that fact to Mr Loder?*⁵⁴

49. In other words, and despite commenting on the fact that sexual harassment cases often involve a fundamental power imbalance, Mathews DCJ found the 'crucial question' to be:

*Was the respondent aware that his conduct was unwelcome to the complainant or were the circumstances such that he should have been aware?*⁵⁵

50. In the far more recent case of *Elliott v Nanda*, Moore J made the following statement in relation to conduct characterised as sexualised discussions, citing *O'Callaghan v Loder* as the authority:

*I entertained sufficient doubt that it would have been apparent to the respondent that these general discussions were unwelcome (particularly given that the applicant did not complain about the discussions at the time and participated in general discussions the respondent had with his friends about topics of current interest) to find, affirmatively, that this conduct was unwelcome: see *O'Callaghan v Loder* [1983] 3 NSWLR 89 at 103-104.*⁵⁶

51. The AHRC has previously noted that 'this statement of the test appears to introduce an objective element'.⁵⁷ The Law Council agrees, although, in light of *O'Callaghan v Loder*,

⁵¹ *Aldridge v Booth* (1988) 80 ALR 1; *Elliott v Nanda* (2001) 111 FCR 240, 277.

⁵² *Kraus v Menzie* [2012] FCA 3.

⁵³ *O'Callaghan v Loder* [1983] 6 IR 1, 27-28.

⁵⁴ *Ibid* 26-27.

⁵⁵ *Ibid* 26.

⁵⁶ *Elliott v Nanda* (2001) 111 FCR 240, 277.

⁵⁷ Australian Human Rights Commission, *Federal Discrimination Law* (2016), 141 <<https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>>.

it would use the word 'reintroduce' and add that it also wanders into the questionable territory of requiring consideration of the intention of the perpetrator.

52. The Law Council believes that reintroducing objective elements or the intention of the perpetrator to the meaning of 'unwelcome' is contrary to the current weight of authority, contrary to the objects of the SDA, which, as set out in subsection 3(c), include 'to eliminate, *so far as is possible*, discrimination involving sexual harassment',⁵⁸ and fails to acknowledge current social and scientific research on common responses to sexual harassment and sexual violence more broadly. It is also unnecessary in the sense that the objective view is already captured in the test through the inclusion of the 'reasonable person', considered below at paragraphs [58]–[75].
53. The Law Council's position on the meaning of 'unwelcome' is that:
- the only relevant factor is the mind of the sexually harassed person following the conduct;
 - whether or not the perpetrator understood the conduct to be unwelcome is irrelevant; and
 - the sexually harassed person is not required to have expressed to the perpetrator that the conduct was unwelcome.
54. This position echoes the following statement made by the AHRC in its Code of Practice for Employers:

*A complaint of sexual harassment should not be rejected just because the complainant did not tell the harasser that their behaviour was unwelcome. The case law takes into account the reasons why someone may feel unable to confront a harasser directly. Case law indicates that factors that might be relevant include the youth and inexperience of the complainant, fear of reprisals and the nature of the power relationship between the parties.*⁵⁹

55. The Law Council would add to this list the possibility that the person harassed may experience a level of trauma which impairs their ability to respond directly, firmly or in any other way considered 'appropriate'. The concept that a person may 'freeze' when confronted with an uncomfortable, surprising or violent situation is also well documented.
56. The Law Council is likely to support an amendment to the SDA clarifying that 'unwelcome' is a subjective consideration based solely on the mind of the person receiving the conduct, and suggests the following wording:

For the purposes of subsection (1), 'unwelcome' is a subjective consideration from the point of view of the person harassed.

57. Conversely, conduct that is welcomed by both parties will not amount to sexual harassment. The law does not prohibit consensual sexual relationships from forming in the workplace or elsewhere. 'The object of the legislation is not to sterilise human relationships, but to encourage their development on a free and equal basis.'⁶⁰

⁵⁸ *Sex Discrimination Act 1984* (Cth) s 3(c) (emphasis added).

⁵⁹ Australian Human Rights Commission, *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* (2008), 7. This document provides 'practical guidance on the sexual harassment provisions in the *Sex Discrimination Act 1984* (Cth)' and although 'not legally binding' incorporates 'established case law principles and accepted practice in the area': 1.

⁶⁰ *O'Callaghan v Loder* [1983] 6 IR 1, 29.

Reasonable Person

58. It is not enough for unwelcome and sexual conduct to have simply occurred. In order for the meaning of sexual harassment in subsection 28A(1) to be satisfied, the possibility of the conduct causing offence, humiliation or intimidation must be assessed against the standard of the reasonable person. That is, would a reasonable person, having regard to all the circumstances, have anticipated the possibility that the person harassed would be offended, humiliated or intimidated?
59. The Law Council recognises two distinct advantages of the federal wording.
60. First, the introduction of the word 'possibility' into subsection 28A(1) in 2011 lowered the threshold for the test and has been widely reviewed as a positive change.
61. Second, as mentioned above at paragraph [52], the reasonable person test is an objective test. Whether the perpetrator anticipated the possibility of offence, humiliation or intimidation is irrelevant.
62. The Law Council supports this approach. Given the nature and prevalence of sexual harassment, the Law Council considers it important to maintain sexual harassment as a civil offence, free from the elements of intention, recklessness or knowledge and the high burden of proof found in criminal cases. As academic and anti-discrimination expert, Beth Gaze, notes:

*the prohibition of sexual harassment has been more successful, perhaps because it does not depend on showing a reason for acting, but merely on establishing that unacceptable conduct took place and had a particular effect.*⁶¹

63. Waiving the intention of the perpetrator is important, because it makes clear that the approach to sexual harassment in Australia, at least in terms of the legal meaning, is non-tolerance. Excuses or common refrains such as 'it was joke', 'I didn't mean anything by it', 'it was harmless fun', or 'it was done while under the influence of alcohol', are unacceptable.⁶² 'A tolerance approach is out of keeping with the legal framework'.⁶³ If we are to eliminate the social attitudes that foster sexual harassment, then this approach to the legislation must be bravely defended; the intention of the perpetrator should never be a mandatory element to establishing that sexual harassment took place.
64. However, the Law Council recognises that even the objective test has shortcomings. Critical and feminist legal scholars have long argued that seemingly neutral legal concepts reproduce the power imbalances and biases found in society at large. This is a valid criticism. The law is made by people, and all people suffer unconscious bias. When those who make or interpret the law – the lawyers, the judges, the legislators – overwhelmingly come from one background – the same race, the same sex, the same social class – then only one perspective, along with all its associated unconscious bias, is heard – and other perspectives are marginalised. For these reasons, the task of giving

⁶¹ Beth Gaze, 'The Sex Discrimination Act After Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27 *University of New South Wales Law Journal* 914, 917.

⁶² Prue Bindon, 'The Weinstein Factor: Where does the legal profession stand?' (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 26; Kate Eastman, Sophie Callan and Aditi Rao, 'Crossing the Line: Behaviour that Gets Barristers into Trouble' [2017] (Summer) *Bar News: Journal of the New South Wales Bar Association* 38, 39.

⁶³ Therese MacDermott, 'Reassessing Sexual Harassment: It's Time' (2015) 40 *Alternative Law Journal* 157, 159.

content to the reasonable person has been ‘fraught with complexity’.⁶⁴ As Mason and Chapman surmise:

*The crux of the problem seems to lie in the question of whose perspective will be taken into account in determining reasonableness.*⁶⁵

65. This is where the law brushes against social norms. Firstly, the legal profession is historically male-dominated, and exists within a society which is also historically male-dominated. Because men have dominated the social positions of leaders and lawmakers throughout history and continue to hold the majority of senior roles in the legal profession today, the reasonableness standard embodies ‘male experiences, views and perspectives’.⁶⁶ That is, the voice of ‘knowledge’, ‘authority’ and ‘law’ – and, yes, ‘reasonableness’ in the context of sexual harassment – has long been male. Secondly, even if men and women held equal positions in the law and their perspectives were given equal weight, ‘what is reasonable?’ is not a neutral question. It assumes a consensus that can cut across gendered lines when the very issue of sexual harassment is heavily gendered. This is considered further at paragraphs [287]–[289] below.
66. In this vein, two further points should be addressed. First, the words ‘offended, humiliated or intimidated’ bear their ordinary meaning. This part of the definition of sexual harassment has faced criticism on the basis that it implies that sexually harassing behaviour is not problematic in itself, but only in whether it elicits a certain response. Second, some commentators have questioned whether the reasonable person test is necessary to the operation of the provision. They suggest that ‘trivial’ conduct would be filtered out in the earlier stages of applying section 28A. To this view, applying a reasonable lens over conduct that already has to be sexual and already has to be unwelcome is unnecessary and suggests a reluctance on the part of lawmakers to relinquish traditional, patriarchal control over gender relations and narratives.
67. The Law Council does not expect to solve this criticism of the reasonable person test, but believes it should be recorded.
68. Since 2011, the SDA has included subsection 28A(1A), which sets out, in a non-exhaustive manner, the circumstances relevant to the reasonable person, including the sex, age, race, and disability of the person harassed and their relationship to the perpetrator. These circumstances seem to reflect the notion that power, or an imbalance of power, is a critical component in sexual harassment cases.⁶⁷ Consequently, the test as it currently stands ‘is highly contextual, taking the target of the conduct, and their circumstances, as the starting point’.⁶⁸
69. Many commentators have suggested that this contextual approach goes some way to mitigating the concerns of critical and feminist scholars stated above. However, the Law Council cautions against seeing subsection 28A(1A) as a definitive fix.

⁶⁴ Prue Bindon, ‘The Weinstein Factor: Where does the legal profession stand?’ (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 27.

⁶⁵ Gail Mason and Anna Chapman, ‘Defining Sexual Harassment: A History of the Commonwealth Legislation and Its Critiques’ (2003) 31 *Federal Law Review* 195, 217.

⁶⁶ Fiona Pace, ‘Concepts of Reasonableness in Sexual Harassment Legislation: Did Queensland Get it Right?’ (2003) 3 *Queensland University of Technology Law Journal* 190, 193.

⁶⁷ See, eg, Prue Bindon, ‘The Weinstein Factor: Where does the legal profession stand?’ (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 27; Kate Eastman, Sophie Callan and Aditi Rao, ‘Crossing the Line: Behaviour that Gets Barristers into Trouble’ [2017] (Summer) *Bar News: Journal of the New South Wales Bar Association* 38, 39.

⁶⁸ Therese MacDermott, ‘Reassessing Sexual Harassment: It’s Time’ (2015) 40 *Alternative Law Journal* 157, 159.

70. Having regard to the circumstances of the complainant does not necessarily make the test immune to issues of perspective. In a critical review of the relevant case law, Fiona Pace provides the following examples:
- In *J & D Pty Ltd and W*, the Commission held that a reasonable person, having regard to all the circumstances, would not have anticipated that the complainant would be offended, humiliated or intimidated, because the complainant was ‘a mature and professional woman of considerable experience’.⁶⁹
 - The same result was recorded in *Davidson v Murphy* on the basis that the complainant was ‘31 years old, married with a child and had a strong personality’.⁷⁰
71. These cases pre-date 2011, but a commission, tribunal or court could follow the same reasoning were the cases decided today. Subsection 28A(1A) explicitly includes age and does not exclude regard to other circumstances such as personalities.
72. There is an argument that this type of consideration of the circumstances encroaches again into subjective territory, when the test should be objective. Fiona Pace, for example, remarks that ‘the problem lies in the application of the test by decision-makers rather than with the test itself’.⁷¹
73. The Law Council agrees that reasoning that attempts to enter the mind of either the complainant or perpetrator by way of the circumstances outlined in section 28A(1A) misapplies the objective test. The reasonable person is to consider the circumstances objectively – not speculate on how the circumstances might have influenced the subjective thoughts or feelings of either party.
74. However, the Law Council cannot conclusively say that the above examples of reasoning are subjective (and therefore a misapplication of the reasonable person test) rather than objective. The Law Council suggests that such reasoning refers back to the inherent problem with the test, discussed above at paragraphs [64]–[66].
75. In conclusion to this section, the Law Council acknowledges that the reasonable person test in section 28A of the SDA is one of the broadest in all Australian jurisdictions. However, the Law Council emphasises that any reasonable person test has inherent shortcomings and, in particular, gendered implications, and would prefer a simpler sexual harassment provision that does not place a reasonableness lens over conduct obviously and self-evidently wrong.

Workplace

76. The National Inquiry is concerned with sexual harassment in the workplace.
77. Section 28B addresses sexual harassment in the area of employment. Subsections 28B(1)–(5) make sexual harassment within five types of employment relationship unlawful:
- employer and (actual or prospective) employee;⁷²

⁶⁹ Fiona Pace, ‘Concepts of Reasonableness in Sexual Harassment Legislation: Did Queensland Get it Right?’ (2003) 3 *Queensland University of Technology Law Journal* 190, 203 citing *J & D Pty Ltd and W* [1997] HREOCA 17 (9 April 1997), 18.

⁷⁰ *Ibid* 7-9.

⁷¹ *Ibid* 203.

⁷² *Sex Discrimination Act 1984* (Cth) s 28B(1).

- employee and (actual or prospective) fellow employee;⁷³
- person and (actual or prospective) commission agent or contract worker of the person;⁷⁴
- commission agent or contract worker and fellow commission agent or contract worker;⁷⁵ and
- partner and (actual or prospective) partner of a partnership.⁷⁶

78. The Law Council notes that no geographical limitation is applied to subsections 28B(1)–(5), meaning that sexual harassment is prohibited in these employment relationships no matter where it occurs – inside or outside the workplace.

79. The operation of subsections 28B(1)–(5) is only limited by the requirement of ‘common employment’, which cannot be ‘unrelated or merely incidental to the sexual harassment of one [person] by the other’.⁷⁷

80. The Law Council further notes that subsection 28B(2) only applies where the perpetrator and sexually harassed person have the same employer.⁷⁸

81. Sexual harassment between persons who do not share the same employer is covered by subsection 28B(6), which limits the prohibition against sexual harassment to sexual harassment occurring at ‘a workplace’ of ‘either or both’ of these persons. This was expanded from ‘a workplace of *both*’ to ‘a workplace of *either or both*’ by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth).⁷⁹

*It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons.*⁸⁰

82. Subsection 28B(7) defines ‘workplace’ as:

*A place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.*⁸¹

83. The case law provides guidance on the operation of the prohibition against sexual harassment in subsection 28B(6) to sexual harassment occurring between workplace participants who do not share the same employer – and, in particular, the scope of the term ‘workplace’ in subsection 28B(7).

84. In *Ewin v Vergara (No 3)*, Bromberg J emphasised that subsections 28B(6) and 28B(7) are ‘cast in wide terms’:⁸²

A ‘workplace’ is not confined to the place of work of the participants but extends to a place at which the participants work or otherwise carry out functions in connection with being a workplace participant. ... That wide approach recognises that work or work based functions are commonly undertaken in a wide range of places

⁷³ Ibid s 28B(2).

⁷⁴ Ibid s 28B(3).

⁷⁵ Ibid s 28B(4).

⁷⁶ Ibid s 28B(5).

⁷⁷ *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402, 409 (Black CJ and Tamberlin J), citing *Leslie v Graham* [2002] FCA 32, [71] (Branson J).

⁷⁸ *Ewin v Vergara (No 3)* [2013] FCA 1311; [2013] 238 IR 118, 126-127 (Bromberg J).

⁷⁹ *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) s 55 (emphasis added).

⁸⁰ *Sex Discrimination Act 1984* (Cth) s 28B(6).

⁸¹ Ibid s 28B(7).

⁸² *Ewin v Vergara (No 3)* [2013] FCA 1311; [2013] 238 IR 118, 129 (Bromberg J).

(including on various means of transport) beyond the principal or ordinary place or places of work ... Such places would commonly include the premises of clients, suppliers, associated businesses, conference halls and other venues where work functions are held and in transportation vehicles during work related travel. The underlying policy objective is accommodated by such a construction and such a construction is also consistent with the scope of the other subsections of s 28B. ... The objective of eliminating sexual harassment in the workplace would be significantly undermined if associated common areas such as entrances, lifts, corridors, kitchens and toilets were construed as falling beyond the geographical scope intended by s 28B(6).⁸³

85. Moreover, Bromberg J was clear that in making these remarks he was ‘not identify[ing] the outer limits of the scope of [subsection] 28B(6)’.⁸⁴

86. Accordingly, courts have interpreted ‘workplace’ to include ‘off site’ and ‘after hours’.

87. Places that have fallen within this broad definition of workplace include:

- a pub attended to continue a discussion begun at the principal workplace;⁸⁵
- a motel bedroom where the employer provided the accommodation;⁸⁶
- a motel suite where the employee was convinced the trip was a work trip;⁸⁷ and
- a street, taxi and office used to travel and attend to clients.⁸⁸

88. The Law Council supports the broad interpretation taken in relation to the term ‘workplace’. However, the Law Council remains concerned because this protection against sexual harassment in the workplace extends only to ‘workplace participants’ defined narrowly in subsection 28B(7) as:

- (a) an employer or employee;*
- (b) a commission agent or contract worker;*
- (c) a partner in a partnership.*

89. The definitions for ‘commission agent’ and ‘contract worker’ are provided in section 4:

commission agent means a person who does work for another person as the agent of that other person and who is remunerated, whether in whole or in part, by commission.

contract worker means a person who does work for another person pursuant to a contract between the employer of the first-mentioned person and that other person.

90. Beyond section 28B, sections 28C–28K might incidentally provide protection against sexual harassment for certain other workplace participants, such as those providing goods, services or facilities. Section 28G makes it unlawful for a person to sexually harass another person ‘in the course of providing, or offering to provide’ or ‘in the course of seeking, or receiving’ goods, services or facilities.⁸⁹ Subsection 28G(2) was included

⁸³ Ibid 129-130 (Bromberg J).

⁸⁴ Ibid (Bromberg J).

⁸⁵ Ibid.

⁸⁶ *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402.

⁸⁷ *Cross v Hughes* (2006) 233 ALR 108.

⁸⁸ *Ewin v Vergara (No 3)* [2013] FCA 1311; [2013] 238 IR 118.

⁸⁹ *Sex Discrimination Act 1984* (Cth) s 28G(1)-(2).

on the advice of the 2008 Senate Standing Committee on Legal and Constitutional Affairs that:

*workers are equally as vulnerable to sexual harassment from customers as from colleagues or employers ... [and] should be afforded protections from sexual harassment by persons with whom they come into contact in connection with their employment.*⁹⁰

91. The provision of goods, services or facilities is not defined in the SDA. In wider case law, the term has been held to include certain types of unpaid work, such as work done by prisoners, making it possible that volunteers, interns and other categories of unpaid or informal workplace participant not included in subsection 28B(7) would be protected from sexual harassment, provided they were carrying out this function.
92. The Law Council is of the view that this irregular, patchy or piecemeal coverage of the SDA is problematic as it creates a vacuum in relation to the rights of certain workers within the current legal framework. The Law Council draws attention to the following:
 - People who are unpaid workplace participants, such as volunteers, interns or students, are not expressly covered by the legislation. Some state and territory legislation is wider than the SDA in this regard. The *Anti-Discrimination Act 1977* (NSW), for example, extends to those who are self-employed, volunteers and unpaid trainees.⁹¹ Similarly, the *Anti-Discrimination Act 1998* (Tas) defines employment as 'employment or occupation in any capacity, with or without remuneration'.⁹²
 - People who are self-employed workplace participants, and not partners, commission agents or contract workers, are not expressly covered by the legislation. This includes barristers and certain statutory office holders or appointees.
 - Particularly vulnerable people, such as labour hire workers, may not be protected from sexual harassment in all circumstances in which they work, or from all people with whom they work. The recent Victorian inquiry into the labour hire sector found serious mistreatment of labour hire workers, including through sexual harassment.⁹³
 - It is unclear whether the definition of contract worker would extend to all types of contracting relationships, such as secondments.
 - It is unclear whether the coverage would extend to irregular types of working relationships, such as those between athletes and coaches. Much would depend on the factual circumstances and the meanings of, for example, providing goods, services and facilities or educational institution.
 - Subsection 13(2) expressly states that '[s]ection 28B does not apply in relation to an act done by an employee of a State or of an instrumentality of a State',⁹⁴ meaning state-based public servants are not able to make a complaint of workplace sexual harassment under section 28B of the SDA and are ultimately left to rely on the coverage provided in their home state or territory jurisdiction. This

⁹⁰ Parliament of Australia, *Government response to the report on the Sex Discrimination Act 1984* (2008) 11 < https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2008-10/sex_discrim/index >, in response to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008).

⁹¹ *Anti-Discrimination Act 1977* (NSW) s 22B(6).

⁹² *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'employment' para (a)).

⁹³ Victorian Government, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (31 August 2016).

⁹⁴ *Sex Discrimination Act 1984* (Cth) s 13(2).

leaves certain state-based public servants, such as those in Western Australia, with more onerous requirements and less protections than their other state-based counterparts. The differences between the federal, state and territory legislation are shown in Table 1. The ability for reforming the SDA in this regard may be affected by constitutional limitations. The issue could be resolved by reforming state and territory legislation, to provide consistency across jurisdictions.

93. Given the prevalence of workplace sexual harassment, and the complex and varied nature of modern work, the Law Council's position is that the federal legislation should protect any person performing work, not just those who meet the proscribed employment relationships,⁹⁵ or the proscribed meanings of workplace participant in a workplace,⁹⁶ or who are incidentally providing goods, services or facilities, educational institutions, or other specific functions.⁹⁷
94. The requirement that 'a person must not sexually harass another person' in section 118 of the *Anti-Discrimination Act 1991* (Qld) is not confined to certain circumstances or relationships, and suggests a way forward for all jurisdictions.
95. The Law Council is aware that a recommendation to expand the prohibition against sexual harassment to all areas of public life was to be considered by the federal government in its plan to consolidate federal, state and territory anti-discrimination legislation, but that this plan failed to be progressed following the federal election in September 2013 and the subsequent change of government.⁹⁸ The Law Council suggests that it is worthwhile to repeat this recommendation in 2019. Under subsection 51(xxix) of the *Constitution*, the Parliament has the power to make laws with respect to 'external affairs',⁹⁹ which, in *Commonwealth v Tasmania*, was held to include the implementation of Australia's obligations under international instruments.¹⁰⁰ The SDA has constitutional validity mainly because of this external affairs power. The SDA implements Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW)*¹⁰¹ as well as other relevant international instruments.¹⁰² Given the wide scope of the CEDAW, which refers broadly to the achievement and maintenance of gender equality, the Law Council suggests that the Parliament would have the power to expand the prohibition against sexual harassment to all areas of public life. The Law Council suggests that such an expansion would deal with the inconsistent coverage of the current legislation in relation to workplace sexual harassment, and would also provide an important normative statement on how the nation views sexual harassment today.
96. Alternatively, the Law Council recommends expanding the definition of workplace participant to cover all participants – paid and unpaid, formal and informal, employed and self-employed.

⁹⁵ Ibid s 28B(1)-(5).

⁹⁶ Ibid s 28B(6)-(7).

⁹⁷ Ibid s 28C-28K.

⁹⁸ Parliament of Australia, *Government response to the report on the Sex Discrimination Act 1984* (2008) 6 <https://www.apf.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2008-10/sex_discrim/index>, in response to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008).

⁹⁹ *Constitution of the Commonwealth of Australia* s 51(xxix) ('*Constitution*').

¹⁰⁰ *Commonwealth v Tasmania* (1983) 158 CLR 1, 259 ('*Tasmanian Dam Case*').

¹⁰¹ *Convention on the Elimination of all Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*').

¹⁰² *Sex Discrimination Act 1984* (Cth) s 3(a).

Vicarious Liability

97. Paragraph 106(1)(b) provides for an employer or principal to be vicariously liable for the sexual harassment perpetrated by an employee or agent. However, the sexual harassment must have occurred 'in connection with' the employee's employment or agent's duties.¹⁰³
98. The expression 'in connection with'¹⁰⁴ has been held to be 'a broad one of practical application' and wider than other expressions used in workers compensation claims such as 'in the course of'.¹⁰⁵ The courts in *Leslie v Graham*¹⁰⁶ and *Lee v Smith*¹⁰⁷ considered the following factors to be relevant in deciding that the requisite nexus with the workplace was sustained, despite the sexual harassment occurring away from the principal workplace:
- the employment relationship between the harasser and person harassed was current;
 - the location where the sexual harassment occurred had been supplied by the employer for the purposes of the employment or arose out of a work situation;
 - the sexual harassment followed other acts of sexual harassment that had occurred at the principal workplace; or
 - the harasser was assisted by fellow employees.
99. The Law Council supports this approach, noting the widespread consensus throughout the case law and the ability of an employer or principal to rely on the defence considered below at paragraph [100].
100. Subsection 106(2) provides a defence against vicarious liability. An employer or principal will not be vicariously liable if they can prove they 'took all reasonable steps to prevent' the alleged sexual harassment.¹⁰⁸
101. The term 'all reasonable steps' has been extensively considered in case law. The mere existence of a policy will not meet the requirement of 'all reasonable steps'. It is likely that a court will require a sexual harassment policy to be both substantial and successfully or actively implemented:

*One needs to look at the compliance program in two respects. Firstly, one must ask whether there was a substantial compliance program in place which was actively implemented ... Secondly, one must ask whether the implementation of the compliance program was successful.*¹⁰⁹

¹⁰³ Ibid s 106(1)(b).

¹⁰⁴ Ibid s 106(1).

¹⁰⁵ *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402, 409-410 (Black CJ and Tamberlin J).

¹⁰⁶ *Leslie v Graham* [2002] FCA 32 (Branson J).

¹⁰⁷ *Lee v Smith* [2007] FMCA 59.

¹⁰⁸ *Sex Discrimination Act 1984* (Cth) s 106(2).

¹⁰⁹ Catherine Van der Winden, 'Combatting Sexual Harassment in the Workplace: Policy vs Legislative Reform' (2014) 12 *Canberra Law Review* 204, 219, quoting *ACCC v Australian Safeway Stores Pty Ltd & Ors* (1998) ATPR 41-562.

102. The Law Council supports this approach, particularly in the wake of recent findings from the International Bar Association (IBA) that training is far more effective in preventing sexual harassment than policy.¹¹⁰

103. It is also likely that any policy must state explicitly that sexual harassment is prohibited under law:

*In my view, advice in clear terms that sexual harassment is against the law, and identification of the source of the relevant legal standard, is a significant additional element to bring to the attention of employees in addition to a statement that sexual harassment is against company policy, no matter how firmly the consequences for breach of company policy might be stated. I take the same view about advice that an employer might also be liable for sexual harassment by an employee.*¹¹¹

104. Again, the Law Council supports this approach, noting requests from a number of its Constituent Bodies that education of the public on the law in relation to sexual harassment be emphasised and improved.

105. Every person is entitled to feel safe at work. Accordingly, it is important to have high standards in addressing workplace sexual harassment. The Law Council acknowledges that the current vicarious liability framework places a burden on employers, but does not consider this burden to be onerous. Employers already have workplace health and safety responsibilities in relation to their employees. Moreover, numerous statements in the case law express the view that the requirement of taking all reasonable steps to prevent sexual harassment is to be tailored to the specific employer and their capabilities:

*it would be unrealistic to expect all employers, regardless of size, to adhere to a common standard of preventative measures. This defence has been interpreted in Australia as requiring the employer or principal to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus, large corporations will be expected to do more than small businesses in order to be held to have acted reasonably.*¹¹²

*These elements were absent from Oracle's global online training package. The fact that they could reasonably have been in place before April 2008 is demonstrated by the existence of the 2004 Code and their introduction by Oracle in November 2008. The omission of these important and easily included aspects from Oracle's statements of its own policies is a sufficient indication that Oracle had not, before November 2008 at least, taken all reasonable steps to prevent sexual harassment.*¹¹³

106. 'There has been no definitive rule for the level of compliance required as the courts have tended to decide vicarious liability on a case-by-case basis.'¹¹⁴

107. The main intention is to prevent inaction, which, in the opinion of the Law Council, is a low bar:

¹¹⁰ International Bar Association, *Global Survey on Bullying and Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results. See also Kate Allman, '#TimesUp for the Legal Profession' (2018) 51 *Law Society of NSW Journal* 30, 35.

¹¹¹ *Richardson v Oracle* [2013] FCA 102; (2013) 232 IR 31, 76 (Buchanan J).

¹¹² *Johanson v Blackledge* [2001] FMCA 6, [101] (Driver FM).

¹¹³ *Richardson v Oracle* [2013] FCA 102; (2013) 232 IR 31, 76 (Buchanan J) (emphasis added).

¹¹⁴ Catherine Van der Winden, 'Combatting Sexual Harassment in the Workplace: Policy vs Legislative Reform' (2014) 12 *Canberra Law Review* 204, 218.

*The discharge of this onus, of course, depends on the particular circumstances of a case, but it is seriously to be doubted that it can be discharged in circumstances of mere ignorance or inactivity. In *Tidwell v American Oil Co* (1971) 332 F Supp 424 at 436 it was said: “The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action”.*¹¹⁵

108. Whether positive duties, such as mandatory reporting requirements, should be placed on employers is considered below at paragraphs [163]–[205].

Damages

109. In 2014, *Richardson v Oracle Corporation Australia Pty Ltd*¹¹⁶ set a new benchmark on the award of general damages for sexual harassment. The Full Court of the Federal Court of Australia awarded \$130 000 to the appellant. This was significantly more than the \$18 000 awarded at first instance; significantly more than the past range of \$12 000 to \$20 000 awarded for general damages in sex discrimination and sexual harassment cases; and compensated for economic loss, as well as for pain and suffering and loss of enjoyment in life.¹¹⁷ Accordingly, Adrienne Morton describes *Richardson v Oracle* as representing ‘a dramatic increase in the size of orders made in sexual harassment cases’.¹¹⁸
110. Prior to *Richardson v Oracle*, concerns around the low awards for damages in sex discrimination and sexual harassment cases were a prevalent theme in academic literature. In 2004, Beth Gaze found that ‘most awards for someone who loses a job through sexual harassment are well under \$10 000’¹¹⁹ and expressed concern that ‘this is not enough to give individuals a sufficient incentive to undergo the stress of complaining and the pressures and risks of litigating’.¹²⁰ Kenny J observed that in the past ‘the range of awards for general damages in cases of the present kind was fixed at a conservative level’.¹²¹
111. The Law Council welcomes this increase on the grounds that reasonable awards might enable more sexually harassed persons to utilise formal complaint processes.¹²² It is the position of the Law Council that access to justice should not be an economic consideration. Therese MacDermott argues that higher damages might also have ‘deterrent value ... as a timely reminder that the monetary costs for employers can be significant’.¹²³ Finally, higher damages provide an important normative statement on social attitudes toward non-tolerance, and recognise the impact that sexual harassment

¹¹⁵ *Aldridge v Booth* (1988) 80 ALR 1, 12.

¹¹⁶ *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 (*‘Richardson v Oracle’*).

¹¹⁷ *Ibid* 357–8, 389.

¹¹⁸ Adrienne Morton, ‘Sexual Harassment in the Legal Profession’ (2018) 144 *Precedent* 34, 35. See also Prue Bindon, ‘The Weinstein Factor: Where does the legal profession stand?’ (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 28.

¹¹⁹ Beth Gaze, ‘The *Sex Discrimination Act* After Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives’ (2004) 27(3) *UNSW Law Journal* 914, 919.

¹²⁰ *Ibid* 920.

¹²¹ *Richardson v Oracle* (2014) 223 FCR 334, 356–7 (Kenny J).

¹²² See Therese MacDermott, ‘Reassessing Sexual Harassment: It’s Time’ (2015) 40 *Alternative Law Journal* 157, 158; John Wilson, ‘Damages for Sexual Harassment: A new era?’ (2014) *Ethos: Law Society of the ACT Journal* 20, 21; Beth Gaze, ‘The *Sex Discrimination Act* After Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives’ (2004) 27(3) *UNSW Law Journal* 914, 920.

¹²³ Therese MacDermott, ‘Reassessing Sexual Harassment: It’s Time’ (2015) 40 *Alternative Law Journal* 157, 157. See also John Wilson, ‘Damages for Sexual Harassment: A new era?’ (2014) *Ethos: Law Society of the ACT Journal* 20, 21.

can have on those targeted.¹²⁴ The Law Council suggests removing the remaining statutory caps on damages awarded in anti-discrimination cases in certain states and territories. The differences between federal, state and territory legislation are shown in Table 1.

112. However, having consulted with practitioners, the Law Council is aware that many settlements have secured considerably higher amounts than even *Richardson v Oracle*, into seven figures.

Comparing Federal, State and Territory Legislation

113. The reader is directed to Table 1, which is attached to this submission.

114. The Law Council draws attention to the following major inconsistencies between federal, state and territory legislation with respect to the prohibitions on sexual harassment.

- The SDA is now narrower than many state and territory anti-discrimination statutes with respect to who is protected from workplace sexual harassment and the obligations on individuals and employers to prevent sexual harassment.
- The *Anti-Discrimination Act 1991* (Qld) makes sexual harassment unlawful in all areas of public life in Queensland.
- The Commonwealth, the Northern Territory and Queensland have a lower threshold than other jurisdictions in determining the reasonableness of a person being offended, humiliated or intimidated by certain conduct, requiring only 'possibility'.
- The *Equal Opportunity Act 1984* (WA) remains the only piece of legislation that maintains the requirement that a person must have suffered actual or believed disadvantage in order to satisfy the definition of sexual harassment.
- Both the *Equal Opportunity Act 1984* (WA) and the *Anti-Discrimination Act 1977* (NSW) include a statutory cap on damages not found in other jurisdictions.
- Where other statutes are silent, the *Equal Opportunity Act 2010* (Vic) places a positive duty on persons to eliminate sexual harassment.
- The *Human Rights Act 2005* (ACT) gives own-initiative powers to its commission.

115. Beyond these major inconsistencies are many minor inconsistencies in wording and operation.

116. The Law Council is concerned that such inconsistencies impact the accessibility of the legislative regime for ordinary Australians, and make a difficult area of the law even more difficult to justify, explain and message, thereby compromising access to justice as well as public awareness raising efforts.

117. The Law Council supports consolidating sexual harassment provisions across jurisdictions, in a manner which enshrines best practice rather than the lowest common denominator.

¹²⁴ See Therese MacDermott, 'Reassessing Sexual Harassment: It's Time' (2015) 40 *Alternative Law Journal* 157, 157–8; John Wilson, 'Damages for Sexual Harassment: A new era?' (2014) *Ethos: Law Society of the ACT Journal* 20, 20; Kate Eastman, Sophie Callan and Aditi Rao, 'Crossing the Line: Behaviour that Gets Barristers into Trouble' [2017] (Summer) *Bar News: Journal of the New South Wales Bar Association* 38, 41.

Complaints Processes

118. The Law Council notes that the process for making a sexual harassment complaint is similar across Australia, but that again there are minor differences, and these inconsistencies decrease the accessibility of the legislative regime for ordinary Australians.

Australian Human Rights Commission Act 1986 (Cth)

119. At the federal level, the statutory body handling sexual harassment complaints is the AHRC. The *Australian Human Rights Commission Act 1986 (Cth)* (**AHRCA**), Part IIB, Division 1 and Division 2, sets out the complaints process under federal law.

120. Subsection 46P(1) of the AHRCA provides for a complaint alleging unlawful discrimination to be lodged with the AHRC.¹²⁵ Section 3 defines unlawful discrimination as including 'any acts, omissions or practices that are unlawful under ... Part II of the *Sex Discrimination Act 1984*',¹²⁶ which of course incorporates sexual harassment into the complaints framework. The complaint must be lodged in writing,¹²⁷ by, or on behalf of, the person or persons aggrieved by the alleged acts, omissions or practices.¹²⁸

121. The AHRC is required to refer all complaints made under section 46P to the President.¹²⁹ The President must decide whether to inquire into the complaint or whether to terminate the complaint.¹³⁰

122. The President's termination powers are wide ranging. Termination may occur at any time, and on either a discretionary or mandatory ground.¹³¹ The discretionary grounds of termination are set out in section 46PH and include if 'the complaint was lodged more than 6 months after the alleged acts, omissions or practices took place'.¹³²

123. If the President does not terminate the complaint, the President must 'inquire into the complaint and attempt to conciliate the complaint'.¹³³ The sections that follow give the President further powers relevant to such an inquiry and conciliation process, including the power to obtain information and the power to hold conferences.¹³⁴

124. If the attempt at conciliation eventually proves unsuccessful, the President must terminate the complaint under paragraph 46PH(1B)(b).

125. The President must provide notice of any termination to the complainant.¹³⁵ Once termination occurs, the complainant has the option of applying to the Federal Court or Federal Circuit Court to resolve the issue¹³⁶ – provided the court gives leave or the complaint was terminated under paragraph 46PH(1)(h) or 46PH(1B)(b).¹³⁷ The

¹²⁵ *Australian Human Rights Commission Act 1986 (Cth)* pt IIB, div 1, s 46P(1)(a)–(b).

¹²⁶ *Ibid* s 3(1)(c).

¹²⁷ *Ibid* s 46P(1).

¹²⁸ *Ibid* ss 46P(2)(a)–(b).

¹²⁹ *Ibid* s 46PD.

¹³⁰ *Ibid* ss 46PF(1)(a)–(b).

¹³¹ *Ibid* ss 46PH(1A), (1D).

¹³² *Ibid* s 46PH(1)(b).

¹³³ *Ibid* s 46PF(1)(c).

¹³⁴ *Ibid* ss 46PI–46PJ.

¹³⁵ *Ibid* s 46PH(2).

¹³⁶ *Ibid* s 46PO(1).

¹³⁷ *Ibid* s 46PO(3A).

application must be made within 60 days from the notice of termination or within such time as the court allows.¹³⁸

126. The Law Council has the following concerns with regard to the federal complaints process.

Time Limit

127. The Law Council notes that the time limit was changed from 12 months to 6 months following the passage of the *Human Rights Legislation Amendment Act 2017* (Cth). The rationale for this amendment, provided in the revised explanatory memorandum to the Human Rights Legislation Amendment Bill 2017 (Cth), was as follows:

This reduction will provide a strong incentive for complainants to lodge complaints in a timely manner following the occurrence of conduct alleged to be unlawful discrimination.

*This reduction will also give the President additional flexibility to terminate complaints that are lodged a significant time after alleged conduct took place for a potentially vexatious or unmeritorious purpose. This will also reduce the burden on potential respondents.*¹³⁹

128. At the time, the Law Council provided the following advice on the 6-month time limit:

*It will make little difference to what claims can be commenced in the Federal Court and it is suggested that the amendment will have no practical effect and should not be pursued.*¹⁴⁰

129. The Law Council maintains its position that the reduction from 12 months to 6 months is unnecessary in helping complainants comply with Federal Court limitation periods. The Law Council accepts that, in imposing time limits on a statutory complaints process, regard should be had to any potentially applicable limitation periods on lodging actions in Australian courts, in order to maintain the option for complainants to litigate after the complaints process with the statutory body has run its course. However, in the case of sexual harassment, the cause of action in litigation is likely to be brought under the same statutory regime as the complaint, and these processes involving the Commission and the Federal Court are tied together. Subsection 46PO(2) calculates the limitation period for making an application to the Federal Court from the date of the Commission's termination notice, not the date of the alleged unlawful discrimination. That is, subsection 46PO(2) provides that an application to the Federal Court or the Federal Circuit Court:

*must be made within 60 days after the date of issue of the notice under subsection 46PH(2), or within such further time as the court concerned allows.*¹⁴¹

130. Even if a complainant sought to bring a claim outside the AHRCA and SDA, the applicable limitation period is likely to extend far beyond 6 months. The legislation on the limitation of actions, found in every state and territory jurisdiction, generally provides

¹³⁸ Ibid s 46PO(2).

¹³⁹ Revised Explanatory Memorandum, Human Rights Legislation Amendment Bill 2017 (Cth) item 39.

¹⁴⁰ Law Council of Australia, Submission No 8 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Human Rights Legislation Amendment Bill 2017* (27 March 2017) 11.

¹⁴¹ *Australian Human Rights Commission Act 1986* (Cth) s 46PO(2).

limitation periods within a range of 3 years to 6 years, and these time frames also occur throughout federal statutes.¹⁴²

131. The Law Council considers that decreasing the time limit from 12 months to 6 months was never necessary to achieve the objectives stated in the revised explanatory memorandum. Firstly, 12 months was already ‘timely’; as noted above, most limitation periods are far longer.¹⁴³ Secondly, complaints lodged ‘for a potentially vexatious or unmeritorious purpose’ are dealt with by the mandatory ground for termination in paragraph 46PH(1B)(a).¹⁴⁴ The President is required to terminate complaints that are ‘trivial, vexatious, misconceived or lacking in substance’.¹⁴⁵
132. Moreover, the Law Council notes that, in discrimination cases, and particularly in sexual harassment cases, the person alleging the conduct is obliged to weigh up the potential cost to their reputation as well as the burden of having to relive personal trauma in deciding whether to pursue a formal complaints process. There is also the added step of internal workplace investigations or complaints processes to consider. This may be particularly pertinent given the costs of legal representation. Attempting resolution internally is cheaper, and may therefore be a more desirable first option. A worker may prefer to try informal or formal internal options before finding it necessary to make use of the Commission, which will add to the length of time before they lodge a complaint. Any time limit should reflect these pressures.
133. Whether or not the President is likely to apply this discretionary ground in practice, it exists in the legislation, and a complainant who triggers it introduces another level of uncertainty into their already stressful complaint process.
134. The 6-month time limit should be removed. If a time limit must be included as a ground for termination, the position of the Law Council, in consultation with its Equal Opportunity Committee and other lawyers practising in this space, is that it should not be less than 6 years.

Investigative Powers

135. The Law Council submits that the powers of the AHRC and the Sex Discrimination Commissioner to enforce the SDA, and in particular the sexual harassment provisions, should be strengthened.
136. The current legislative framework provides no general inquiries power. As a statutory body, the AHRC has the powers conferred upon it by section 13 and section 11 of the AHRCA. This includes the function ‘to inquire into, and attempt to conciliate, complaints of unlawful discrimination’ as well as the functions conferred by subsection 48(1) of the SDA, none of which allow own-motion inquiries or investigations.¹⁴⁶ Of course, this also includes the function set out in paragraph 11(1)(f) to:¹⁴⁷

(i) inquire into any act or practice that may be inconsistent with or contrary to any human right; and

¹⁴² See, eg, *Limitation Act*, *Limitation Act 1985* (ACT); *Limitation Act 1969* (NSW); *Limitation Act 1981* (NT); *Limitations of Actions Act 1974* (Qld); *Limitation of Actions Act 1936* (SA); *Limitation Act 1974* (Tas); *Limitation of Actions Act 1958* (Vic); *Limitation Act 2005* (WA). See also *Corporations Act 2001* (Cth) s 1325(4); *Trade Practices Act 1974* (Cth) s 82(2).

¹⁴³ *Ibid.*

¹⁴⁴ *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B)(a).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(aa); *Sex Discrimination Act 1984* (Cth) s 48(1).

¹⁴⁷ *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(f)(i)–(ii).

(ii) if the Commission considers it appropriate to do so – endeavour by conciliation to effect a settlement of the matters that gave rise to the inquiry ...

137. However, paragraph 11(1)(f) is limited by subsection 3(1), which defines ‘act’ and ‘practice’ as something done ‘by or on behalf of the Commonwealth or an authority of the Commonwealth’.¹⁴⁸
138. The AHRC has no proper regulatory powers. Its enforcement of the sexual harassment provisions is dependent upon a person – generally meaning the sexually harassed individual or their legal representative – lodging and pursuing a complaint.
139. The Law Council considers that the AHRC should be empowered to investigate sexual harassment and to commence court proceedings at its own initiative and without needing to rely upon the existence of a formal individual complaint. This is necessary to address the systemic nature of sexual harassment and to take the burden off individual complainants, who are currently carrying the responsibility of responding to a structural issue.
140. This is not a new proposal. In 2008, the Human Rights and Equal Opportunity Commission (**HREOC**) submitted to the Senate Standing Committee on Legal and Constitutional Affairs that:

*the Commissioner have the power to commence an investigation. The Commissioner may identify a potential breach of the SDA either through an inquiry, or upon notification from third parties. The Commissioner would be given the power to: investigate the allegations; carry out negotiations; enter into settlement arrangements; agree enforceable undertakings; issue compliance notices. ... If a complaint cannot be satisfactorily resolved through the use of these new powers of the Commissioner, HREOC proposes that the Commissioner could refer the matter to HREOC as a whole. HREOC would then decide whether to commence legal action in the Federal Court or Federal Magistrates Court, and have the power to do so.*¹⁴⁹

141. The Law Council notes that section 48 of the *Human Rights Commission Act 2005* (ACT) provides a template for a general inquiries power.

48 Consideration without complaint or appropriate complainant

- (1) *The Commission may, on its own initiative, consider (by a commission-initiated consideration) –*
- (a) *an act or service that appears to the commission to be an act or service about which a person could make, but has not made, a complaint under this Act; or*
 - (b) *any other matter related to the commission’s functions.*

142. Similarly, the Racial Discrimination Commission has the power ‘to inquire into, and make determination on, matters referred to it by the Minister or the Commissioner’.¹⁵⁰

¹⁴⁸ Ibid s 3(1).

¹⁴⁹ Human Rights and Equal Opportunity Commission, Submission No 69 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (12 December 2008) 226. This position was reiterated in Australian Human Rights Commission, *Australia’s Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)* (2010) 22.

¹⁵⁰ *Racial Discrimination Act 1975* (Cth) s 20(f).

143. In the United Kingdom, the Commission for Equality and Human Rights may conduct an inquiry into a matter relating to any of the Commission's duties or to human rights and may commence an investigation if it suspects that a person may have committed an unlawful act.¹⁵¹
144. The Law Council further notes that under other Australian laws, such as those relating to occupational health and safety and consumer protection, watchdogs have a range of regulatory tools at their disposal, including the power to investigate breaches, gather information, access premises, issue improvement notices, undertake dispute resolution, settlement or litigation, and monitor and enforce court orders.
145. Conferring a general inquiries power upon a statutory body is not unprecedented.

Resources and Funding

146. The AHRC remains significantly under resourced, with complaints regularly taking five to six months to reach a conciliation hearing.
147. Were the Commonwealth Government to increase the functions conferred on the AHRC, it must proportionately increase its funding.

Public Accountability

Non-Disclosure Agreements

148. Non-disclosure agreements (**NDA**s), also known as confidentiality agreements, are often used in the settlement of sexual harassment cases.
149. NDAs are contracts. They create obligations, which are legally enforceable. In contract law, the nature of each party's obligations depends on the terms of the contract, which may be express or implied. Remedies for breach of contract include injunctions and damages. Accordingly, NDAs are not 'mere formalities' or necessarily 'toothless'. It is possible that, were a sexual harassment victim to breach the terms of an NDA, the perpetrator could seek an injunction to prevent further sharing of the information as well as compensation for economic loss from the victim. 'Relief is [also] available against third party recipients of confidential information, and those who knowingly assist a confidant to breach his or her obligations of confidentiality.'¹⁵²
150. The Law Council considers the importance of avoiding generalised narratives, which trade on unconscious biases around gender stereotypes and position women as victims lacking in agency. In many instances, the sexually harassed person has as much interest as the perpetrator in establishing a confidentiality agreement. This may itself be due to the unfair gendered responses the public has to reports of sexual harassment; nevertheless, it is a circumstance that exists.
151. The Law Council recognises that NDAs provide legitimate benefits for sexually harassed persons, including:

¹⁵¹ *Equality Act 2006* (UK) ss 16 and 20.

¹⁵² Australian Law Reform Commission, *Obligations of Confidence* (2018) <<https://www.alrc.gov.au/publications/15.%20Federal%20Information%20Laws/obligations-confidence>> citing *Johns v Australian Securities Commission* (1993) 178 CLR 408, 459-460; *Breen v Williams* (1996) 186 CLR 71, 129; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [137].

- the privacy or anonymity necessary to protect their reputation, professional standing and workplace wellbeing, especially by preventing unfair judgment, prejudice or gossip;
- greater power in negotiating a settlement agreement or compensation payment as the promise of their silence may be used to leverage a more favourable deal – this is a consideration particularly important for low-income workers, illegal workers, or those who have few avenues to speak out, be heard or find support;
- a better chance to reach settlement, thereby avoiding the uncertainty as well as the financial and emotional costs associated with litigation, such as the burden of having to prove their case, relive their experience, or submit to lengthy delays – we know that opportunities for alternative dispute resolution decrease the stress on litigants and the burden on courts; and
- a definitive resolution to a traumatic experience, which allows for closure and healing.

152. This view finds support in recent literature and media case studies:

*Nondisclosure agreements (NDAs) can have legitimate uses. Some survivors want privacy. Survivors can reasonably fear that being known as a person who makes sexual misconduct allegations will reduce their future employment prospects or lead to being accused or suspected of lying or a variety of other negative consequences.*¹⁵³

*... participants thought NDAs could be valuable for “victims” as well as “perpetrators” in many cases: ... providing ... protection of valid confidences and reputations and an important bargaining chip for exposed and otherwise less powerful complainants who may want a quick resolution and to ‘move on’.*¹⁵⁴

*... the publicity can be personally embarrassing and scarring, both in the short-term and in the long-term. ... Victims of harassment also tend to fear that knowledge of a settlement will harm future job prospects by tainting them as litigious. Furthermore, the difficulties of litigating such claims, which often involve a “he-said, she-said” scenario and a lack of concrete evidence, often force victims to settle with their abusers out-of-court ... it is possible that employers and harassers might be less willing to negotiate or pay a settlement if they could not acquire an NDA, which could diminish victims’ bargaining power in recovering damages.*¹⁵⁵

*I chose not to make a complaint for a number of reasons. It is clear to me that a woman who is the subject of such behaviour is often the person who suffers once a complaint is made. I cherished my position as a state political reporter and feared that would be lost. I also feared the negative impact the publicity could have on me personally and on my young family. This impact is now being felt profoundly.*¹⁵⁶

¹⁵³ Ian Ayres, ‘Targeting Repeat Offender NDAs’ (2018) 71 *Stanford Law Review Online* 76, 77.

¹⁵⁴ Centre for Ethics and Law, ‘Ethics and NDAs: A Centre for Ethics and Law’s Think Tank Report (University College of London Faculty of Law, April 2018) 6.

¹⁵⁵ Vasundhara Prasad, ‘If Anyone is Listening, #MeToo: Breaking the Culture of Silence around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements’ (2018) 59 *Boston College Law Review* 2507, 2516.

¹⁵⁶ ABC News, ‘ABC Journalist Ashleigh Raper’s Statement in Full’ (9 November 2018). This is not in the context of a non-disclosure agreement, but demonstrates the strain that can be placed on sexually harassed persons when their experiences are publicised without their consent and the reasons why they may prefer to stay silent.

153. The other view is that the use of NDAs in sexual harassment cases contributes to a culture of silence, which disempowers victims, covers up unlawful conduct, and facilitates repeat offending. This argument emphasises the individual interests of other past or potential victims, as well as the general public interest in the rule of law, gender equality, workplace health and safety, and tackling the systemic nature of sexual harassment.

*... treating confidentiality solely as a matter of bargaining between two parties ignores the interest of other parties who might be affected (e.g. other victims of the same perpetrator) and the public interest (e.g. in seeing wrongdoing ... properly scrutinised).*¹⁵⁷

154. The Law Council recognises the significance of the concern that NDAs enable offenders to repeat their behaviour with different victims. By definition, confidentiality agreements keep information hidden, denying people who are not privy to the agreement the chance of being warned about a perpetrator's past behaviour and acting to mitigate the risk of their own harm. In many cases that have come to light, perpetrators have used NDAs as a tool for predation. This is arguably then an issue of workplace health and safety.

*Indeed, from the serial offender's perspective, an important goal of the NDA is to protect the offender from having to reveal the serial nature of their activity.*¹⁵⁸

155. The Law Council also considers the potential of NDAs to harm victims. Just as many sexually harassed persons value their privacy, many sexually harassed persons find immense power in being able to speak about their experience. Furthermore, while generalised narratives are to be avoided, some sexually harassed persons have been subjected to power-imbalanced negotiations, and find themselves bound by agreements they never wanted or that do not adequately reflect their interests. It is difficult to know the numbers of these cases; however, in the wake of #MeToo, the following example is often cited:

About twenty years ago, acting for Miramax, Allen & Overy negotiated an NDA inhibiting Zelda Perkins, a former colleague of Harvey Weinstein, from disclosing allegations of serious sexual assault. ... That NDA has been criticised, in particular, because:

- *It sought to inhibit disclosure in "any criminal legal process" by requiring "where reasonably practicable" at least forty-eight hours written notice to be given through a named lawyer at Allen & Overy before making any such disclosure.*
- *It required Perkins to, "use all reasonable endeavours to limit the scope of [such] disclosure as far as possible".*
- *It permitted disclosure to medical personnel of the allegations of misconduct only if the medical professional(s) signed confidentiality agreements agreed with Miramax.*
- *It is alleged those negotiations took place between a group of Weinstein/Miramax lawyers and one two-year PQE lawyer representing Ms Perkins over a period of about one week, with long negotiation sessions over three days, including one twelve-hour session concluding at 5am. That*

¹⁵⁷ Centre for Ethics and Law, 'Ethics and NDAs: A Centre for Ethics and Law's Think Tank Report (University College of London Faculty of Law, April 2018) 7.

¹⁵⁸ Ian Ayres, 'Targeting Repeat Offender NDAs' (2018) 71 *Stanford Law Review Online* 76, 78.

*negotiation included a meeting where Perkins and Weinstein were present in the same room for a discussion prior to the signing of the agreement.*¹⁵⁹

156. There have also been concerns raised over perpetrators making less commitment to confidentiality than victims by falsely denying the occurrence of the sexual harassment or speaking out against victims in potentially damaging ways:

*It is bad faith to bargain for someone else's silence about certain facts and then to lie about what really happened. ... There is an unfortunate power to unrebutted false denials of sexual wrongdoing.*¹⁶⁰

*[Lawyers] [Mullin] and Smith filed a lawsuit on behalf of Rachel Witlieb Bernstein, one of the women who'd settled a sexual harassment claim against former Fox News host Bill O'Reilly, all the way back in 2002. ... Bernstein, the lawsuit complains, has kept her end of the deal: She's never spoken publicly about whatever experience it was that she had with O'Reilly. ... Meanwhile, since he was ousted in April, O'Reilly has made frequent statements to news outlets in which he complains that the charges against him are untrue and ideologically motivated. "No one was mistreated on my watch," he insisted ... Mullin and Smith say this sort of statement – which O'Reilly has made again and again – disparages their client.*¹⁶¹

157. The Law Council cautions against a 'one-size-fits-all' approach to law reform. To outright ban the use of NDAs risks exposing the sexually harassed person who has done nothing wrong to damage. It ignores their agency and the legitimate benefits they may derive from these agreements.
158. However, these agreements should be better regulated. The Law Council suggests that both sides to the debate have a shared interest, which is ensuring that NDAs are fairly and ethically drafted.
159. It is crucial that lawyers representing sexually harassed persons ensure that their client wants an NDA, and attempt to negotiate an NDA that provides as much benefit to their client as possible. Important to this point is the possibility for NDAs to include 'carve-outs'.
160. The Law Council suggests that there are best practice examples of how to formally regulate NDAs without subjugating the interests of the individual to the public good. Looking internationally, Ian Ayres, writing in the *Stanford Law Review Online*, proposes:

*conditioning the enforcement of NDA provisions on compliance with three requirements that are aimed at exposing repeat offenders to the prospect of heightened scrutiny and potential investigation.*¹⁶²

Specifically, NDAs should be enforceable only (1) if they explicitly describe the rights which the survivor retains, notwithstanding the NDA, to report the perpetrator's behaviour to the Equal Employment Opportunity Commission (EEOC) and other investigative authorities; (2) if they explicitly make the accuser's

¹⁵⁹ Centre for Ethics and Law, 'Ethics and NDAs: A Centre for Ethics and Law's Think Tank Report (University College of London Faculty of Law, April 2018) 4. See also Vasundhara Prasad, 'If Anyone is Listening, #MeToo: Breaking the Culture of Silence around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements' (2018) 59 *Boston College Law Review* 2507, 2518-2519.

¹⁶⁰ Ian Ayres, 'Targeting Repeat Offender NDAs' (2018) 71 *Stanford Law Review Online* 76, 82-83.

¹⁶¹ Michelle Dean, 'Contracts of Silence', *Columbia Journalism Review* (online), Winter 2018 <https://www.cjr.org/special_report/nda-agreement.php>.

¹⁶² Ian Ayres, 'Targeting Repeat Offender NDAs' (2018) 71 *Stanford Law Review Online* 76, 78.

*promises to not disclose conditional on the perpetrator not misrepresenting any of the survivor and perpetrator's past interactions; and (3) if the underlying survivor allegations are deposited in an information escrow that would be released for investigation by the EEOC if another complaint is received against the same perpetrator.*¹⁶³

161. In the Australian context, one would substitute the EEOC with the AHRC or equivalent state or territory statutory body.
162. Considering this background and examples of good practice, the Law Council recommends legislative reform, which would make NDAs unenforceable where they fail to meet certain mandatory standards.

Positive Duties on Employers, etc.

163. Under the current federal legislative framework, an employer's liability for workplace sexual harassment is limited to vicarious liability, which is considered above at paragraphs [97]–[108].
164. The Law Council would support the introduction of new provisions in the federal legislative framework requiring persons to take certain positive measures to prevent and respond to sexual harassment. The Law Council has received strong input from a number of its Constituent Bodies on this point.
165. Before outlining what these positive duties might include, the Law Council considers it important to address the concern that positive duties 'would place unnecessary regulatory burden on duty holders and may not achieve their aims'.¹⁶⁴
166. Employers already have responsibilities assuming they do not wish to be held vicariously liable for sexual harassment, considered above at paragraphs [97]–[108], as well as proactive duties under Australia's occupational health and safety laws, considered below at paragraphs [234]–[238].
167. The positive duties suggested here would not significantly increase the burden of the existing responsibilities or proactive duties already faced by employers, agents and other duty holders, but would strengthen them in regard to sexual harassment and provide duty holders with clarification as to best practice.
168. The Law Council's position is that positive duties should be required in proportion to the size, resources and capabilities of the duty holder, which is comparable to how judges currently approach the prerequisite to the defence against vicarious liability that the employer or principal 'took all reasonable steps' to prevent the employee or agent perpetrating sexual harassment.
169. The Law Council draws attention to the findings of *Everybody's business: Fourth national survey on sexual harassment in Australian workplaces* to explain why positive duties are necessary. The high rate of sexual harassment, as well as the low rate of reporting sexual harassment, which is often explained by the low confidence the sexually harassed person has in the response of their employer and in the likelihood of sanctions attaching to the perpetrator, suggest that the existing provisions need to be supplemented by heavier measures.

¹⁶³ Ibid 79.

¹⁶⁴ Catherine Van der Winden, 'Combatting Sexual Harassment in the Workplace: Policy vs Legislative Reform' (2014) 12 *Canberra Law Review* 204, 220 quoting Attorney-General's Department, Parliament of Australia, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (2011) 18.

170. For these reasons the Law Council recommends three positive duties – the duties to eliminate, respond and report – which the Law Council believes are in the best interests of employers and employees alike. These duties complement one another and would work together to enshrine best practice into legislation. The Law Council’s position is that all three should be introduced into the SDA.

Duty to Eliminate

171. The Law Council recommends the introduction of a positive duty to eliminate sexual harassment.

172. The *Workplace Health and Safety Act 2011* (Cth) already places a positive duty on persons who are conducting a business or undertaking or who are self-employed to eliminate or minimise risks to health and safety so far as is reasonably practicable. Section 19 sets out the primary duty of care, with section 18 explaining in more detail what is meant by ‘reasonably practicable’.

173. While a person failing to prevent sexual harassment may constitute a breach of this primary duty to ensure health and safety, the *Workplace Health and Safety Act 2011* (Cth) does not explicitly refer to sexual harassment. For this reason, the Law Council supports including an express provision in the SDA in order to avoid any uncertainty.

174. The *Equal Opportunity Act 2010* (Vic) provides an example of what a positive duty specific to sexual harassment might look like. Section 15 places a positive duty to eliminate sexual harassment on any person bound by the prohibitions against sexual harassment in Parts 4, 6 or 7 of the Act:

15 Duty to eliminate discrimination, sexual harassment or victimisation

(1) *This section applies to a person who has a duty under Part 4, 6 or 7 not to engage in discrimination, sexual harassment or victimisation.*

(2) *A person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.*

...

(4) *A contravention of the duty imposed by subsection (2) may be the subject of an investigation or a public inquiry undertaken by the Commission under Part 9.*

...

(6) *In determining whether a measure is reasonable and proportionate the following factors must be considered –*

(a) *the size of the person’s business or operations;*

(b) *the nature and circumstances of the person’s business or operations;*

(c) *the person’s resources;*

(d) *the person’s business and operational priorities;*

(e) *the practicability and the cost of the measures.*

Examples

1 *A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation’s commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.*

2 *A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.*

175. The reasoning behind introducing the positive duty was set out in the Explanatory Memorandum:

*The duty will mean that duty holders will need to think proactively about their compliance obligations rather than waiting for a dispute to be brought to elicit a response.*¹⁶⁵

176. This is reiterated in section 14 of the Act:

14 Purpose of Part

The purpose of this Part is to provide for the taking of positive action to eliminate discrimination, sexual harassment and victimisation.

177. The New South Wales Bar Association has generously provided the Law Council with a copy of the positive duty to eliminate sexual harassment that it recommends be included as a provision in the SDA:

Measures to eliminate discrimination, sexual harassment or victimisation

- (1) *This section applies to persons to whom Part II, Divisions 1, 2 and 3 of this Act applies.*
- (2) *A person should take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.*
- (3) *In determining whether a measure is reasonable and proportionate the following factors must be considered –*
 - (a) *the size of the person's business or operations;*
 - (b) *the nature and circumstances of the person's business or operations;*
 - (c) *the person's resources;*
 - (d) *the person's business and operational priorities;*
 - (e) *the practicability and the cost of the measures.*
- (4) *A failure to comply with sub-section (2):*
 - (a) *is not unlawful discrimination; but*
 - (b) *may be the subject of an investigation by the Australian Human Rights Commission*

178. The differences between the provision currently contained in the *Equal Opportunity Act 2010* (Vic) and the provision proposed by the New South Wales Bar Association is whether failing to comply with the duty to eliminate would be unlawful. Whilst there is merit in the proposal by the New South Wales Bar Association, the Law Council is of the view that taking into account the views of all its Constituent Bodies, failing to comply should be unlawful. The Law Council also supports expanding the own-motion powers of the AHRC, which is discussed in more detail at paragraphs [135]–[145].

¹⁶⁵ Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) cl 15.

Duty to Respond

179. At present, the SDA does not require employers and other relevant duty holders to respond to allegations of sexual harassment in any particular way, nor does the SDA prescribe an internal complaints procedure for employers and other relevant duty holders to implement.
180. The Law Council recommends the introduction of a positive duty to respond to allegations of sexual harassment.
181. For what such a duty to respond should encompass, the Law Council acknowledges and draws upon existing guidelines, as well as the recommendations of its Constituent Bodies.
182. The *Equal Opportunity Act 1984* (SA) contains one example of a duty to respond. Subsection 87(7) extends the idea of taking reasonable steps to prevent sexual harassment from the defence against vicarious liability, making this a positive duty on the employer in circumstances where an allegation of sexual harassment has been made by an employee to the employer.

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...

- (7) *If an employee reports to his or her employer specific circumstances in which the employee was subjected, in the course of his or her employment, to sexual harassment by a person other than a fellow worker, and it is reasonable in all the circumstances to expect that further sexual harassment of the employee by the same person is likely to occur, it is unlawful for the employer to fail to take reasonable steps to prevent the further sexual harassment.*

183. However, the Law Society of Western Australia suggests that any provisions introduced into the SDA should outline a mechanism for employers to address allegations of sexual harassment, and cites the *Fair Work Act 2009* (Cth) (**the FWA**), section 65, as an example of such a mechanism. The Law Society of Western Australia goes on to suggest that:

The mechanism could outline the best practice model for responding to complaints of sexual harassment, including any confidentiality obligations on the parties and the timeframes for each step in the complaint resolution and/or investigative process.

184. The Law Council notes existing best practice guidelines on investigating and determining complaints of sexual harassment, including the AHRC's suggestions in *Effectively preventing and responding to sexual harassment: A Code of Practice for Employers*,¹⁶⁶ and suggests that a best practice model for an internal sexual harassment complaints process might include the following elements:
 - the requirement that a sexual harassment complaint be addressed in a fair, timely and confidential manner;
 - the requirement that the employer take disciplinary measures in relation to any employee against whom a sexual harassment complaint has been upheld;

¹⁶⁶ Australian Human Rights Commission, *Effectively preventing and responding to sexual harassment: A Code of Practice for Employers* (2008).

- examples of such disciplinary measures, including dismissal;
- the requirement that the complainant be notified at all stages of the process, including of the outcome, of any sanctions attaching to the alleged harasser, and of external avenues for pursuing the matter;
- the requirement that the procedure for making a complaint be public, clear and documented, with a copy provided and explained to each employee, and that this include an undertaking against victimisation;
- the requirement that the procedure be administered by trained personnel; and
- the requirement that the procedure be regularly audited for effectiveness.

185. The Law Institute of Victoria suggests that the duty to respond include the requirement that:

All workplaces must have a designated 'first responder' to receive and manage reports of sexual harassment in the workplace. This person or persons must receive training on how to receive and direct reports of sexual harassment to the appropriate person or authority. This person or persons must be internal but be aware of external responders, such as trade unions; complaints processes, such as the Australian Human Rights Commission, the Fair Work Commission, and the relevant state or territory occupational health and safety commission; and services, such as counselling.

186. The AHRC stresses that:

... sexual harassment complaints may be complex, sensitive and potentially volatile. Anyone who has responsibility for dealing with them will require specialist expertise and should receive appropriate training.¹⁶⁷

187. The Law Institute of Victoria further suggests a definition of 'serious levels of sexual harassment', and the idea that, where this occurs, the first responder, providing they have the consent of the victims, must escalate allegations of sexual harassment to the appropriate authority.

Serious levels of sexual harassment may include systemic levels in which harassment is prevalent throughout all levels of the business (i.e. across all ranks and departments); is perpetrated by senior staff; has been repeated and unmanaged by the workplace following a formal complaint [sic]. Any one of these factors alone should be considered as 'serious' levels, a combination would be 'extreme'.

188. The Law Society of Western Australia raises the following issue:

In our experience, victims often feel aggrieved when, following the investigative process, the employer advises the victim their complaint is upheld but does not provide the victim with information about any disciplinary or other action taken in relation to the perpetrator on privacy grounds. This also prevents the victim from finding a sense of closure at the end of the process. This could be overcome if the statutory mechanism allowed for the disclosure of the perpetrator's personal information to the victim (in terms of the disciplinary action taken), which would then classify as an exemption under Australian Privacy Principle 6 on the grounds

¹⁶⁷ Ibid 31.

that the “use or disclosure of the personal information is required or authorised by or under an Australian law”.

189. These suggestions raise a number of issues for discussion.
190. First, the Law Council draws attention to its position that any positive duty should be required in proportion to the size, resources and capabilities of the duty holder. The Law Council suggests that any mechanism enshrined in legislation leave room for employers to match the requirements to the size, structure and resources of their organisation. Alternatively, the Law Council suggests making a distinction in the legislation between large and small businesses and notes the AHRC’s suggestions in *Effectively preventing and responding to sexual harassment: A Code of Practice for Employers* in relation to small business.¹⁶⁸
191. Of course, the Law Council recognises that any requirement on a duty holder to investigate and determine a complaint must be of a lower threshold than that applied to a commission, tribunal or court; it is not the responsibility of duty holders to enforce the provisions of the SDA or other statutes, but rather to comply with them. The possibility, then, that the internal investigation or determination may not adequately address certain complaints is mitigated by the requirement that the duty holder inform the complainant of the outcome and external avenues for redress, including the opportunity to take the complaint to a commission, tribunal or court.
192. Second, the Law Council acknowledges that any complaints process should be based on the principles of procedural fairness. Procedural fairness is concerned with the procedures used by a decision-maker in coming to a decision, and traditionally includes the rule of providing a fair hearing and the rule against bias. All parties to a sexual harassment complaint must be given notice of the complaint and the process through which the complaint will be addressed, and must be given an opportunity to present their case and respond to any opposing arguments. The decision-maker must act impartially, appraised of the circumstances, and must not pre-judge the decision.
193. Third, whether employers would feel themselves under an obligation to dismiss workers accused of sexual harassment, for fear of otherwise breaching their duty to respond, comes up against Australia’s unfair dismissal laws.
194. Section 385 of the FWA provides that an employer has been unfairly dismissed where ‘the dismissal was harsh, unjust or unreasonable’.¹⁶⁹ Section 387 requires the Fair Work Commission take into account the following criteria when considering the meaning of ‘harsh, unjust or unreasonable’:

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) *whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and*
- (b) *whether the person was notified of that reason; and*
- (c) *whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*

¹⁶⁸ Ibid 37–39.

¹⁶⁹ *Fair Work Act 2009* (Cth) s 385(b).

- ...
195. The Law Council considers that any action to dismiss a person accused of sexual harassment taken under the duty to respond to sexual harassment allegations must take into account these ideas of 'a valid reason' and 'an opportunity to respond'. The position of the Law Council is that the duty to respond should not impose an obligation to dismiss a person accused of sexual harassment. Nor should the duty impose an obligation to dismiss a person against whom a sexual harassment complaint has been upheld. Rather, the duty should attach disciplinary measures only to a person against whom a sexual harassment complaint has been upheld and dismissal should be an option, not an obligation, taking into account these requirements of the FWA.
196. In addition to including the duty to respond in the SDA, the Law Institute of Victoria recommends including information on preventing and responding to sexual harassment in the Fair Work Information Statement. At present, the Fair Work Information Statement includes information on 'adverse action, discrimination or undue pressure', but no express mention of sexual harassment.¹⁷⁰ The Law Institute of Victoria suggests the following plain wording for consideration as the sexual harassment statement in the Fair Work Information Statement:

Dealing with sexual harassment:

You should feel safe from sexual harassment in the workplace. All workplaces are now required to take steps to prevent sexual harassment from occurring in the workplace. Workplaces must also have clear procedures available to explain what steps to take in the event you have experienced or witnessed sexual harassment in the workplace.

If you have experienced or witnessed this type of harassment in the workplace and are unsure of what to do, you can seek assistance from the Australian Human Rights Commission. If you have been sexually assaulted, report the incident to the police immediately by phoning 000.

See the Australian Human Rights Commission website or Sex Discrimination Act 1984 (Cth) for more information.

Duty to Report

197. There is presently no formal requirement for employers or other relevant persons, such as those providing accommodation, educational institutions or services, to regularly report sexual harassment statistics and claims, either internally or externally. This lack of workplace and public accountability is concerning. As discussed at paragraphs [323] – [325], silence is a driver of sexual harassment.
198. The Law Council notes the *Workplace Gender Equality Act 2012* (Cth), which requires various employers to lodge reports each year containing information relating to various gender equality indicators. The Law Council suggests this as a template but emphasises that mandatory reporting requirements in relation to sexual harassment would require significant differences.
199. The Law Council recommends the introduction of a positive duty on employers and other relevant persons to report all allegations of sexual harassment to their corporate board and to an independent statutory body. Whether this statutory body would be the AHRC under the AHRCA, as suggested by the Law Society of New South Wales, or the Workplace Gender Equality Agency under the *Workplace Gender Equality Act 2012*

¹⁷⁰ Fair Work Ombudsman, *Fair Work Information Statement* (at 1 February 2019) 2.

(Cth), as suggested by the Law Institute of Victoria, or, alternatively, an entirely new body, remains to be determined. Whichever way, new provisions would need to be drafted into federal legislation.

200. To this end, the Law Council notes that the Australian Privacy Principles allow for an entity to collect, disclose and use sensitive information where the collection, disclosure or use of the information is required or authorised by an Australian law or a court or tribunal order.¹⁷¹
201. As with the issue of NDAs, the Law Council considers that any reporting requirement must be balanced against the sexually harassed person's desire for anonymity or privacy. The Law Council supports an approach that recognises and emphasises the agency of the sexually harassed person. It is not the place of any person or body other than the sexually harassed person or, in the case of legal incapacity, their parent or guardian, to publicise the name of the sexually harassed person. Further the Law Council considers that employers should never be in a position where they have to choose between their reporting requirements under law and their sexually harassed employee's desire for privacy. The Law Council strongly recommends that all information subject to reporting requirements should be de-identified to protect the sexually harassed person.
202. The Law Institute of Victoria adds the following consideration:

It is also recommended that large private and large public sectors be treated equally with regards to expectations in preventing and responding to sexual harassment in the workplace. All reporting requirements imposed on larger public entities, must also be a legislated requirement of larger private entities.

Compulsory composition reporting should be introduced for all industries, not just public entities currently required to report on topics such as workplace gender equality. Reports must include the rate of incidents of sexual harassment in workplace and staff satisfaction with complaints process [sic].

Penalties for Breach of Duty to Eliminate, Respond or Report

203. The *Workplace Health and Safety Act 2011* (Cth) also imposes penalties on persons who fail to comply with a health or safety duty and thereby commit an offence under the Act. This might include a monetary penalty between \$500,000 and \$3,000,000 for a body corporate or a monetary penalty between \$100,000 and \$600,000 and up to five years imprisonment for an individual as a person, or an officer of a person, conducting a business or undertaking. Similar provisions occur in the corresponding state and territory legislation.
204. The Law Society of Western Australia notes the Western Australian occupational health and safety legislation and makes the following point on the influence of penalties:

If an employer fails to provide a safe workplace, significant penalties apply. For a first offence, these penalties range from \$1,500,000 to \$2,700,000.

The Occupational Safety and Health Act 1984 (WA) also imposes liability on company directors, managers, officers and on the company secretary, in circumstances where the company is found guilty of an offence under the Act, and the offence occurred with the consent or connivance or neglect on the part of the company director, manager, secretary or officer. The penalties for a first offence range from a fine of \$250,000 to \$550,000 and up to five years imprisonment.

¹⁷¹ See, eg, Office of the Australian Information Commissioner, *Privacy Fact Sheet 17 – Australian Privacy Principles* (January 2014).

Given the significant penalties, those holding managerial positions are usually invested in ensuring a safe workplace and in ensuring appropriate systems are developed to identify, eliminate or reduce the impacts of safety risks in the workplace. This could be introduced into the Commonwealth and State anti-discrimination legislation in the context of senior managers also bearing some degree of responsibility for ensuring that systems are in place to prevent sexual harassment in the workplace.

205. The Law Council believes that appropriate penalties should attach to any breach of the duties to eliminate, respond or report in relation to sexual harassment.

Positive Duties on Bystanders

206. The Law Council notes that some of its constituent bodies recommend positive duties be placed on bystanders as well as employers or other relevant persons, such as those providing accommodation, educational institutions or services.

207. The Law Society of Western Australia suggests that provisions imposing positive duties on bystanders, including to report incidents of sexual harassment, could be introduced into the SDA. The Law Society of Western Australia references the 'bystander effect', where 'multiple witnesses don't do anything because each is waiting for someone else to react first', and suggests that:

A possible method to overcome the 'bystander effect' is to introduce provisions which place a positive obligation on the bystander as a workplace participant not to ignore sexual harassment in their workplace. An example is the safety legislation which imposes a positive duty on an employer to provide a safe workplace (which includes a workplace free from sexual harassment), and also imposes duties on employees to ensure their own safety at work and to avoid adversely affecting the safety or health of any person through any act or omission. An employee breaches the Occupational Safety and Health Act 1984 (WA), if they fail to: comply with their employer's instructions regarding the safety and health of the employee or other persons; cooperate with their employer in the carrying out of the employer's obligations to provide a safe workplace; or immediately report to the employer any situation at the workplace that the employee has reason to believe could constitute a hazard to any person that the employee cannot correct; or any injury or harm to health of which they are aware arises in the course of, or in connection with, their work.

208. The Law Council expects that further consultation is required as to whether such bystander provisions should be introduced into the SDA.

209. The Law Council notes that the AHRC's *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace*, authored by academics Paula McDonald and Michael Flood, considers the influence of bystanders in preventing and responding to sexual harassment:

Education about bystander intervention is a potentially invaluable element for preventing sexual harassment in the workforce.¹⁷²

Recent work has also indicated that the involvement of bystanders in workplace safety can lead to reshaping the traditional norms, which influence men's and

¹⁷² Paula McDonald and Michael Flood, Australian Human Rights Commission, *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace* (June 2012) 5.

women's behaviour and are associated with sexual harassment and other forms of gendered mistreatment at work.¹⁷³

210. However, this does not necessarily suggest that bystanders should be involved through the imposition of positive duties.
211. Placing a positive duty on bystanders does not seem to recognise that witnesses of sexual harassment are often constrained by the same fears as victims of sexual harassment when it comes to reporting, in particular around issues of reputation and perceived futility:

*... the decision of an observer to express voice (such as reporting the injustice) through organisational channels is influenced by the extent to which the organisation is open to voice and will take the observer's views into account ... This is related to a person's expectations about psychological safety and the way they weigh up the potential benefits of changing the ... work environment, versus being seen as a troublemaker or feeling as though the attempts at change have been futile.*¹⁷⁴

212. This research suggests that improving employers' complaints processes (through the positive duties to eliminate, respond and report sexual harassment discussed above) would in turn increase the likelihood for bystanders to report incidents of sexual harassment (without requiring the imposition of positive duties on bystanders themselves).
213. There is also the question of how a positive duty would apply to different types of bystanders. Bystanders can be defined more broadly than 'those who directly observe' sexual harassment:

*Bystanders, as we define them here, may include co-workers who are informed of sexual harassment via the workplace grapevine, or via targets themselves who seek emotional support and advice.*¹⁷⁵

214. Whether such people should be under a legal obligation to report what they have heard, even where they cannot independently verify its truth, or even where the victim, to whom they likely owe no duty of care (under federal legislation), both being employees on the same level in the organisation, has come to them in friendship and in confidence, is a difficult issue. Such a duty should not be imposed on bystanders if it would result in disclosing information which has been provided by a victim in confidence.
215. The Law Council does support involving bystanders in preventing and responding to sexual harassment. However, this is likely best done through education and training, which is discussed further at paragraphs [222]–[230], rather than legal obligations.

Whistleblower Protections

216. Where bystanders choose to report sexual harassment, they should be adequately protected.
217. The SDA and corresponding state and territory legislation provide protection against victimisation. Subsection 94(1) of the SDA makes it unlawful for a person to commit an act of victimisation against another person. Subsection 94(2) explains that victimisation

¹⁷³ Ibid.

¹⁷⁴ Ibid, 21.

¹⁷⁵ Ibid, 9.

means, 'the first-mentioned person subjects, or threatens to subject, the other person to any detriment' on the grounds provided, including on the grounds that the other person:

(a) *has made, or proposed to make, a complaint under this Act or the Australian Human Rights Commission Act 1986; or*

...

(g) *has made an allegation that a person has done an act that is unlawful by reason of a provision of Part II;*

218. The Law Council notes that the inclusion of paragraph 94(2)(g) ensures protection against victimisation extends beyond complaints made to the AHRC, and therefore covers internal complaints processes.

219. While these protections exist, they are perhaps not properly communicated. The law relating to victimisation, along with the law relating to the prohibition against sexual harassment, needs to be provided and explained at all levels of an organisation – a requirement which should form part of an employer's duty to eliminate, as noted above at paragraphs [171]–[178], or at least part of public awareness raising, as noted below at paragraphs [222]–[230].

220. The Law Council supports the provisions against victimisation as drafted in the SDA. However, the Law Council's long-held position is that whistleblowing laws should be consolidated across Australia:

... the Law Council favours whistleblowing laws to be uniform in structure and operation, applying across all contexts and sectors and administered by a single regulatory body that could then pass disclosures to the relevant regulatory body responsible for investigations into the misconduct disclosed. The Law Council considers that there may be value for whistleblowing provisions to be located in the one piece of legislation to ensure that uniformity is established and maintained. Replicating provisions across various pieces of legislation may increase the possibility for amendments across a suite of legislation with the potential to hinder the objective of uniformity.¹⁷⁶

221. Consolidating whistleblowing laws would increase public understanding and accessibility, which is an essential component in legislative frameworks seeking to promote public interest issues. The Law Council is likely to support a federal whistleblowing law applying uniformly across all contexts and sectors, provided sexual harassment complaints are explicitly included as protected disclosures.

Public Education, Training and Awareness Raising

222. The Law Council is concerned that there is a lack of public knowledge around the laws relating to sexual harassment, as well as complaints processes and support.

223. The Law Council notes that information is available online. There are currently several reliable sources on understanding, preventing and responding to workplace sexual harassment available to employers and employees alike.

224. However, this requires the public to proactively go looking for information. If the public does not know the information is out there in the first instance, why would they go looking

¹⁷⁶ Law Council of Australia, Submission No 371554177 to Treasury, Parliament of Australia, *Exposure Draft Treasury Laws Amendment (Whistleblowers) Bill 2017* (November 2017) 6, citing Law Council of Australia, Submission No 52 to Joint Parliamentary Committee on Corporations and Financial Services, *Inquiry into Whistleblower Protections in the Corporate, Public and Not-For-Profit Sectors* (February 2017).

for it? It also requires the public to be able to sort relevant and accurate information from irrelevant and inaccurate information. People are time poor, unlikely to seek information on issues until these issues directly affect them, and some people, particularly people already facing hardship and vulnerability, lack the literacy, technological literacy or access to computer and internet resources necessary to 'self-help'. The message should be brought to the public.

225. The Law Council recommends a government-funded public awareness campaign, for example through television and radio advertisements, informing employers and employees: what workplace sexual harassment is, meaning the actual conduct and circumstances meeting the legal definition; that workplace sexual harassment is unlawful; that workplace sexual harassment is everybody's business; that consequences attach to workplace sexual harassment; how to report workplace sexual harassment; and where to seek support. The Law Council also calls for community legal centres and other bodies that give advice in this area to be appropriately funded.
226. The Queensland Law Society makes the further point that education can pre-empt the confusion and pushback which often occurs in discussions around diversity and equality or around changing public behaviour:

... public debate can become emotionally charged ... education is a key means of minimising misunderstanding, confusion and hysteria about where the dividing line is found between proscribed conduct and behaviour not amounting to sexual harassment.

227. Public education and awareness raising should be a joint initiative between government, the media, the legal profession, the medical profession and other health services, social services, workplace health and safety regulators, professional and corporate bodies and associations, organisations, and schools and universities.
228. The Law Council received the following suggestions from its Constituent Bodies on how education and awareness raising efforts on understanding, preventing and responding to sexual harassment could be widely supported across Australian society, including within Australian workplaces, organisations and other relevant entities. The following suggestions aim to highlight and support workplaces, organisations and other relevant entities in establishing best practice approaches.

There should be recognition of the benefits of a safe and respectful workplace free from harassment and discrimination where the organisation does not tolerate sexual harassment.

All workplaces and relevant entities (e.g. public and private entities, associations, etc.) should support education and awareness raising, including the use of notices and other campaigns to emphasise peer enforcement that will help prevent sexual harassment in the workplace.

All workplaces should have workplace policies addressing sexual harassment which include a set of values or principles for standards of conduct in the workplace, a clear definition of sexual harassment, and details of whistleblowing or speak up procedures.

Workplaces should have training programs for all staff which support workplace policies at least every two years, with tailored programs for management given their heightened responsibilities.

Managers that are trained in responding to sexual harassment complaints will be able to mitigate any damage caused by sexual harassment, both to the victim and

to the workplace. Complaints that go unanswered create an unhealthy workplace culture.

Workplaces, organisations and other entities should have effective procedures which support their objectives and policies, including a robust and effective complaints mechanism and investigation procedures.

Workplaces, organisations and other entities should have a feedback mechanism for staff to make comments and suggestions for improvements in relation to the approach to combatting sexual harassment.

Internal and external options must be made available and communicated in workplaces for any person wishing to report sexual harassment.

Workplaces, organisations and other entities should have procedures which finalise the complaint with the complainant once any investigation has concluded, and include the provision of appropriate support to the complainant through an employee assistance program or external providers. Any disciplinary outcomes should also be documented.

Counselling services (public or private) must be promoted in awareness raising activities to support persons harassed. In addition, the perpetrator of the harassment must attend compulsory counselling to learn about strategies to prevent reoffending.

In addition, it is important to identify whether some individuals are more likely to perpetrate sexual harassment and there should be delivery of targeted education to raise standards of behaviour in such persons.

There should be reporting mechanisms to capture data in relation to complaints of sexual harassment in the workplace.

Schools and universities must include workplace preparation education and awareness raising activities to help prepare students for the workforce. It is hoped this will mitigate the risk of sexual harassment occurring. This should include age appropriate communication and adhere to existing education guidelines. It should include explanations of what is deemed as inappropriate sexual behaviour and sexual misconduct, acceptable boundaries between, and negative consequences of, sexual harassment.

Government should consider legislating targets or quotas for gender equality in large organisations on the basis that sexual harassment is more common in organisations dominated by one gender. Enforcing transparency on this issue is encouraged. Medium to large sized companies should be required to publish annual reports disclosing how they are meeting these targets or quotas.

229. The Law Council reiterates that public understanding and accessibility would be improved if there was consistency across jurisdictions, and if sexual harassment was unlawful in all areas of public life (or at least in relation to all workplace participants) as irregular coverage is difficult to justify, explain and message.
230. Effective action against workplace sexual harassment requires a combination of legal frameworks, as well as greater enforcement, adequately funded and empowered institutions, and better public awareness of the issue.

Criminal Law

231. Sexual harassment is unlawful, not criminal. However, some sexual harassment might also amount to an offence under criminal law; for example, where the behaviour meets the threshold of indecent exposure, stalking, or sexual assault.

232. The main difference between civil law and criminal law is the remedies available to the victim. Courts exercising civil jurisdiction cannot apply a sentence of imprisonment but can order the payment of damages. Consequently, under the current legislative framework, a person accused of sexual harassment will never be imprisoned for sexual harassment.
233. The Law Council is not aware of any proposal to make sexual harassment a criminal offence.

Occupational Health and Safety Law

234. Employers have a common law duty to take reasonable care for the health and safety of their employees, as well as additional duties under federal and state or territory occupational health and safety legislation.
235. Sexual harassment may constitute a breach of these duties to provide a safe workplace.
236. However, as far as the Law Council knows, no legislation in Australia includes an express provision defining, preventing or responding to sexual harassment as a workplace health and safety issue.
237. The Law Council is not aware of any proposal to amend the *Workplace Health and Safety Act 2011* (Cth) or any state or territory occupational health and safety legislation in relation to preventing or responding to sexual harassment.
238. Subject to any expert advice provided in the future, the Law Council considers the issue of health and safety most important as part of the normative context informing discussions around workplace sexual harassment and the action or reaction of employers, along with gender equality and human rights. The Law Council is not aware of any pertinent reason to shift the prohibitions against sexual harassment from the anti-discrimination legislative framework to the occupational health and safety legislative framework.

Fair Work Act 2009 (Cth)

239. The FWA currently allows a worker who reasonably believes they have been bullied at work to apply to the Fair Work Commission for a 'stop bullying order'.¹⁷⁷ This is an expediated process designed to provide support to the victim, and to enable the victim to continue to work safely in their role while they assess their options for redress or while any investigation or complaint processes are underway. The Fair Work Commission must deal with such an application within 14 days,¹⁷⁸ and may make any appropriate order to stop the bullying, other than the payment of pecuniary damages,¹⁷⁹ with which the stated persons must comply.¹⁸⁰
240. The Law Council supports the general reasoning behind suggestions that the FWA be amended to include an equivalent 'stop sexual harassment order'.
241. However, the Law Council cautions that sexual harassment is not directly covered by the general protections provisions of the FWA. That is, the definition of 'adverse action' does not explicitly include sexual harassment, and, while the protections against discrimination in section 351 of the FWA prohibit adverse action due to sex, it is not clear

¹⁷⁷ *Fair Work Act 2009* (Cth) s 789FC(1).

¹⁷⁸ *Ibid* s 789FE(1).

¹⁷⁹ *Ibid* s 789FF(1).

¹⁸⁰ *Ibid* s 789FG.

that sexual harassment is prohibited by this section. Section 351 applies to ‘employers’, and does not apply to the conduct of an employee towards another employee. Sexual harassment by definition is perpetrated by an individual who may or may not also be the ‘employer’. In order for the FWA to apply in relation to sexual harassment, section 351 of the FWA could be amended to include sexual harassment (whether perpetrated by employer or employee) in the definition of ‘adverse action’.

International Law

242. Australia’s prohibitions against sexual harassment should be understood as part of a wider international movement to recognise and protect the human rights of women.
243. The objects of the SDA include ‘to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments’.¹⁸¹ Section 4 provides a list of these relevant international instruments.¹⁸²
244. The Law Council considers that advances in international law should be regularly incorporated into the SDA.
245. In June 2019, the International Labour Conference will discuss an item entitled ‘Violence and harassment in the world of work’, with a view to the adoption of a Convention supplemented by a Recommendation.¹⁸³ The proposed Convention text encapsulates arguments raised in this submission.¹⁸⁴ Subject to viewing the final form and content of the Convention, on the advice of the Law Society of New South Wales, the Law Council urges the federal government to adopt this instrument and ratify and incorporate it into domestic law. Alternatively, as mentioned in paragraphs [94]–[95], the Law Council urges the federal government to make sexual harassment unlawful in all areas of public life.

Intersectionality

246. The Law Council notes that, in deciding whether sexual harassment has occurred, the decision-maker is directed to certain circumstances including ‘the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed’ and ‘any disability of the person harassed’.¹⁸⁵ The Law Council supports this acknowledgement of diversity and intersectionality.
247. However, on the whole, the current legislative framework does not adequately recognise diversity or the ways in which individuals may experience intersectional forms of harassment and discrimination. The different elements of a person’s identity and experience, including race, cultural heritage, sexuality, disability or age can intersect to create specific forms of disadvantage. Currently, however, each different form of discrimination is encapsulated in a different piece of anti-discrimination legislation. This may act as a further barrier to minority groups who experience sexual harassment along with discrimination based on other protected attributes from pursuing a claim. There is a

¹⁸¹ *Sex Discrimination Act 1984* (Cth) s 3(a).

¹⁸² *Ibid* s 4.

¹⁸³ International Labour Organization, *Ending violence and harassment in the world of work*, Report V(1), International Labour Conference, 108th sess, Agenda Item 5, Geneva, 2019, ILC.108/V/1 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_637108.pdf>.

¹⁸⁴ International Labour Organization, *Ending violence and harassment in the world of work*, Report V(1), International Labour Conference, 108th sess, Agenda Item 5, Geneva, 2019, ILC.108/V/1 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_637108.pdf>.

¹⁸⁵ *Sex Discrimination Act 1984* (Cth) s 28A(1A).

question as to whether such persons would have to bring separate claims. The Law Council notes that there is limited case law on this topic. In the case of *Djokic v Sinclair*, the Tribunal allowed sexual and racial harassment to be joined.¹⁸⁶ The complaint was made under the SDA and race was considered as an aggravating factor.

248. The Law Council suggests that the federal government consider consolidating federal anti-discrimination law to address all the prohibited grounds of discrimination, including sexual harassment. The definition under any consolidated act should include intersectional discrimination.
249. The Law Council further suggests that courts and tribunals factor intersectionality when assessing the overall impact of the injury and the award of damages in sexual harassment claims. As academic and anti-discrimination law expert, Beth Gaze, asserts:

*All women cannot be understood to face similar problems, modelled on the concerns of white middle-class women. This denies the specific experiences of other women and fails to remedy their disadvantage.*¹⁸⁷

Aboriginal and Torres Strait Islander Women

250. Many women experience difficulty in speaking about or reporting sexual harassment. However, this difficulty can manifest in culturally specific ways for Aboriginal and Torres Strait Islander women.

251. Engagement with the legal system by Aboriginal and Torres Strait Islander people must be understood through the history of dispossession, colonialism, inter-generational trauma, poverty, violence, and racism in Australia. This is not to paint Indigenous people as victims in need of saving. Indigenous people have shown remarkable strength, resilience and political advocacy in the century since dispossession. Aboriginal communities across Australia have an ancient, intricate and varied cultural and spiritual history, which should be celebrated. Rather, it is to acknowledge that policies or strategies that ignore the systemic issues at the heart of Indigenous people's disadvantage risk failing and thereby perpetuating this disadvantage. As Judy Atkinson, a Murri woman from Queensland, wrote in her report on Aboriginal women and violence nearly twenty years ago:

*Furthermore, any recommendations for preventative strategies must be based on a clear understanding of the impact of colonisation on a nation of people whose cultural and spiritual values were radically different from the colonisers, and the trauma and injury which followed, within Aboriginal Australia. Any preventative strategies which do not take these factors into account simply would not work.*¹⁸⁸

252. The Law Council's recent Justice Project emphasised that, because of this legacy of dispossession, marginalisation and exclusion, many Indigenous people distrust institutionalised services, and avoid coming into contact with service providers:

Many Aboriginal and Torres Strait Islander people have experience of intergenerational trauma linked with the justice system, and many also have personal prior experience of it working 'against them' instead of 'for them'. This lack of trust 'affects all aspects of the interaction between Indigenous Australians

¹⁸⁶ *Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd* [1994] HREOCA 16 (24 August 1994).

¹⁸⁷ Beth Gaze, 'The Sex Discrimination Act After Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27(3) *UNSW Law Journal* 914, 918.

¹⁸⁸ Judy Atkinson, 'Violence in Aboriginal Australia: Colonisation and Gender' (1990) 14 *Aboriginal and Islander Health Worker Journal* 5, 7.

*and access to justice'. It has led to police, government, social services and the law being viewed as a tool of oppression by many.*¹⁸⁹

253. Moreover, services are often not set up to accommodate Aboriginal and Torres Strait Islander people.
254. In particular, Aboriginal and Torres Strait Islander women may be dissuaded from complaining about sexual harassment due to a lack of cultural competence or cultural sensitivity on the part of employers, managers, psychologists, lawyers, and other service providers.¹⁹⁰
255. Discussions of a sexual nature are difficult for Aboriginal and Torres Strait Islander women. There are cultural restrictions on who they might speak to and the circumstances in which such discussions might occur. Most Indigenous women would not be comfortable making disclosures about sexual harassment to male professionals. This becomes especially problematic when the element of 'sexual conduct' must be proven in front of a court or tribunal.
256. It is also important to recognise that Aboriginal and Torres Strait Islander women have to contend with certain discursive narratives, or myths, around their sexual and racial identities when addressing sexual harassment.
257. First, Indigenous women must confront the very real possibility that any complaints they make regarding Indigenous men may be seized upon as a cultural failing. When sexual harassment occurs between white Australians, it is not even discursively framed as occurring between white Australians, let alone as evidence of an inherent failing within white Australia. Those involved are discursively framed as people or as men and women, independent of any mention of race. This goes back to the theory that white supremacy operates to make whiteness 'normal'. Whiteness is the dominant state of being, the benchmark against which the 'other' is positioned, and thus, in many instances, whiteness becomes invisible.¹⁹¹ In order to create space for Indigenous women to speak about sexual harassment perpetrated within their own communities, there must be an understanding that such admissions will not be taken as 'evidence' of a problem 'inherent' to Indigenous culture – and will not be used to justify discriminatory attitudes or punitive measures against only their communities.
258. The second myth to confront is that, throughout the history of colonisation, Indigenous women have been constructed as sexually promiscuous or available. Indigenous women carry with them the knowledge that, should they make a sexual harassment complaint, they may be less likely to be defended or supported due to these discriminatory attitudes.
259. Aboriginal and Torres Strait Islander women are both *sexually* and *racially* embodied. Speaking about sexual harassment carries the risks associated with constructions around what it means to be a woman, what it means to be Indigenous, and what it means to be an Indigenous woman.

¹⁸⁹ Law Council of Australia, 'Aboriginal and Torres Strait Islander People' (Justice Project: Final Report, August 2018) 30, referencing Productivity Commission, *Access to Justice Inquiry*, vol 2, 765, quoting Queensland Indigenous Family Violence Legal Service, Submission No 46, 7–8.

¹⁹⁰ *Ibid.* See *R v Kina* [1993] QCA 480. See also Hedley Thomas, 'Failure of justice system that feels all too familiar', *The Australian* (online at 16 December 2006) <<https://www.theaustralian.com.au/news/nation/failure-of-justice-system-that-feels-all-too-familiar/news-story/ed21250be366297a3aeaa3f16bc0a42c>>.

¹⁹¹ See, eg, Aileen Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the Yorta Yorta Decision' (2004) *Borderlands EJournal* [1], [5].

260. The Law Council considers that the burden of ‘unmaking the myths’ has long been shouldered by Aboriginal and Torres Strait Islander women, and now needs to be taken up by mainstream Australia.
261. Aboriginal and Torres Strait Islander people might also face additional barriers to being believed or understood when they complain about sexual harassment. Many Aboriginal and Torres Strait Islander people have a style of linguistic and body communication, which includes minimising eye contact, valuing silence, and showing deference to authority. As a consequence, when giving information or evidence, they may be wrongly assessed as evasive or dishonest. Additionally, communication barriers and a lack of professional interpreters can complicate their interaction with service providers. English is likely to be a second, third or fourth language for those living in remote communities for example.¹⁹²
262. The Law Council is concerned that, whilst a lack of awareness around behaviours constituting sexual harassment and avenues for redress is a problem throughout Australia, it may be particularly pronounced within Aboriginal and Torres Strait Islander communities. The Justice Project emphasised that there is a high level of unidentified legal need among Aboriginal and Torres Strait Islander people.¹⁹³ As Kingsford Legal Centre submitted to the Justice project:

*A major obstacle in accessing legal services is a lack of awareness that an issue has legal aspects and that legal advice may be of use.*¹⁹⁴

263. Australia’s legacy of dispossession, marginalisation and exclusion suggests that Aboriginal and Torres Strait Islander people may have a higher threshold for tolerance of harmful behaviours, including sexual harassment. Normalising disadvantage is what their existence has been about, and thus they may be less likely to defend their own rights and entitlements.
264. Further to this point is that Aboriginal and Torres Strait Islander women are less likely to access services or complaints processes in a timely fashion, and instead will report sexual harassment when they are ready. This emphasises the importance of increasing the time limits on complaints processes, as discussed above at paragraphs [127]–[134].
265. In considering how to respond to these issues, the Law Council reiterates the position advanced throughout the Justice Project that:

*Aboriginal and Torres Strait Islander community-controlled organisations and Aboriginal and Torres Strait Islander people are most appropriately placed to provide services and speak on behalf of Aboriginal and Torres Strait Islander peoples.*¹⁹⁵

To address existing distrust, and to bridge cultural divides and communication gaps, it is essential that ongoing cultural competence training, informed and led by Aboriginal and Torres Strait Islander people and organisations, is provided to those working within the justice system and beyond. Strategies to increase the

¹⁹² Law Council of Australia, ‘Aboriginal and Torres Strait Islander People’ (Justice Project: Final Report, August 2018) 31–32.

¹⁹³ Ibid 33.

¹⁹⁴ Ibid 33, quoting Kingsford Legal Centre, *Submission No 93*.

¹⁹⁵ Ibid 7.

*employment of Aboriginal and Torres Strait Islander people across the sector are similarly important in this respect.*¹⁹⁶

266. The Law Council considers it important to consult directly with Aboriginal and Torres Strait Islander women, advocates and organisations with regard to preventing and responding to sexual harassment. The people living and working in this space are best placed to suggest strategies that will be culturally appropriate and effective. Experts in this space who are Indigenous should be consulted and listened to.
267. One strategy might be to include within formal complaints processes a statutory office holder, who would be tasked with providing support to Indigenous women and who would herself be an Indigenous woman.
268. The Law Council also supports embedding within the implementation of strategies to prevent and respond to sexual harassment such initiatives as: ongoing cultural competence or sensitivity training; professional Aboriginal and Torres Strait Islander interpreters; specialist, culturally-safe and community-connected courts, tribunals or programs; and community-based prevention and early intervention support programs that facilitate healing.¹⁹⁷
269. As the Justice Project remarked, ‘there is no shortage of ideas and solutions, which have been identified and progressed consistently’ by Aboriginal and Torres Strait Islander led community organisations.¹⁹⁸ However, the underlying need for such culturally competent, appropriate or sensitive solutions must first be acknowledged and then the solutions adequately funded. Self-determination is critical. At the very least, Indigenous voices and perspectives must be included at every level of government, corporate and social reform.

Sexual Harassment within the Legal Profession

Nature and Prevalence

270. The Law Council acknowledges that the legal profession is not immune from the issue of sexual harassment. One quick comparison of available statistics suggests that, on average, women in the law experience sexual harassment ‘at about the national rate for women’,¹⁹⁹ or higher. For example:
 - 24% of women in the Australian legal profession experienced sexual harassment in their current legal workplace, as reported in 2014;²⁰⁰
 - 24% of women in the Victorian legal profession experienced sexual harassment at some point in their legal career, as reported in 2012;²⁰¹
 - 25% of women at the Victorian Bar experienced sexual harassment in the last 5 years, as reported in 2018;²⁰²

¹⁹⁶ Ibid 4. Aboriginal and Torres Strait Islander people, as individuals or communities, may be better placed to speak on these issues, as organisations are subject to many different perspectives, including governance perspectives. Indigenous experts in the relevant field should be sought, as would occur in contexts not racialised.

¹⁹⁷ Ibid 4–5.

¹⁹⁸ Ibid 4.

¹⁹⁹ Adrienne Morton, ‘Sexual Harassment in the Legal Profession’ (2018) 144 *Precedent* 34, 35.

²⁰⁰ Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014) 32.

²⁰¹ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 42.

²⁰² Victorian Bar, *Victorian Bar: Quality of Working Life Survey* (University of Portsmouth, 2018) 19.

- 25% of Australian women experienced workplace sexual harassment in the last 5 years, as reported in 2012;²⁰³
- 23% of Australian women experienced workplace sexual harassment in the last 12 months, as reported in 2018;²⁰⁴ and
- 47% of women in the Australian legal profession have experienced sexual harassment while at work or in work-related contexts, as reported in 2018.²⁰⁵

271. The Law Council supports further research focusing specifically on sexual harassment within the legal profession. There are currently four main published sources of statistics: the Law Council's NARS Report; the Victorian Equal Opportunity and Human Rights Commission's *Changing the rules: the experiences of female lawyers in Victoria* (2012); the Victorian Bar's *Quality of Working Life Survey* (2018); and the IBA's upcoming global survey on bullying and harassment in the legal profession. These are considered in detail below. The Law Council is also aware of data recently collected by the NSW Young Lawyers, the Law Society of South Australia²⁰⁶ and the Women Lawyers Association of the Australian Capital Territory. However, much evidence about the nature and prevalence of the problem is anecdotal.²⁰⁷

National Attrition and Re-Engagement Study

272. In 2013, the Law Council conducted the NARS to investigate attrition in the legal profession in Australia. A key focus of the study was on the experiences of women, the barriers women face, and what might be driving women from the profession.

273. The NARS methodology included three separate online surveys of practising lawyers (practising), lawyers who have left the profession within the last five years (no longer practising), and individuals who have completed a law degree but never practised (never practised), as well as in-depth interviews with randomly-selected participants of the surveys. 3960 people participated in the surveys, and 82 in the in-depth interviews.

274. In 2014, the NARS Report was released.

275. The NARS made the following findings in relation to sexual harassment in the legal profession:

- 24% of women and 8% of men experienced sexual harassment in their current workplace.²⁰⁸ This is approximately one in four women.²⁰⁹
- There were key differences in reporting between female barristers and female solicitors.²¹⁰ 'Female barristers were twice as likely as those in private practice or in-house roles to have ever experienced sexual harassment at their workplace.'²¹¹ 55% of women barristers, 22% of women in private practice, and 20% of women

²⁰³ Australian Human Rights Commission, *Working without Fear: Results of the Sexual Harassment National Telephone Survey* (2012).

²⁰⁴ Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (2018).

²⁰⁵ International Bar Association, *Global Survey on Bullying and Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results.

²⁰⁶ See Law Society of South Australia, *Media Release* (18 October 2018) <https://www.lawsocietysa.asn.au/LSSA/Media/Bullying_discrimination_and_harassment_survey.aspx>.

²⁰⁷ See, eg, Kate Allman, '#TimesUp for the Legal Profession' (2018) 51 *Law Society of NSW Journal* 30.

²⁰⁸ Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014) 32.

²⁰⁹ *Ibid* 76.

²¹⁰ *Ibid* 80.

²¹¹ *Ibid* 80.

working in-house, reported having ever experienced sexual harassment at their workplace.²¹²

- In private practice, women in large firms and medium firms were more likely to have experienced sexual harassment than women in small firms.²¹³ 24% of women in large firms, 26% of women in medium firms, and 18% of women in small firms, reported having ever experienced sexual harassment at their workplace.²¹⁴
- In terms of geographic location, female lawyers working in a CBD were more likely to have experienced sexual harassment than female lawyers working in other locations.²¹⁵
- In terms of age, women 45-54 years were most likely to have ever experienced sexual harassment at their workplace. 15% of women under 25 years, 24% of women aged 25-34 years, 24% of women aged 35-44 years, 27% of women aged 45-54 years, and 17% of women aged over 55 years, reported having ever experienced sexual harassment at their workplace.²¹⁶

276. The NARS also collected statements from interview participants. 'A number of women disclosed their experiences of receiving unwanted advances, feeling objectified or being exposed to inappropriate sexual behaviour.'²¹⁷ The following statements demonstrate some women's experiences:

I was hit on quite aggressively by a number of male barristers ... I mean like barristers attempted to kiss me. That happened twice with one silk and one a contemporary who was married. I didn't think of it at the time but both of these gentlemen were married. And that in and of itself doesn't really say anything about the kind of work that you get, but it does sort of say something about how you are considered fair game. Like that, things that happen at the Bar that wouldn't happen in any other work environment. That kind of happens all the time. (Female, Government legal, 35-39 years)²¹⁸

The sort of objectifying of women is a lot more blatant which, you know, you think 'so big deal', but it's not at the end of the day you realise hey I'm just here to be a barrister I'm not here to be a woman. I'm just here to do my work. So don't look at my tits, just evaluate the merit of my work. So you sort of never knew if you were being evaluated on your merit or on the size of your breasts or anything else. (Female, Government legal, 35-39 years)²¹⁹

Victoria

277. In 2012, the Victorian Equal Opportunity and Human Rights Commission conducted an online survey of women lawyers, which received 427 responses.²²⁰ The survey had four sections, with the final section focusing on sexual harassment, as well as opportunities for qualitative remarks.²²¹ This was followed by a focus group on women who had left the

²¹² Ibid 80.

²¹³ Ibid 79.

²¹⁴ Ibid 79.

²¹⁵ Ibid 81.

²¹⁶ Ibid 78.

²¹⁷ Ibid 76.

²¹⁸ Ibid 35.

²¹⁹ Ibid 35.

²²⁰ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 10.

²²¹ Ibid 9.

profession, and interviews with four key informants.²²² *Changing the rules: the experiences of female lawyers in Victoria* reported the following key findings on sexual harassment within the Victorian legal profession:

- 23.9% of women 'had experienced sexual harassment whilst working as a lawyer or legal trainee in Victoria';²²³
- Of the 71 respondents who had experienced sexual harassment in their 'former workplace', 53 worked in a private firm, 5 a state government department, 5 in-house, 3 a statutory authority, 2 a community legal centre, 2 another workplace, and 1 a court or tribunal;²²⁴
- 67.2% 'experienced sexually suggestive comments or jokes (in person or via email, SMS or other social media)'; 44.3% 'experienced intrusive questions about their private life of physical appearance that were offensive'; 41.6% 'experienced unwelcome or inappropriate physical contact'; 38.9% 'experienced unwelcome staring or leering that was intimidating';²²⁵
- 48 respondents 'were aware of instances of sexual harassment that had happened to other female lawyers in their workplace in the last 12 months';²²⁶ and
- Respondents reported witnessing 'behaviour that included 'rating' the attractiveness of female colleagues; partners 'grooming' female colleagues for sexual encounters; inappropriate behaviour at Christmas parties and circulation of sexually explicit emails about female employees'.²²⁷

278. The Victorian Bar has reported to the Law Council that, whilst the focus of the recent *State of the Victorian Bar* report was on members' 'work practices, incomes and demographic information to identify opportunities and challenges for the Bar',²²⁸ it was based on the *Case for Change* survey in which 20% of female barristers and 1% of male barristers reported experiencing sexual harassment in the last 5 years (within the meaning of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*).

279. The Victorian Bar in conjunction with the Health and Wellbeing Committee conducted a health and wellbeing survey of its members in June 2018. The survey was completed by 856 Victorian barristers, which represents a total of 40% of Victorian practising counsel. The final report, *The Victorian Bar: Quality of Working Life Survey*, was released in October 2018. In relation to sexual harassment, the report showed that:

- 16% of female barristers and 2% of male barristers reported that they had been sexually harassed in the last year. This means women were eight times as likely as men to report experiencing sexual harassment.²²⁹
- 334 women and 503 men submitted responses around the types of sexual harassment they had experienced in the last year: 7% of women versus 0% of men reported experiencing an unwelcome sexual advance; 2% of women versus 0% of men reported experiencing an unwelcome request for sexual favours; 10% of women versus 1% of men reported experiencing unwelcome sexual conduct; and

²²² Ibid 9.

²²³ Ibid 30.

²²⁴ Ibid 31.

²²⁵ Ibid 30.

²²⁶ Ibid 30.

²²⁷ Ibid 31.

²²⁸ Victorian Bar, *The State of the Victorian Bar: Performances, challenges and opportunities* (March 2018).

²²⁹ Victorian Bar, *Victorian Bar: Quality of Working Life Survey* (University of Portsmouth, 2018) 16, 17.

the same result of 10% versus 1% was reported for 'other' types of sexual harassment.²³⁰

- However, this suggests that rates of sexual harassment experienced by members of the Victorian Bar are below those of Australian workplaces generally and the legal profession nationally.
- 25% of female barristers and 1% of male barristers reported that they had been sexually harassed in the last 5 years.²³¹
- Experiences of sexual harassment peaked for those members of the Victorian Bar at 1 to 5 years' call, followed by 6 to 10 years' call.²³²
- 'Respondents considering themselves to belong to an ethnic minority did not report markedly different rates of sexual harassment ...'.²³³
- 'Respondents considering themselves as disabled reported ... twice the level of sexual harassment ...'.²³⁴
- Perpetrators of the sexual harassment were reported to be predominantly internal, with the majority described as a colleague or other barrister. This was at odds with perpetrators of discrimination and workplace bullying, who were reported to be predominantly external to the Victorian Bar (instructing solicitors/judicial officers).²³⁵

New South Wales

280. The Law Society of New South Wales has reported to the Law Council that from October to November 2018, NSW Young Lawyers conducted a survey on young lawyers' experiences of sexual harassment in the workplace. The survey was distributed to the NSW Young Lawyers mailing list, and received 125 responses. It found that:

- 51% of respondents disclosed having been sexually harassed in the workplace;²³⁶ and
- 25% of respondents had witnessed another person being sexually harassed in their legal workplace.²³⁷

281. The Law Society of New South Wales Journal published the following anecdotal information in December 2018:²³⁸

- 'When I posed a question about the prevalence of sexual harassment among lawyers on social media, I was met with a flood of responses from women ... I followed up with more than 10 women over the phone or in person and they detailed behaviour that ranged from creepy to criminal. No men responded to me.'²³⁹
- A female lawyer, who 'left the firm in August 2018', reported numerous incidents by a male senior associate and male partner. These incidents included such detail as:

²³⁰ Ibid 33.

²³¹ Ibid 19.

²³² Ibid 17, 19.

²³³ Ibid 16.

²³⁴ Ibid 16.

²³⁵ Ibid 20.

²³⁶ New South Wales Young Lawyers Human Rights Committee, 'Sexual Harassment in Australian Workplaces Survey results' (November 2018).

²³⁷ Ibid.

²³⁸ See Kate Allman, '#TimesUp for the Legal Profession' (2018) 51 *Law Society of NSW Journal* 30, 33.

²³⁹ Kate Allman, '#TimesUp for the Legal Profession' (2018) 51 *Law Society of NSW Journal* 30, 33.

'he would say he wanted to have sex with me [and] would ask me to go away with him on the weekend'; 'I was put in situations with a lot of physical contact that I didn't want'; 'he forced his genitals into her hand'; '[t]he partner paid for a lap dance and insisted [she] accompany him', 'made lewd comments', 'and found ways to touch [her] chest or bottom'.²⁴⁰

- 'One Brisbane graduate said ... a male colleague had followed her to her parents' home late at night and banged on the door, demanding a sexual invitation.'²⁴¹
- 'Another woman, a talented young lawyer I attended law school with, had been forcibly kissed on the lips by an older lawyer at a party.'²⁴²

Australian Capital Territory

282. The Women Lawyers Association of the Australian Capital Territory (**WLA ACT**) has recently conducted a detailed survey of sexual harassment within the legal profession in the Australian Capital Territory. The WLA ACT has generously provided the Law Council with a copy of the final raw data from this survey. Of the 104 people who responded to the survey, 95% were female and 5% were male. The raw data suggests, among other findings, that:²⁴³

- 57% of respondents have been sexually harassed in the workplace or at a work event while engaged in the legal profession;
- 49% of respondents have observed another person being sexually harassed in the workplace or at a work event while engaged in the legal profession;
- The majority of sexual harassers were in a senior position to the sexually harassed individual;
- The sexual harassment was most likely to have occurred at the workplace of the sexually harassed individual or the sexual harasser, but also at a social event;
- The sexual harassment was most likely to manifest as unwelcome comments (83% of respondents); sexually explicit comments, jokes or insults (57%); staring or leering (41%); intrusive questions (35%); unwelcome touching (33%); and unwelcome sexual advances (25%), although other behaviour was also reported;
- 22% of respondents had made a complaint about their experience of sexual harassment to their employer or an external body, but 78% had not;
- 5% of respondents had made a complaint about a colleague's experience of sexual harassment to their employer or an external body, but 95% had not;
- Of these last two groups, 31% of respondents had not made a complaint because they had not experienced sexual harassment; however, 32% were not confident that anything would come from making a complaint and 32% were fearful of the impact complaining would have on their career; and
- On the measures for addressing sexual harassment in place at their current workplace, 67% of respondents reported there is a workplace policy; 23% reported specific training has been provided; and 19% reported a senior colleague has proactively discussed the issue with staff. However, 17% were not sure and 18% reported their workplace has no measures in place.

²⁴⁰ Ibid 31-32.

²⁴¹ Ibid 33.

²⁴² Ibid.

²⁴³ Women Lawyers Association of the Australian Capital Territory, *Survey of Sexual Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results, which was generously shared with the Law Council in February 2019.

South Australia

283. In August 2018, the Law Society of South Australia conducted a survey in order to gather information relating to the nature and prevalence of bullying, harassment and discrimination in the local legal profession. The survey was sent to 3477 admitted members of the Law Society, receiving 346 responses. The Law Society of South Australia has generously alerted the Law Council to the following preliminary findings of the survey, based on the raw data:²⁴⁴

- 33% of respondents have been sexually harassed in some form;
- Of these respondents, 42% were female and 12% were male;
- 44% of respondents identified line managers or supervisors as the most likely perpetrators of sexual harassment; 43% identified someone more senior; 31% identified third parties; and 25% identified someone of equal seniority; and
- 67% of respondents have never reported incidents of sexual harassment perpetrated against them.

International

284. In 2017, the IBA Legal Policy and Research Unit (**LPRU**) published the following findings in a report on *Women in Commercial Legal Practice*:

- Globally, 27% of women and 7% of men working in commercial legal practice have experienced sexual harassment. 'Women experienced more discrimination [than men] in all areas [surveyed] except sexual preference.'²⁴⁵
- 'These findings were fairly consistent across the regions', which were categorised as Europe, Africa, Asia, Americas and Oceania.²⁴⁶

285. In 2019, the IBA will be releasing the results of its *Global Survey on Bullying and Harassment in the Legal Profession*. The IBA surveyed almost 7,000 legal professionals. Of these respondents, 934 were Australian. The IBA has generously provided the Law Council with a high-level summary of the key findings, particularly the Australia-specific data.²⁴⁷ This summary shows that:

- Over one third (37%) of Australian lawyers have experienced sexual harassment while at work or in work-related contexts.
- 47% of women working in the law in Australia reported having been sexually harassed, compared with 13% of men. This equates to almost one in two women and one in eight men.
- By comparison, 37% of female lawyers and 7% of male lawyers have experienced workplace sexual harassment globally, meaning Australian legal professionals report a higher prevalence of workplace sexual harassment.
- This is a contemporary issue. 32% of incidents occurred in the last year.
- 46% of incidents occurred in government; 44% judiciary; 43% in-house; 41% barristers' chambers; and 33% law firms.

²⁴⁴ Law Society of South Australia, *Bullying, Harassment and Discrimination Survey 2018: Preliminary Report – Version 1* (2018). This is preliminary data ahead of the final publication of results, which was generously shared with the Law Council in February 2019.

²⁴⁵ International Bar Association, *IBA LPRU: Women in Commercial Legal Practice* (December 2017) 34.

²⁴⁶ *Ibid* 35.

²⁴⁷ International Bar Association, *Global Survey on Bullying and Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results.

- Sexual harassment predominantly occurs in the workplace. 74% of respondents indicated that they had been sexually harassed at work. However, there are other notable settings. 54% of respondents indicated that they experienced sexual harassment at a work-related social event; 15% during proceedings; 15% at non-work social events; and 14% at the offices of a third party.
- Incidents of sexual harassment commonly include: 'sexual or sexually suggestive comments, remark or sounds' (73%); 'sexist comments, including inappropriate humour or jokes about sex or gender' (68%); 'inappropriate physical contact' (47%); 'being looked at in an inappropriate manner which made the respondent feel uncomfortable' (46%); 'sexual propositions, invitations or other pressure for sex' (26%).

286. The New Zealand Law Society's recent *Workplace Environment Survey* found that:²⁴⁸

- 31% of female lawyers and 5% of male lawyers have been 'sexually harassed in a legal environment at some time in their working life';
- 17% of female lawyers have experienced sexual harassment in the last 5 years; and
- Two thirds of all cases included some form of unwanted physical contact.

Drivers of Sexual Harassment

Power, Gender Inequality and Hegemonic Masculinity in Australia

287. The Law Council considers that sexual harassment should be analysed as a political, as opposed to a personal, issue. Sexual harassment does not occur in a blanket fashion. It is heavily gendered. According to the AHRC, 'the majority of workplace sexual harassment in the past five years was perpetrated by men'.²⁴⁹ '93% of female victims' and '58% of male victims' were sexually harassed by male perpetrators.²⁵⁰ Moreover, studies consistently show that women are significantly more likely than men to experience sexual harassment.²⁵¹ Due to the proportionately higher rates of sexual harassment experienced by women, feminist scholars rightly argue that 'sexual harassment causes considerable harm to women as a group'.²⁵²

288. Feminist and critical scholars have long contended that sexual harassment is about power, not sexual desire or sexual gratification.²⁵³ This view is beginning to be accepted and publicised more widely, including within the legal profession.²⁵⁴ In 2018, the following

²⁴⁸ New Zealand Law Society, *Legal Workplace Environment Survey* (May 2018) <https://www.lawsociety.org.nz/_data/assets/pdf_file/0009/122679/Report-28-May-2018.pdf> 16-17.

²⁴⁹ Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (2018) 33.

²⁵⁰ Ibid.

²⁵¹ Ibid; Australian Human Rights Commission, *Working without Fear: Results of the Sexual Harassment National Telephone Survey* (2012); Australian Human Rights Commission, *Sexual Harassment: Serious Business; Results of the 2008 Sexual Harassment National Telephone Survey* (2008); Human Rights and Equal Opportunity Commission, *20 Years On: The Challenges Continue ... ; Sexual Harassment in the Australian Workplace* (2004). See also Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 34.

²⁵² Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333; Catharine A MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press, 1979); Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and Its Critiques' (2003) 31 *Federal Law Review* 195, 197.

²⁵³ See, eg, Catharine A MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press, 1979).

²⁵⁴ See, eg, Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35.

quote relating to sexual harassment was published in the Law Society of New South Wales Journal: 'The common theme is power. Wherever there is a power imbalance, that's when someone becomes vulnerable.'²⁵⁵ However the full meaning that feminist and critical scholars attach to power is rarely reflected in the dominant discourse.

289. Power imbalance does not only occur between positions in the workplace. It is a feature of society more broadly. Power attaches to sex, gender, sexuality, race, class, title, wealth, education, occupation, disability, and so on, and shifts depending on such things as context, audience, or which identity markers are foregrounded. Accordingly, when scholars say sexual harassment is about unequal power relationships, they are grappling not only with power conferred through workplace hierarchy, but with men's power over women, with the history of white supremacy, with heteronormativity, with ableism, etc.

Features of the Legal Profession

290. Within this framework, the Law Council considers that certain features of the legal profession contribute to the risk of sexual harassment. There is consensus throughout the profession on this point,²⁵⁶ which is also supported by the wider literature on the types of workplaces most susceptible to unethical behaviours like bullying, discrimination and harassment. As Prue Bindon asserts:

*When lawyers engage in sexual harassment, it is difficult to believe that they do so because they do not appreciate that the conduct is unlawful. Lawyers know the law better than the average person.*²⁵⁷

Hierarchical

291. The legal profession is 'heavily'²⁵⁸ and 'strictly'²⁵⁹ hierarchical. There are marked power imbalances in the relationships between colleagues – for example, intern or clerk compared to practising lawyer; associate compared to partner; junior counsel compared to senior counsel; counsel compared to judge. These relationships are further skewed by a transactional element. Clients and senior colleagues largely determine the work that a lawyer gets to do, and career advancement is 'often strongly dependent on having the right sort of senior allies'.²⁶⁰

*This is not to say that it is only in these situations that sexual harassment occurs, but the cases suggest that these factors often play a part.*²⁶¹

292. The *Changing the Rules* study of women lawyers in Victoria found that, in 78% of cases, the harasser held a more senior position within the workplace: 30% were an employer or partner; 25% a senior co-worker; and 23% an immediate supervisor; while, in 28% of cases, the harasser was a barrister or client – positions which may also hold power over

²⁵⁵ Kate Allman, '#TimesUp for the Legal Profession' (2018) 51 *Law Society of NSW Journal* 30, 34.

²⁵⁶ See also Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession' (2014) 37 *UNSW Law Journal* 1031, 1045; Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 102; Paula Baron and Lillian Corbin, 'Ethics Begin at Home' (2016) 19 *Legal Ethics* 281, 289; Prue Bindon, 'The Weinstein Factor: Where does the legal profession stand?' (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 30.

²⁵⁷ Prue Bindon, 'The Weinstein Factor: Where does the legal profession stand?' (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 30.

²⁵⁸ *Ibid.*

²⁵⁹ Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35.

²⁶⁰ Prue Bindon, 'The Weinstein Factor: Where does the legal profession stand?' (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 30.

²⁶¹ *Ibid.*

law firm employees.²⁶² Data from the WLA ACT's and the Law Society of South Australia's recent, as yet unpublished, surveys support this suggestion that the majority of sexual harassers are in a position of relative seniority or influence to the individuals they sexually harass.²⁶³

293. The *Changing the Rules* study also found that 'sexual harassment was most likely to occur in the early stages of employment', leading the authors to suggest this:

*... is likely to relate to the power imbalance that underpins sexual harassment ... the less amount of time that a person is employed, the younger they are, and the less established their reputation is ...*²⁶⁴

294. Similarly, the *Victorian Bar: Quality of Working Life Survey* shows that most barristers experience sexual harassment within the first 1 to 5 years of their life at the Bar.²⁶⁵

295. On a global basis, 44% of people who had been harassed in legal workplaces reported that the perpetrator was 'more senior' than them; in 19% of cases the perpetrator was someone of equal seniority, and in only 4% of cases was the person responsible for the harassment someone junior.²⁶⁶

296. One respondent to a recent request for anecdotal information provided the following statement:

*All the hierarchies and processes firms have in place are almost designed to allow this [sexual harassment] to happen ... People say they're surprised when it gets taken advantage of. But I don't think anyone should be surprised. Because of the enormous power imbalance that the firm establishes.*²⁶⁷

Male-Dominated

297. Multiple studies report that participants experience the legal profession as a male-dominated culture.²⁶⁸ Sexual harassment is consistently associated with workplaces that have strongly embedded masculine norms.²⁶⁹

298. The relatively low position of women in the legal profession compounds the problem. Statistics suggest that sexual harassment, bullying and intimidation is less likely to occur

²⁶² Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 32.

²⁶³ Women Lawyers Association of the Australian Capital Territory, *Survey of Sexual Harassment in the Legal Profession* (2018); Law Society of South Australia, *Bullying, Harassment and Discrimination Survey 2018: Preliminary Report – Version 1* (2018). This is preliminary data ahead of the final publication of results, which was generously shared with the Law Council in February 2019.

²⁶⁴ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 31.

²⁶⁵ Victorian Bar, *Victorian Bar: Quality of Working Life Survey* (University of Portsmouth, 2018) 17, 19.

²⁶⁶ International Bar Association, *Global Survey on Bullying and Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results. These particular statistics were provided to the Law Council by the Law Society of New South Wales, and did not form part of the high-level summary provided to the Law Council by the International Bar Association.

²⁶⁷ Kate Allman, '#TimesUp for the Legal Profession' (2018) 51 *Law Society of NSW Journal* 30, 35.

²⁶⁸ Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014); Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012); Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 106.

²⁶⁹ Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333, 336. See also Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 105.

in workplaces where women hold '40 per cent or more of senior positions'.²⁷⁰ We also know that 'women have a higher expectation of what the ethical climate of organisations should be'.²⁷¹ Unfortunately, while men and women currently enter the legal profession at roughly equal rates, men continue to dominate senior leadership positions.²⁷² (Women on average do not experience the same career trajectories as their male counterparts. The NARS found that one in three women, compared to less than one in five men, expressed dissatisfaction with their career progression.²⁷³) This means that:

*men are more likely to be in positions of structural advantage over women, controlling access to limited social goods like opportunity and advancement, and wielding structural power like seniority, reputation and authority.*²⁷⁴

299. On the other hand, resentment towards women's upward mobility can also factor. Some men react 'strongly and negatively' to the changing demographics of their workplace.²⁷⁵ In these instances, unethical behaviour towards women becomes a 'means of maintaining control' over a profession traditionally considered male.²⁷⁶ Research suggests an overlap between sexual harassment and 'gender discrimination',²⁷⁷ 'workplace bullying',²⁷⁸ 'aggressive hazing',²⁷⁹ or other 'toxic' behaviours,²⁸⁰ which combine to protect and reproduce the status quo and 'exclude'²⁸¹ or 'alienate'²⁸² those who are seen as outsiders.

300. This affects not only women, but also people of diverse races, cultures, sexualities, and abilities.

301. As a historical profession, the legal profession has long been based on:

*a strong sense of a perpetuation of images of the way law should be practised, or who should be a lawyer.*²⁸³

302. Similarly, scholars suggest that legal workplaces have traditionally fostered 'intolerance of physical differences, different ideas, thinking and approaches'.²⁸⁴

²⁷⁰ Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35.

²⁷¹ Paula Baron and Lillian Corbin, 'Ethics Begin at Home' (2016) 19 *Legal Ethics* 281, 286.

²⁷² Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 106.

²⁷³ Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014) 76.

²⁷⁴ Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35.

²⁷⁵ Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 105.

²⁷⁶ *Ibid* 105.

²⁷⁷ Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35; Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333, 350.

²⁷⁸ Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333, 350. See also Bridget Burton, 'Sexual Harassment in the Law: What are "All reasonable Steps for Prevention"?' (2018) *Proctor* 20, 21.

²⁷⁹ Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 102.

²⁸⁰ Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333, 350. See also Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35.

²⁸¹ Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333, 350.

²⁸² Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 106.

²⁸³ *Ibid* 102.

²⁸⁴ *Ibid* citing Maryam Omari and Megan Paull, 'Shut Up and Bill: Workplace Bullying Challenges for the Legal Profession' (2014) 20 *International Journal of the Legal Profession* 141, 149-152.

Competitive

303. Competitive environments tend to increase incidences of bad behaviour.²⁸⁵ When people are motivated to pursue their own self-interest, for example through internal competition, high pressure, reward systems, promotions, or limited workplace goods, they are also motivated to engage in unethical behaviours, such as bullying and harassment, in an effort to 'eliminate colleagues or subordinates who are considered as burdens or rivals'.²⁸⁶

304. Safe Work Australia refers to this as the 'retain and build personal power hypothesis' where perpetrators:

*focus their bullying behaviours on ... individuals ... viewed as a threat to their personal power and level of resources.*²⁸⁷

305. Several reports have noted a link between legal workplaces, competition, and bullying and harassment.²⁸⁸ *Towards Dignity & Respect at Work* concluded that:

*the highly competitive nature of the profession ... is a proven antecedent of negative workplace behaviours (including workplace bullying).*²⁸⁹

306. Whether this link specifically extends to sexual harassment remains to be addressed.

Commercial and Managerial

307. Commercialism and managerialism are often highlighted as key issues impacting modern law firms.²⁹⁰ Commercialism drives firms to focus on profits, productivity, efficiency, and client satisfaction, and 'rely heavily on practices that promote' these goals, including the 'promotion of effective profit earners'.²⁹¹ The worry is that these goals:

*can trump concerns about worker wellbeing and lead to a ready acceptance of problematic behaviours performed by particularly productive workers.*²⁹²

308. Similarly, managerialism focuses on the firm over the individual, and considers a person through their membership in the firm.²⁹³ Where commercialism and managerialism reign,

²⁸⁵ Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 103.

²⁸⁶ Ibid quoting D Salin, 'Workplace Bullying among Business Professionals: Prevalence, Gender Differences and the Role of Organizational Politics (2005) *Pistes* 7, 7.

²⁸⁷ Safe Work Australia, *Bullying & Harassment in Australian Workplaces: Results from the Australian Workplace Barometer Project 2014/2015* (2016) 15.

²⁸⁸ See, eg, Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014) 76; Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 44.

²⁸⁹ Maryam Omari, *Towards Dignity & Respect at Work: an exploration of work behaviours in a professional environment* (The Law Society of Western Australia and Edith Cowan University, 2010) 9.

²⁹⁰ See, eg, Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87; Paula Baron and Lillian Corbin, 'Ethics Begin at Home' (2016) 19 *Legal Ethics* 281; Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession' (2014) 37 *UNSW Law Journal* 1031.

²⁹¹ Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession' (2014) 37 *UNSW Law Journal* 1031, 1047.

²⁹² Ibid 1061 quoted by Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 103-104.

²⁹³ Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession' (2014) 37 *UNSW Law Journal* 1031, 1047.

'there is a particularly damaging influence on the ethics of organisational members.'²⁹⁴
The profits and reputation of the firm are given priority.

Social Events and Alcohol

309. Excessive drinking can be a cultural issue in certain societies, professions and workplaces.
310. There is anecdotal evidence that incidents of sexual harassment within the legal profession, and particularly within corporate law firms, are exacerbated by social events centred around the availability and high consumption of alcohol.
311. The Law Council is unaware of any formal complaints or data on this point.
312. The Law Council is aware, through information provided by the Law Society of New South Wales, that NSW Young Lawyers, in response to a recent survey on young lawyers' experiences of sexual harassment in the workplace, recommend reducing alcohol consumption at work-related events.
313. The Law Council also draws attention to the recent *Independent Review of Russell McVeagh*, a prominent law firm in New Zealand, where numerous allegations were made concerning sexual harassment perpetrated by male partners of the firm at workplace social events, who were described as being intoxicated or as putting pressure on younger female colleagues to drink.²⁹⁵
314. As part of the *Independent Review*, Dame Margaret Bazley recommended implementing policies on 'alcohol use', 'host responsibility' and 'expected behaviours at social functions',²⁹⁶ as well as moving social functions to 'lunches and other activities that are not centred on alcohol'.²⁹⁷
315. The Law Council supports similar efforts in Australia. The Law Council is not suggesting that the consumption of alcohol causes sexual harassment, or that such changes would solve the problem, but that alcohol is one contributing factor to the high rates of sexual harassment and that mitigation of harm should be attempted wherever possible.

The Bar

316. The Australian legal profession is divided into two main types of legal practitioner – solicitors and barristers. The Law Council acknowledges the particular issues faced by barristers in preventing and responding to sexual harassment.
317. Many features driving sexual harassment at the Bar are similar to the features driving sexual harassment within the wider legal profession, as well as other workplaces. These include that the Bar is hierarchical, male-dominated, adversarial, and subject to unconscious bias.

²⁹⁴ Paula Baron and Lillian Corbin, 'Ethics Begin at Home' (2016) 19 *Legal Ethics* 281, 290. See also Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession' (2014) 37 *UNSW Law Journal* 1031, 1047; Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 113.

²⁹⁵ Dame Margaret Bazley, *Independent Review of Russell McVeagh* (March–June 2018) 3, 16-22 <<https://www.russellmcveagh.com/getmedia/cc682d64-46a1-40e3-987b-cd82223bea24/Independent-Review-of-Russell-McVeagh-2018.pdf>>.

²⁹⁶ *Ibid* 22.

²⁹⁷ *Ibid* 16.

318. However, there are also unique features of working at the Bar which may contribute to the problems in preventing and responding to sexual harassment.

319. The New South Wales Bar Association emphasises the fact that barristers are self-employed:

With a few exceptions, barristers are self-employed and sole practitioners. ... Barristers at the private Bar in New South Wales are not permitted to be employees. They do not work in law firms and they are not permitted to form any business association or partnership. They are not permitted to employ another legal practitioner. However, barristers may work together. ... A barrister generally receives her or his work by way of a referral from a solicitor. This is commonly described as a 'brief' either to advise or appear in court or other forum. The barrister then works with the solicitor and the client in the preparation of the case.

Given the nature of barristers' work, industrial and discrimination laws, including the SDA, have limited operation and application to them.

320. This point is also picked up by the Victorian Bar:

Barristers practice as individual sole practitioners. That being the case, their workplace is not typical, nor reflective of, usual employer/employee relationships. Rather, the workplace of a barrister is made up of individual professionals who are generally retained by solicitors through briefs and whom engage in adversarial court processes. This necessitates daily interaction with solicitors, other barristers, and judicial officers. It is these unique elements that dictate the critical professional interactions that occur in the workplace of barristers.

321. This vacuum in the coverage of the legal framework prohibiting sexual harassment is discussed above, at paragraphs [76]–[96].

322. The Victorian Bar emphasises that barristers therefore rely wholly on their Bar Associations, as well as Law Societies and other bodies regulating members of the legal profession who work with barristers, to implement policies and procedures on preventing and responding to sexual harassment, which might normally be implemented by an employer:

In the absence of employer policies and procedures, the Bar is of the view that it is critical that regulators and professional associations alike, including the Bar, address both formal and informal structures that govern workplace behaviours.

Low Reporting

323. Lawyers who experience sexual harassment in the workplace are reluctant to make a formal report or complaint.²⁹⁸ *Changing the Rules* found that 66% of women lawyers who experienced workplace sexual harassment in Victoria did not make a complaint, and 29% did not tell anyone at all.²⁹⁹ A recent survey of young lawyers in New South Wales found that, of the 51% who disclosed experiencing sexual harassment, less than 30% made a

²⁹⁸ Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 36; Prue Bindon, 'The Weinstein Factor: Where does the legal profession stand?' (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 29; Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 114.

²⁹⁹ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 30, 33.

complaint.³⁰⁰ The IBA is reporting that 77% of sexual harassment cases in legal workplaces across Australia go unreported.³⁰¹

324. Reasons for low rates of reporting of sexual harassment within the legal profession may include:

- ‘did not think that anything would happen so there was no point in complaining’;³⁰²
- ‘lack of confidence in protocols’;³⁰³
- ‘little perceived benefit in reporting sexual harassment’;³⁰⁴
- ‘I did (informally) report to the CEO and the President ... nothing was done and I no longer work there’;³⁰⁵
- fear of repercussions;³⁰⁶
- ‘they were concerned about negative repercussions for their career; and they were concerned their reputation would be negatively affected’;³⁰⁷
- ‘they were concerned there would be negative repercussions for their career ... that their reputation in the legal profession would be jeopardised ... they would lose career opportunities ... they would be ostracised ... demoted ... transferred ...’;³⁰⁸
- ‘... [they] were too terrified of the repercussions ... Each had peers warn them not to report the situation in case whistleblowers were treated unfavourably ...’;³⁰⁹
- ‘on the one occasion I did I found myself ostracised and then made redundant’;³¹⁰
- ‘fearful that our industry will continue to punish, in some subtle way, those who make public claims against their employers’;³¹¹
- ‘Absolutely no way that I want to be labelled a trouble-maker. Making a complaint makes me the problem and could prejudice my career’;³¹²

³⁰⁰ New South Wales Young Lawyers Human Rights Committee, ‘Sexual Harassment in Australian Workplaces Survey results’ (November 2018).

³⁰¹ International Bar Association, *Global Survey on Bullying and Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results. See also Kate Allman, ‘#TimesUp for the Legal Profession’ (2018) 51 *Law Society of NSW Journal* 30, 32-33.

³⁰² Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 30, 35.

³⁰³ Grace Ormsby, ‘IBA: 43% of Lawyers Bullied and 25% Sexually Harassed’, *Lawyers Weekly* (online), 11 October 2018 <<https://www.lawyersweekly.com.au/biglaw/24234-iba-43-of-lawyers-bullied-and-25-sexually-harassed>> quoting IBA fact sheet. Information also supplied to the Law Council by the Victorian Bar.

³⁰⁴ Adrienne Morton, ‘Sexual Harassment in the Legal Profession’ (2018) 144 *Precedent* 34, 36.

³⁰⁵ Women Lawyers Association of the Australian Capital Territory, *Survey of Sexual Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results, which was generously shared with the Law Council in February 2019.

³⁰⁶ Grace Ormsby, ‘IBA: 43% of Lawyers Bullied and 25% Sexually Harassed’, *Lawyers Weekly* (online), 11 October 2018 <<https://www.lawyersweekly.com.au/biglaw/24234-iba-43-of-lawyers-bullied-and-25-sexually-harassed>> quoting IBA fact sheet. Information also supplied to the Law Council by the Victorian Bar.

³⁰⁷ Paula Baron and Lillian Corbin, ‘Ethics Begin at Home’ (2016) 19 *Legal Ethics* 281, 289.

³⁰⁸ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 30, 35.

³⁰⁹ Kate Allman, ‘#TimesUp for the Legal Profession’ (2018) 51 *Law Society of NSW Journal* 30, 35.

³¹⁰ Women Lawyers Association of the Australian Capital Territory, *Survey of Sexual Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results, which was generously shared with the Law Council in February 2019.

³¹¹ Bridget Burton, ‘Sexual Harassment in the Law: What are “All reasonable Steps for Prevention”?’ (2018) *Proctor* 20, 20.

³¹² Women Lawyers Association of the Australian Capital Territory, *Survey of Sexual Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results, which was generously shared with the Law Council in February 2019.

- ‘worry about how they will be received in the profession’;³¹³
- ‘did not think they would be believed’;³¹⁴
- ‘they may have feelings of embarrassment, guilt, shame, trauma, and stigma’;³¹⁵
- ‘It was embarrassing, and I did not want the stigma of being a complainer or too sensitive. I thought that complaining would be considered a “weak female” response’;³¹⁶
- the profile or status of the perpetrator;³¹⁷
- ‘It is impossible to make a complaint against a partner in a law firm for whom you work. HR has no power as the partners are the owners of the company. I feared retaliation’;³¹⁸
- ‘[at] the firm I worked for it was ingrained in the culture and the male was a director and protected because his receipts were high’;³¹⁹
- ‘A male client sexually harassed me and because of his high profile in the public service the firm would’ve been more protective of maintaining the relationship for future work’;³²⁰
- ‘Past experience has shown that colleagues who have raised complaints of sexual harassment (following quite serious harassments [sic]) have not been listened to, and have in fact suffered detriment as a result of their complaint (seen as not being ‘team players’ or being ‘too sensitive’, while the harasser has been promoted and their conduct has been dismissed as ‘just what boys do’);³²¹
- ‘incidents being endemic to the workplace’;³²²
- ‘did not think that the matter was serious enough to warrant a complaint’;³²³
- ‘I was an articled clerk and he was pretty senior. I didn’t mention it as, at the time, it was the sort of thing that people joked about and you were supposed to take in your stride’;³²⁴

³¹³ Bridget Burton, ‘Sexual Harassment in the Law: What are “All reasonable Steps for Prevention”?’ (2018) *Proctor* 20, 20.

³¹⁴ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 30, 35.

³¹⁵ *Ibid.*

³¹⁶ New South Wales Young Lawyers Human Rights Committee, ‘Sexual Harassment in Australian Workplaces Survey results’ (November 2018).

³¹⁷ Grace Ormsby, ‘IBA: 43% of Lawyers Bullied and 25% Sexually Harassed’, *Lawyers Weekly* (online), 11 October 2018 <<https://www.lawyersweekly.com.au/biglaw/24234-iba-43-of-lawyers-bullied-and-25-sexually-harassed>> quoting IBA fact sheet. Information also supplied to the Law Council by the Victorian Bar.

³¹⁸ New South Wales Young Lawyers Human Rights Committee, ‘Sexual Harassment in Australian Workplaces Survey results’ (November 2018).

³¹⁹ Women Lawyers Association of the Australian Capital Territory, *Survey of Sexual Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results, which was generously shared with the Law Council in February 2019.

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² Grace Ormsby, ‘IBA: 43% of Lawyers Bullied and 25% Sexually Harassed’, *Lawyers Weekly* (online), 11 October 2018 <<https://www.lawyersweekly.com.au/biglaw/24234-iba-43-of-lawyers-bullied-and-25-sexually-harassed>> quoting IBA fact sheet. Information also supplied to the Law Council by the Victorian Bar.

³²³ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 30, 35.

³²⁴ *Ibid.*

- ‘because in my experience the harasser has been a senior associate or partner, making comments or jokes they think are fine, and making a complaint would just label you as sensitive or weak or not having a sense of humour ...’;³²⁵
- ‘The behaviour was pretty openly displayed and accepted by all. I felt uncomfortable about it but as a graduate there was not much I could do and the behaviour seemed tolerated at the top’;³²⁶
- ‘felt that the complaint process was too daunting’;³²⁷ and
- ‘It could escalate beyond what I would feel comfortable with. Also hard to establish evidence.’³²⁸

325. This is consistent with general reports and commentary.³²⁹ The Law Council notes that the AHRC has found ‘the majority of people who were sexually harassed in the workplace in the last five years did not make a formal report or complaint.’³³⁰ Less than one in five people report workplace sexual harassment.³³¹

Lack of Action When Reporting Does Occur

326. When sexual harassment within legal workplaces is reported, it is often not handled adequately by management. The IBA is reporting that, of those lawyers who did report workplace sexual harassment in a recent survey, 73% said their employer’s response was either insufficient or negligible and 80% said the perpetrator was not sanctioned.³³² In Victoria in 2012, ‘three out of 10 [women lawyers] reported that nothing happened to the alleged harasser’.³³³

327. Lack of action from employers can perpetuate, in the minds of both perpetrators and victims, a workplace culture that implicitly condones sexual harassment. Failure to sanction a harasser can impact on perceptions of acceptable workplace conduct, increasing the likelihood of future incidents and making future victims less likely to come forward. It can also amplify the negative mental, physical and career impacts on the victim as they try to negotiate a workplace lacking in support and a sense of justice. As Paula Baron asserts:

³²⁵ Women Lawyers Association of the Australian Capital Territory, *Survey of Sexual Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results, which was generously shared with the Law Council in February 2019.

³²⁶ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 35.

³²⁷ *Ibid.*

³²⁸ Women Lawyers Association of the Australian Capital Territory, *Survey of Sexual Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results, which was generously shared with the Law Council in February 2019.

³²⁹ Paula Baron and Lillian Corbin, ‘Ethics Begin at Home’ (2016) 19 *Legal Ethics* 281, 289.

³³⁰ Australian Human Rights Commission, *Everyone’s business: Fourth national survey on sexual harassment in Australian workplaces* (2018) 67. See also Paula Baron, ‘The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours’ (2015) 41 *Australian Feminist Law Journal* 87, 114; Adrienne Morton, ‘Sexual Harassment in the Legal Profession’ (2018) 144 *Precedent* 34, 36.

³³¹ Australian Human Rights Commission, *Everyone’s business: Fourth national survey on sexual harassment in Australian workplaces* (2018) 67.

³³² International Bar Association, *Global Survey on Bullying and Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results. This information was also provided to the Law Council by the Law Society of New South Wales.

³³³ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 30, 36.

*managerial responses (whether effective, absent or ineffective) influence witnesses “to speak out or stay silent, engender support for or withhold support from targeted workers, and increase or decrease intentions to leave”.*³³⁴

Problematic Focus on the Individual

328. Many complaints processes, including the statutory complaints process under the AHRCA, as discussed at paragraph [139], but also informal complaints processes within organisations, require any complaint to be made and progressed by the individual sexually harassed person. This places a burden on the individual, who is often not adequately supported or is experiencing the impacts considered below, which impair their ability to ‘self-help’. It also prevents society addressing the issue of sexual harassment in a structural or systemic way. As Adrienne Morton asserts, this impacts the take-up and efficacy of complaints processes:

*because ‘targets of sexual harassment often respond passively to the conduct ... organisational approaches which rely exclusively on individual complaints made by targets of sexual harassment are unlikely to be successful’.*³³⁵

Impacts of Sexual Harassment

329. The impacts of sexual harassment are widespread, affecting the government, legal profession, law firms, women, bystanders, and sexually harassed individuals. The impacts may be direct or indirect; may incur financial, physical or mental costs; and may be felt organisationally or individually.

Government

330. Sexual harassment in Australian workplaces is thought to have a significant financial cost for the government and economy, due largely to reduced productivity.³³⁶ Other possible costs include those associated with healthcare, charges filed in commissions, courts and tribunals, and government compensation payouts.

Legal Profession

331. The standing of the legal profession is important. ‘It has been said that the profession’s most valuable asset is its collective reputation and the public confidence which that inspires’.³³⁷ The public must have confidence in the administration of justice, and often this comes down to the conduct of individual legal practitioners. When lawyers behave unethically, including sexually harassing their colleagues or clients, there is a critical impact on the justice system.

³³⁴ Paula Baron, ‘The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 110 quoting Gary Namie and Pamela E Lutgen-Sandvik, ‘Active and Passive Accomplices: The Communal Character of Workplace Bullying’ (2010) 4 *International Journal of Communication* 343, 347.

³³⁵ Adrienne Morton, ‘Sexual Harassment in the Legal Profession’ (2018) 144 *Precedent* 34, 36 quoting Paula McDonald and Michael Flood, Australian Human Rights Commission, *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace* (June 2012) 5.

³³⁶ See, eg, Suzanne Le Mire and Rosemary Owens, ‘A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession’ (2014) 37 *UNSW Law Journal* 1031, 1035; Paula Baron, ‘The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 111. See also Heather McLaughlin, Christopher Uggen and Amy Blackstone, ‘The Economic and Career Effects of Sexual Harassment on Working Women’ (2017) 31 *Gender and Society* 333, 335.

³³⁷ Paula Baron and Lillian Corbin, ‘Ethics Begin at Home’ (2016) 19 *Legal Ethics* 281, 282.

332. The attrition rate of women lawyers is high,³³⁸ and experiences of sexual harassment are a key reason why women leave the law. The IBA is reporting that 38% of lawyers who disclosed harassment expressed an intention to leave the workplace as a result.³³⁹ Similarly, *Changing the Rules* reported respondents who left their workplace or decided to never work in private practice or a law firm again.³⁴⁰ This is supported by the wider literature on legal workplaces.³⁴¹ The legal profession is losing diverse talent, which negatively impacts factors such as performance, quality work, innovative solutions, risk reduction, and client satisfaction,³⁴² and jeopardises the sustainability of the profession as a whole.

Organisation, Association, Company or Firm

333. Sexual harassment is expensive for organisations, including law firms. It negatively impacts productivity and, because it also drives low job satisfaction and ill health, increases absenteeism and attrition. This in turn creates indirect costs associated with employee turnover, recruiting and training.³⁴³ Law firms incur further direct costs in responding to sexual harassment complaints, conducting investigations, litigating charges of vicarious liability, and paying damages. On top of this, there is the potential damage to a law firm's reputation and goodwill to consider.³⁴⁴

334. Negative impacts may be felt across the firm. Research shows that witnesses to unethical behaviours 'report higher levels of stress and workplace negativity and lower levels of job satisfaction'.³⁴⁵ As discussed above, the commitment, enthusiasm and trust of workers can be lost where managers fail to sanction harassers, and workplace culture can suffer.³⁴⁶

335. For women as a group, these impacts are even greater. Firstly, if sexual harassment pushes women out of law, halts their career advancement, or impacts their standing in the profession or in the public eye, then conceivably it contributes to a cycle where women are under-represented in senior positions. Secondly, as Adrienne Morton, quoting McDonald and Flood, notes:

³³⁸ See, eg, Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014).

³³⁹ International Bar Association, *Global Survey on Bullying and Harassment in the Legal Profession* (2018). This is preliminary data ahead of the final publication of results. This information was also provided to the Law Council by the Law Society of New South Wales.

³⁴⁰ Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 30, 37.

³⁴¹ See, eg, Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 109; Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333.

³⁴² See Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014) 81-82.

³⁴³ See, eg, Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession' (2014) 37 *UNSW Law Journal* 1031, 1035-1036; Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 109, 111; Paula Baron and Lillian Corbin, 'Ethics Begin at Home' (2016) 19 *Legal Ethics* 281, 288; Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35.

³⁴⁴ See, eg, Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession' (2014) 37 *UNSW Law Journal* 1031, 1035-1036; Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 109, 111; Paula Baron and Lillian Corbin, 'Ethics Begin at Home' (2016) 19 *Legal Ethics* 281, 288; Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35.

³⁴⁵ Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 110.

³⁴⁶ Ibid; Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333, 335; Victorian Equal Opportunity and Human Rights Commission, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 30, 36.

women working in environments hostile to women, where sexual harassment is tolerated, “can experience similar negative impacts to those women who are actual targets of sexual harassment”.³⁴⁷

Individual

Physical

336. Studies list the following as potential physical symptoms of sexual harassment:³⁴⁸

- minor physical issues associated with, for example, anxiety, such as clammy hands, dry mouth;
- major physical issues associated with, for example, anxiety, such as panic attacks, irritable bowel syndrome, sleep disruption;
- headaches;
- hypertension;
- higher body mass;
- heightened risk of cardiovascular disease;
- heightened risk of chronic disease generally;
- musculoskeletal issues; and
- a weakened immune system.

Mental

337. Mental health issues arising from the experience of sexual harassment may include:³⁴⁹

- anxiety;
- depression;
- post-traumatic stress disorder;
- confusion, helplessness and lack of concentration;
- high levels of disappointment, negativity and stress;
- feeling ashamed, embarrassed, worthless, guilty, angry, unsafe, scared;
- self-doubt and loss of confidence, self-esteem and morale;
- increased risk of smoking, alcohol and drug abuse;
- insomnia; and
- suicide.

³⁴⁷ Adrienne Morton, ‘Sexual Harassment in the Legal Profession’ (2018) 144 *Precedent* 34, 35.

³⁴⁸ See, eg, Paula Baron, ‘The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours’ (2015) 41 *Australian Feminist Law Journal* 87, 108-109; Paula Baron and Lillian Corbin, ‘Ethics Begin at Home’ (2016) 19 *Legal Ethics* 281, 288; Maryam Omari, *Towards Dignity & Respect at Work: an exploration of work behaviours in a professional environment* (The Law Society of Western Australia and Edith Cowan University, 2010).

³⁴⁹ See, eg, *Changing the rules: the experiences of female lawyers in Victoria* (2012) 30, 37; Paula Baron, ‘The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours’ (2015) 41 *Australian Feminist Law Journal* 87, 108-109; Suzanne Le Mire and Rosemary Owens, ‘A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession’ (2014) 37 *UNSW Law Journal* 1031, 1035; Heather McLaughlin, Christopher Uggan and Amy Blackstone, ‘The Economic and Career Effects of Sexual Harassment on Working Women’ (2017) 31 *Gender and Society* 333, 334.

338. The Law Council notes that past research suggests lawyers report higher rates of mental illness and mental ill health than the general population. The impact that sexual harassment may have on an already vulnerable profession is concerning.

Career

339. Whilst numerous studies link unethical behaviours, including sexual harassment, with low job satisfaction and high attrition rates, the Law Council notes a lack of detail, and lack of Australian legal research, on how sexual harassment affects career trajectory and financial earning.

340. An American study recently examined the relationship between sexual harassment and the professional standing of women lawyers.³⁵⁰ The authors of the study found that women lawyers experienced both short-term and long-term career effects as a direct result of sexual harassment, including immediate financial stress, and overall career disruption and decreased earnings due to job change, industry change, reduced work hours, reduced seniority, relinquishing firm-specific human capital, being unable to obtain references, or being seen as unreliable.³⁵¹ Further, this disadvantage was unique to women:

*when men experience disruptions to their school or work trajectory, they remain likely to obtain relatively high-paying jobs.*³⁵²

341. The potential impact that sexual harassment can have on a career needs to be considered in hiring practices. As Bridget Burton stresses:

*It is important for legal employers to also understand that work history can reflect the bad behaviour of others in the form of mental illness, absenteeism or presenteeism, unusual career decisions such as leaving a great job for a lesser one, and less-than-glowing references.*³⁵³

Existing Measures and Good Practice

342. The Law Council believes that there is widespread and genuine support across the legal profession for action to be taken with regard to preventing and responding to sexual harassment. Numerous sectors of the legal profession have already implemented certain measures.

Professional Conduct Rules

343. In addition to the federal, state and territory legislation which prohibits sexual harassment in certain circumstances, Australian lawyers are bound by professional conduct rules.

Solicitors

344. The *Australian Solicitors' Conduct Rules (the Rules or the ASCRs)* are model rules published by the Law Council and adopted by professional associations. The Rules have been adopted in South Australia, Queensland and the Australian Capital Territory. The

³⁵⁰ Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333.

³⁵¹ *Ibid.*

³⁵² *Ibid* 352.

³⁵³ Bridget Burton, 'Sexual Harassment in the Law: What are "All reasonable Steps for Prevention"?' (2018) *Proctor* 20, 21.

Rules have also been adopted in New South Wales and Victoria as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

345. Rule 42 of the ASCRs is set out as follows:

42. ANTI-DISCRIMINATION AND HARASSMENT

42.1 *A solicitor must not, in the course of practice, engage in conduct which constitutes:*

42.1.1 discrimination;

42.1.2 sexual harassment; or

42.1.3 workplace bullying.

346. The term 'sexual harassment' in Rule 42.1.2 of the ASCRs is defined by reference to:

the applicable state, territory or federal anti-discrimination or human rights legislation.

347. The Law Council notes the opposition of its Equal Opportunity Committee to a recent proposal in the *Consultation Discussion Paper for Review of the Australian Solicitors' Conduct Rules* to remove the word 'sexual' from Rule 42.1.2. The Equal Opportunity Committee considers that Rule 42 should refer to both harassment and sexual harassment, and not subsume the two behaviours under one heading. In light of the research and statistics outlined in this submission, the Equal Opportunity Committee believes it important to focus on sexual harassment as a particular issue.

348. Sexual harassment is also a breach of Rule 17 of the *Legal Profession Conduct Rules 2010 (WA)*.

349. No comparable rule against sexual harassment is found in the Rules of the remaining jurisdictions of Tasmania or the Northern Territory.

Barristers

350. Similarly, the Australian Bar Association (**ABA**) developed the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, which have been adopted in New South Wales and Victoria.

351. Under Rule 123:

123 *a barrister must not, in the course of practice, engage in conduct which constitutes:*

(a) discrimination,

(b) sexual harassment, or

(c) workplace bullying.

352. Again the term 'sexual harassment' in Rule 123 is defined in Rule 125 by reference to:

the applicable state, territory or federal anti-discrimination or human rights legislation.

353. Sexual harassment is also a breach of Rule 117 of the *Western Australian Barristers' Rules* and Rule 122.1 of the *ACT Bar Association Legal Profession (Barristers) Rules*.

354. As far as the Law Council knows, the Barristers' Rules in the other jurisdictions of Queensland, South Australia, Tasmania and the Northern Territory do not currently include a comparable rule against sexual harassment.

Disciplinary Action

355. The process for making a complaint against a lawyer for breaching professional conduct rules depends on whether the lawyer is a barrister or solicitor and where the lawyer is located. Each Law Society in each state and territory provides information on how to make a complaint against a solicitor. Each Bar Association in each state and territory provides information on how to make a complaint against a barrister. Generally, however, a complaint will be received and handled by the appropriate disciplinary body.

356. These disciplinary bodies, depending on the state or territory, are:

- in New South Wales, the Office of the Legal Services Commissioner;
- in Victoria, the Victorian Legal Services Board and Commissioner;
- in Western Australia, the Legal Practice Board of Western Australia's Legal Profession Complaints Committee;
- in South Australia, the Legal Profession Conduct Commissioner;
- in Tasmania, the Legal Profession Board Tasmania;
- in Queensland, the Legal Services Commission;
- in the Northern Territory, the Law Society Northern Territory, which can refer serious matters to the Legal Practitioners' Disciplinary Tribunal; and
- in the Australian Capital Territory, the ACT Law Society.

357. The disciplinary bodies do not publish complete data lists of the number or types of complaints received, nor do they publish substantial details of complaints, even where those complaints are upheld and result in disciplinary action. Some disciplinary bodies, such as the Victorian Legal Services Board and Commissioner, do produce an annual report, providing an overview of the number and types of complaints received. The following statistics are currently available to the Law Council:

- In Western Australia, as at November 2018, no complaints relating to sexual harassment have been lodged with or prosecuted by the Legal Profession Complaints Committee;
- In its Annual Report 2016, the Victorian Legal Services Board reported it had received the following number of complaints relating to 'sexual impropriety': in 2013-2014, three complaints; in 2014-2015, two complaints; and, in 2015-2016, no complaints.³⁵⁴ In its Annual Report 2018, the Victorian Legal Services Board no longer included complaints relating to 'sexual impropriety', but its foreword included the following statement on complaints relating to sexual harassment:

*As Commissioner, I have noticed that complaints from lawyers alleging sexual harassment by another lawyer are extremely rare, yet anecdotally it appears to be prevalent within the profession. This is a serious concern for the Board and Commissioner – not only because of the breach of ethics and potential criminal conduct, but also for the impact it has on the mental health of those who experience this behaviour.*³⁵⁵

³⁵⁴ Victorian Legal Services Board + Commissioner, *Annual Report 2016*, 56.

³⁵⁵ Victorian Legal Services Board, *Annual Report 2018*, 7.

358. The Law Council notes that professional conduct rules on sexual harassment, like much federal, state and territory legislation on sexual harassment, conceptualise addressing sexual harassment as a reactive process. Unlike the legislation, the individual reporting the complaint does not have to be the sexually harassed person or anyone related to the sexually harassed person. This conception of shared responsibility for the standing of the profession, as well as the very existence of the rules, provide an important normative statement against sexual harassment within the profession. However, the operation of the rules still depends on waiting for an incident to occur and then assuming individuals who experienced, witnessed or otherwise learned of the incident will be willing to make a complaint.

Law Council of Australia

359. In response to the NARS, the Law Council developed and implemented the following national initiatives supported by its Constituent Bodies and Equal Opportunity Committee:

- The Diversity and Equality Charter, which is a statement of principles that firms and chambers can adopt to acknowledge publicly a commitment to diversity and equality.³⁵⁶
- The Equitable Briefing Policy, which aims, through targets and adoption and reporting mechanisms, to improve the briefing of women barristers, address the gap between men and women barristers in terms of pay and representation, and thereby drive cultural change within the legal profession.³⁵⁷
- Unconscious Bias Training, which was developed specifically for the legal profession, and is currently available to all lawyers and provided in different formats in order to address accessibility issues around cost and location, including face-to-face workshops, train-the-trainer modules, and online e-learning courses.³⁵⁸
- The Inclusion and Diversity Webpages, including the Sexual Harassment in the Workplace Webpage, which includes resources and information to address sexual harassment and is updated regularly with examples of best practice throughout the legal profession.³⁵⁹

360. The NARS Report published a number of recommendations to be considered by professional bodies, meaning the Law Societies and Bar Associations, as well as by firms, chambers and practicing lawyers, including:³⁶⁰

- Establish taskforces in each jurisdiction to address the issue of sexual harassment in the legal profession;
- As a basis, use recommendations contained in the Victorian equal Opportunity and Human Rights Commission 2013 Report 'Changing the Rules: the experiences of female lawyers in Victoria':
 - Professional associations develop a communications plan to promote issues of gender equality and awareness of sexual harassment in the legal

³⁵⁶ Law Council of Australia, *Diversity and Equality Charter* <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/diversity-and-equality-charter>>.

³⁵⁷ Law Council of Australia, *Equitable Briefing Policy* (1 September 2016) <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy>>.

³⁵⁸ Law Council of Australia, *Unconscious Bias Training Now Available to All Australian Lawyers* (8 March 2017) <<https://www.lawcouncil.asn.au/media/media-releases/unconscious-bias-training-now-available-to-all-australian-lawyers>> citing Symmetra, *Diversity in Law* <<http://www.diversityinlaw.com.au/>>.

³⁵⁹ Law Council of Australia, *Sexual Harassment in the Workplace* (6 July 2018) <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/sexual-harassment-in-the-workplace>>.

³⁶⁰ Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014) 94.

profession – including publishing articles, seminars, media releases, and social media;

- Consider the development of a voluntary code to include, for example, the profile of a firm, number of complaints made based on gender, number of discrimination/sexual harassment complaints lodged internally and externally, and the outcomes of these;
- Consider the development of a mechanism whereby lawyers who are experiencing sexual harassment can confidentially discuss their situation, and seek advice on strategies and options and/or have any complaint handled by a panel review comprising external organisations; and
- Develop and promote education programs on sexual harassment;
- Develop clear and accessible written policies and guidelines on addressing and countering gender discrimination, sexual harassment and bullying;
- Develop clear, accessible complaint processes in place for gender discrimination, sexual harassment and bullying [sic]; and
- Conduct training on gender discrimination, sexual harassment and bullying (including ‘bystander’ training for those who witness discrimination, sexual harassment or bullying).

361. The Law Council, supported by its Equal Opportunity Committee, intends to continue this work in 2019. Promoting engagement and collaboration by the legal profession with the National Inquiry is a current Presidential Priority for the Law Council.

362. The Law Council also supports the work and initiatives of its Constituent Bodies, Committees and Sectors. A number of the Law Council’s Constituent Bodies have developed resources to prevent and respond to sexual harassment, including the following.

Victoria

363. The Law Institute of Victoria has published a strong statement against sexual harassment in the workplace, as part of a broader webpage dedicated to addressing this issue.³⁶¹

364. The Victorian Bar has implemented the following measures in response to recent findings on the nature and prevalence of sexual harassment in the legal profession:

- The Diversity and Inclusion Working Group, in order to, amongst other things, draft new conduct policies that address bullying, discrimination and sexual harassment. Each of the policies deal with the Bar’s stance in relation to these behaviours and outline the Bar’s processes for reporting or making a complaint.
- The Policy Against Sexual Harassment, which aims to, amongst other things, create a work environment free from sexual harassment; treat complaints made in good faith about sexual harassment in a manner that is, to the extent possible, confidential, timely, fair and with protection from reprisal; encourage reports of sexual harassment; and implement training and awareness of behaviours that

³⁶¹ Law Institute of Victoria, *Sexual harassment – how to stop it happening in your office* <<https://www.liv.asn.au/LIVPresBlog2014/November-2014/Sexual-harassment-%E2%80%93-how-to-stop-it-happening-in-yo>>.

constitute sexual harassment. The Policy outlines the internal grievance processes through which occurrences of sexual harassment may be handled.³⁶²

- Internal Bar Conciliators, who have been trained by the AHRC to conciliate complaints made under the conduct policies, and who can be contacted to assist with any concerns that members of the Bar may have relating to bullying, discrimination and sexual harassment.
- The 24-hour crisis help-line, which is available to all members seeking confidential assistance for any work or personal issues they may be experiencing.
- The continuing professional development and education program, which promotes high standards of professional conduct, including raising awareness and understanding of sexual harassment in the workplace and the mechanisms available to members of the Bar to report such behaviour.
- The Health and Wellbeing Information and Resources Online Portal for Barristers, which is currently in development following the findings of *The Victorian Bar: Quality of Working Life Survey*. The portal will provide a central hub for members to readily access useful information and resources including proactive preventative resources to assist members experiencing poor health and wellbeing and to educate members on health and wellbeing strategies, including those who experience or witness sexual harassment.

New South Wales

365. The New South Wales Bar Association has developed a six-point strategy to prevent and respond to sexual harassment, which includes a Best Practice Guideline, Continuing Professional Development and the Bar Association's Diversity and Equality Committee. The Guideline provides a structure to assist in resolving matters of harassment, discrimination, vilification and victimization, including sexual harassment.³⁶³ The Guideline also promotes the Barristers' Conduct Rules and the New South Wales Bar Association's Diversity and Equity Policy.³⁶⁴

Queensland

366. The Queensland Law Society has developed a Sexual Harassment Policy, which outlines employer, manager and employee responsibilities in relation to sexual harassment, and procedures for dealing with a sexual harassment complaint.³⁶⁵ This is in addition to the Queensland Law Society's broader Position Statement issued in November 2018 concerning 'Sexual harassment, bullying and discrimination in the workplace'.³⁶⁶ The Position Statement makes clear the issue at hand, the Society's commitment to address it, the specific steps the Society will undertake, and its 2019 Focus Areas.

³⁶² Victorian Bar, *Policy Against Sexual Harassment* (1 July 2018) <<https://www.vicbar.com.au/sites/default/files/Policy%20Against%20Sexual%20Harassment.pdf>>.

³⁶³ New South Wales Bar Association, *Model Harassment, Discrimination, Vilification and Victimization Best Practice Guideline* <https://www.nswbar.asn.au/docs/webdocs/bpg_harassment_210820152.pdf>.

³⁶⁴ New South Wales Bar Association, *Diversity and Equity Policy* <<https://www.nswbar.asn.au/docs/webdocs/diversity1.pdf>>.

³⁶⁵ Queensland Law Society, *Sexual Harassment Policy* <http://www.qls.com.au/About_QLS/The_Queensland_Law_Society/Resources_publications/Corporate_documents/Right_to_information_information_privacy/Publication_scheme/Our_policies/Sexual_Harassment_Policy>.

³⁶⁶ Queensland Law Society, *Position statement on sexual harassment, workplace bullying, and discrimination* (21 November 2018) <http://www.qls.com.au/About_QLS/News_media/News/Position_statement_on_sexual_harassment_workplace_bullying_and_discrimination>.

Australian Capital Territory

367. The ACT Bar Association, through its equality Committee, is developing two proposals: a model policy and grievance procedure to be adopted by chambers; and the introduction of mandatory continuing professional development points on discrimination, harassment and bullying.³⁶⁷

South Australia

368. The Law Society of South Australia has formed a Working Group to develop strategies and recommendations to address bullying, discrimination and harassment in the local legal profession, following the preliminary results of its recent survey. This will lead to the development of resources and guidelines for the profession with regards to preventative strategies and providing support for people who are mistreated in the workplace. The Law Society has also adopted the Law Council's Equality and Diversity Charter, as well as the Australian Solicitors Conduct Rules, and has expressed its view that sexual harassment continue to be specifically addressed in these Rules.³⁶⁸

Law Firms Australia

369. Law Firms Australia (**LFA**) represents Australia's leading multi-jurisdictional law firms, being Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, MinterEllison and Norton Rose Fulbright Australia.

370. First and foremost, LFA member firms are committed to ensuring that their workplaces are free from harassment (including sexual harassment), discrimination, and bullying. It is recognised that it is incumbent on all employers to actively foster safe and inclusive working environments, and ensure that workplace culture is based on mutual respect.

371. Policies of LFA member firms have been developed and revised to promote environments in which it is safe for employees to voice concerns and challenge inappropriate behaviour. Although specific policies of each firm differ, LFA member firms have generally implemented policies to address the following issues:

- Harassment, including sexual harassment;
- Discrimination;
- Bullying;
- Domestic and family violence;
- Close and personal relationships with colleagues or suppliers;
- Diversity and inclusion;
- Alcohol and drugs;
- Whistleblower protection; and
- Technology usage, including social media usage.

372. In addition, LFA member firms also implement grievance procedures to address and resolve complaints of inappropriate behaviour by partners and employees.

³⁶⁷ Prue Bindon, 'The Weinstein Factor: Where does the legal profession stand?' (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 31.

³⁶⁸ See Law Society of South Australia, *Media Release* (18 October 2018) <https://www.lawsocietysa.asn.au/LSSA/Media/Bullying_discrimination_and_harassment_survey.aspx>.

373. However, it is recognised that policies alone are insufficient to provide safe workplaces. The policies must: be understood and accepted by all partners and employees; be capable of being implemented; be subject to feedback and regular review; be consistent with other policies, and; be supported by complementary activities and programs.
374. Accordingly, LFA member firms have also implemented a combination of the following initiatives.

External counselling services

375. Such services provide free and confidential access to counsellors and psychologists for firm employees and their family members, typically available 24 hours a day, 7 days a week. Sessions may be conducted in person, over the telephone or on Skype, and other services, such as legal advice or financial counselling, can also be provided.

Workplace training

376. Firms provide online and group training to both new staff (as part of the onboarding process) and existing staff (as refresher courses) on a variety of issues, including harassment, bullying, discrimination, leadership and mental health.
377. Specific training is also provided to staff, such as bystander intervention workshops and unconscious bias modules. Bystander intervention workshops are designed to equip individuals with the skills and confidence to recognise and report unacceptable language and behaviour in the workplace. Unconscious bias modules provide an introduction to the issue, detail how participants can recognise the role of unconscious bias in decision making, and outline steps to mitigate bias with a focus on respect and inclusion.

Workplace surveys and meetings

378. Typically, all partners and employees confidentially complete internal surveys on work related issues, including harassment, culture, support and mental health. Firms also participate in industry based surveys, such as that provided by the International Bar Association's Legal Policy & Research Unit. Results from such surveys and resulting recommendations are valuable resources in continuously improving programs and systems to provide a safe working environment.
379. Workshops, particularly with junior lawyers, are also often held following internal surveys to allow for the confidential discussion of issues that have been raised. Such workshops may be facilitated by a third party provider, with an anonymised report provided to the firm following the workshops.
380. Partners and managers are also encouraged to have individual conversations with team members to foster an environment of support and engage with ideas or concerns raised in firm surveys.

Contact officers

381. Partners and employees of different levels of seniority are designated and advertised within firms as contact officers. The role of contact officers is to listen to, provide support to, and discuss workplace issues with, colleagues in a confidential setting. Appropriate and regular training is provided to all contact officers to support them in their roles.

Exit interviews

382. Firms conduct exit interviews with departing employees, during which employees are asked about their experience at the firm and any issues they may have had.

Support and helplines

383. Firms publish information on resources for partners and employees who are victims of sexual harassment, assault or violence (for instance, 1800RESPECT), and helplines in each state and territory (for instance, Women's Helplines, Sexual Assault Help Lines, Men's DV Helpline and Rape Crisis Centres).

Workplace campaigns and communications

384. Campaigns to raise awareness about support and wellness initiatives, as well as to promote a safe culture, are deployed in offices. Such campaigns often encourage individuals to raise any concerns about inappropriate language or behaviour.
385. Firms also remind partners and employees of support services and workplace responsibilities at 'town hall' meetings and by email. For instance, festive season emails remind partners and employees of the common obligation to contribute towards a working environment where people can enjoy their work and professional relationships. This includes being mindful of responsibilities contained in bullying, harassment and drug and alcohol policies, which extend beyond the physical workplace to include any work-related social functions.

Diversity and inclusion initiatives

386. Such initiatives aim to increase the number of partners proactively engaged in promoting diversity and inclusion – an integral part of achieving a high performance culture. Partners are introduced as ambassadors of change who lead by example, speak out about unacceptable behaviour, encourage staff to get involved in diversity initiatives and help communicate key diversity messages. Firms may also report to such external bodies as the Workplace Gender Equality Agency on gender equality indicators.

Conclusion

387. LFA member firms recognise that implementing best practice policies, training and other measures is only the starting point for preventing sexual harassment. It is acknowledged that a significant challenge, and one that is yet to be adequately addressed in the legal profession, is ensuring that employees are able to report instances of harassment and discrimination without fear of professional or personal recrimination or victimisation. All staff, irrespective of age, seniority or gender, must feel safe in calling out unacceptable behaviour. LFA member firms are committed to continuing to address this issue in partnership with employees, partners, regulators and the profession at large.

International

388. Many of the drivers of sexual harassment are related to workplace culture and structure, including the hierarchical and male-dominated nature of the legal profession. Sexual harassment should be framed as one part of a broader problem of gender inequality. Accordingly, alternative legal services, legal firms and business models, which seek to address the gaps in representation, position and pay between male and female legal staff, may also help to prevent sexual harassment. Adrienne Morton provides one such example:

For instance, Chicago-based international law firm Seyfarth Shaw introduced 'lean management principles' – creating what it has termed 'adhocracy' where people have authority based on their actual knowledge or expertise, meaning that a legal secretary may actually have a better understanding of a project or underlying processes than the relevant senior partner. It should be noted that Seyfarth Shaw has achieved a perfect score of 100 for the last ten years in the annual Human Rights Campaign Foundation's Corporate Equality Index ...³⁶⁹

389. There is genuine support from the legal profession to look at best practice examples from all angles, including from inside and outside Australia.

³⁶⁹ Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 37.

Table 1. Sexual Harassment: Comparing Federal, State and Territory Legislation

A note on the table:

The following table provides an overview of the differences between federal, state and territory sexual harassment provisions. The state and territory jurisdictions are listed in alphabetical order after the federal jurisdiction. The key is intuitive: green shows where the provisions are the same; yellow shows where the provisions diverge in terms of wording and, possibly, operation; and red shows where a piece of legislation does not include the component discussed. There are both major and minor discrepancies between jurisdictions. The biggest outlier is Western Australia, which requires the sexually harassed person to suffer disadvantage as a mandatory element of meeting the definition of sexual harassment.

	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Legislation									
What is the relevant statute?	<i>Sex Discrimination Act 1984</i> (Cth)	<i>Discrimination Act 1991</i> (ACT)	<i>Anti-Discrimination Act 1977</i> (NSW)	<i>Anti-Discrimination Act 1996</i> (NT)	<i>Anti-Discrimination Act 1991</i> (Qld)	<i>Equal Opportunity Act 1984</i> (SA)	<i>Anti-Discrimination Act 1998</i> (Tas)	<i>Equal Opportunity Act 2010</i> (Vic)	<i>Equal Opportunity Act 1984</i> (WA)
Meaning of <i>sexual harassment</i> - elements of 'unwelcome' and 'sexual'									
A person sexually harasses another person if the person makes or engages in ...									
... an unwelcome sexual advance	s 28A(1)(a)	s 58(1)	s 22A(a)	✘	✘	s 87(9)(a)(i)	s 17(3)(b)	s 92(1)(a)	ss 24(3), 25(2), 26(2)
... an unwelcome request for sexual favours	s 28A(1)(a)	s 58(1)	s 22A(a)	s 22(2)(b)	s 119(b)	s 87(9)(a)(i)	s 17(3)(b)	s 92(1)(a)	ss 24(3), 25(2), 26(2)
... other unwelcome conduct of a sexual nature	s 28A(1)(b)	s 58(1)	s 22A(b)	s 22(2)(d)	s 119(d)	s 87(9)(a)(ii)	s 17(3)(e)	s 92(1)(b)	ss 24(3), 25(2), 26(2)
... an unwelcome act of physical intimacy	✘	✘	✘	s 22(2)(a)	s 119(a)	✘	s 17(3)(a)	✘	✘
... an unwelcome remark with sexual connotations	✘	✘	✘	s 22(2)(c)	s 119(c)	✘	s 17(3)(c)	✘	✘
... any unwelcome gesture, action or comment of a sexual nature	✘	✘	✘	✘	✘	✘	s 17(3)(d)	✘	✘

The statute provides specific examples of sexual harassment?	x	x	x	x	✓	x	x	x	x
Where 'conduct of a sexual nature' is defined as including ...									
... making a statement of a sexual nature to a person, or in the presence of a person, whether that statement is made orally or in writing	s 28A(1)(2)	s 58(2)	x	x	x	s 87(9)(b)	s 3 (definition of 'conduct of a sexual nature' para (a))	x	s 24(4), 25(3), 26(3)
... subjecting a person to any act of physical intimacy	x	x	x	x	x	x	x	s 92(2)(a)	x
... making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence	x	x	x	x	x	x	x	s 92(2)(b)	x
... making any gesture, action or comment of a sexual nature in a person's presence	x	x	x	x	x	x	x	s 92(2)(c)	x

Meaning of sexual harassment - element of 'reasonableness'

In circumstances in which ...									
... a reasonable person	s 28A(1)	s 58(1)	s 22A	s 22(2)(e)(ii)	s 119(f)	s 87(9)(a)	s 17(3)	s 92(1)	x
... having regard to all the circumstances	s 28A(1)	x	s 22A	x	x	s 87(9)(a)	s 17(3)	s 92(1)	x
... would have anticipated the possibility that the person harassed would be	s 28A(1)	x	x	s 22(2)(e)(ii)	s 119(f)	x	x	x	x
... offended	s 28A(1)	s 58(1)	s 22A	s 22(2)(e)(ii)	s 119(f)	s 87(9)(a)	s 17(3)	s 92(1)	x

... humiliated	s 28A(1)	s 58(1)	s 22A	s 22(2)(e)(ii)	s 119(f)	s 87(9)(a)	s 17(3)	s 92(1)	✘
... intimidated	s 28A(1)	s 58(1)	s 22A	s 22(2)(e)(ii)	s 119(f)	s 87(9)(a)	s 17(3)	s 92(1)	✘
... insulted	✘	✘	✘	✘	✘	✘	s 17(3)	✘	✘
... ridiculed	✘	✘	✘	✘	✘	✘	s 17(3)	✘	✘
Where the circumstances to be taken into account by the reasonable person include the following circumstances of the person harassed:									
Age	s 28A(1A)(a)	✘	✘	s 22(3)(a)	s 120(b)	✘	✘	✘	✘
Sex	s 28A(1A)(a)	✘	✘	s 22(3)(a)	s 120(a)	✘	✘	✘	✘
Sexual orientation	s 28A(1A)(a)	✘	✘	✘	✘	✘	✘	✘	✘
Gender identity	s 28A(1A)(a)	✘	✘	✘	✘	✘	✘	✘	✘
Intersex status	s 28A(1A)(a)	✘	✘	✘	✘	✘	✘	✘	✘
Marital or relationship status	s 28A(1A)(a)	✘	✘	✘	✘	✘	✘	✘	✘
Religious belief	s 28A(1A)(a)	✘	✘	✘	✘	✘	✘	✘	✘
Race	s 28A(1A)(a)	✘	✘	s 22(3)(a)	s 120(c)	✘	✘	✘	✘
Colour	s 28A(1A)(a)	✘	✘	✘	✘	✘	✘	✘	✘
National or ethnic origin	s 28A(1A)(a)	✘	✘	✘	✘	✘	✘	✘	✘
Disability	s 28A(1A)(c)	✘	✘	s 22(3)(b)	s 120(d)	✘	✘	✘	✘
The relationship between the person harassed and the person	s 28A(1A)(b)	✘	✘	s 22(3)(c)	s 120(e)	✘	✘	✘	✘
Any other relevant circumstance	s 28A(1A)(d)	✘	✘	s 22(3)(d)	s 120(f)	✘	✘	✘	✘

Meaning of sexual harassment - intention of the perpetrator

The statute includes as a mandatory element, the intention of the perpetrator?	x	x	x	x	x	x	x	x	x
The statute includes as a discretionary element, the intention of the perpetrator?	x	x	x	s 22(2)(e)(i)	s 119(e)	x	x	x	x

Meaning of sexual harassment - disadvantage

The statute includes as a mandatory element, that the sexually harassed person suffer actual or believed detriment if they object?	x	x	x	x	x	x	x	x	ss 24(3)(a)-(b), 25(2)(a)-(b), 26(2)(a)-(b)
The statute includes as a discretionary element, that the sexually harassed person suffer actual or believed detriment if they object?	x	x	x	s 22(2)(f)	x	x	x	x	x

Vicarious liability

The statute provides for an employer or principal to be vicariously liable for an act done by an employee or agent?	s 106(1)(b)	s 121A(1), (2), (4)	s 53(1) only if, before or after the act, they expressly or impliedly authorise the act	s 105(1)(a)-(b)	s 133(1) 'jointly and severally civilly liable'	s 91(1) also s 87(7) makes it unlawful for employers to fail to take 'reasonable steps' to prevent further sexual harassment after a report is made	s 104(3) places obligations on organisations, including 'reasonable steps', and organisations will be liable where they do not comply	s 109	s 161(1)
The act done by the employee or agent must have been done 'in connection with' the employee's employment or agent's duties?	s 106(b)(1) 'in connection with'	s 121A(2) 'within the scope of' the employee's or agent's 'actual or apparent authority'	x	s 105(1)(a)-(b) 'in connection with'	s 133(1) 'in the course of'	s 91(1) 'in the course of'	x	s 109 'in the course of'	s 161(1) 'in connection with'
The statute provides for an employer or agent to claim the defence of 'all reasonable steps'?	s 106(2) 'all reasonable steps'	s 121A(3) 'all reasonable steps'	s 53(3) 'all reasonable steps'	s 105(2) 'all reasonable steps'	s 133(2) 'reasonable steps'	s 91(2) 'reasonable steps'	x	s 110 'reasonable precautions'	s 161(2) 'all reasonable steps'
The statute provides a list of matters to be taken into account in determining 'reasonable steps'?	x	x	x	s 105(3)	x	s 91(3)	x	x	x

Damages

The statute sets a cap on damages?	x	x	s 108(2)(a) 'not exceeding \$100,000'	x But s 105(4) requires that the 'steps taken' by the employer or agent be taken into account when calculating damages for vicarious liability	x	x	x	x	s 127(b)(i) 'not exceeding \$40,000'
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Unlawfulness of sexual harassment									
The statute includes a general provision that sexual harassment is unlawful?	✘	✘	✘	✘	s 118	✘	s 17(2)	✘	✘
The statute makes sexual harassment unlawful in certain areas or circumstances?	ss 28B-28L	ss 59-64	ss 22B-22J	ss 22(1), 28(a)-(f)	✘	s 87(1)-(6g)	s 22(1)(a)-(g), which limits s 17(2)	ss 93-102	ss 24(1)-(2), 25(1), 26(1)