The Law Society of Western Australia
The voice of the legal profession in Western Australia

National Inquiry into Sexual Harassment in Australian Workplaces

To

LAW COUNCIL OF AUSTRALIA

Law Society Contact

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Introduction

1. This submission addresses the following two terms of reference of the Australian Human Rights Commission's (**AHRC's**) National Inquiry into Sexual Harassment in Australian Workplaces (**Inquiry**) Terms of Reference (**TOR**):

   1.1 The current legal framework with respect to sexual harassment; and

   1.2 Recommendations to address sexual harassment in Australian workplaces.

The current legal framework with respect to sexual harassment – a comparison of Western Australian and Commonwealth legislative provisions related to sexual harassment

Commonwealth

2. The Inquiry applies the definition of sexual harassment applicable under the *Sex Discrimination Act 1984* (Cth) (**Federal Act**).

3. Section 28A of the Federal Act defines sexual harassment as follows.

> **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.
>
> (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.

4. Section 28B of the Federal Act makes it unlawful for a person to sexually harass employees and prospective employees, commission agents and prospective commission agents, contract workers and prospective contract workers, partners and prospective partners, and all other workplace participants.

5. The mechanism for dealing with complaints under the Federal Act is found in the Australian *Human Rights Commission Act 1986* (Cth).

6. A complainant may lodge a complaint with the AHRC,[1] which will then investigate and attempt to resolve the issue through conciliation.[2]

7. The AHRC does not have the power to determine whether unlawful discrimination has occurred, and must terminate the complaint either through successful conciliation, dismissal, or because there are no reasonable prospects of it being resolved (among other reasons).[3]

8. The AHRC may terminate a complaint on any of the following grounds:[4]

    8.1 the AHRC is satisfied that the alleged acts, omissions or practices are not unlawful discrimination;

    8.2 the complaint was lodged more than 6 months after the alleged acts, omissions or practices took place;

    8.3 the AHRC is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted;

    8.4 in a case where some other remedy has been sought in relation to the subject matter of the complaint, the AHRC is satisfied that the subject matter of the complaint has been adequately dealt with;

    8.5 the AHRC is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;

    8.6 in a case where the subject matter of the complaint has already been dealt with by the AHRC or by another statutory authority, the AHRC is satisfied that the subject matter of the complaint has been adequately dealt with;

    8.7 the AHRC is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority; or

    8.8 the AHRC is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court.

9. Once a complaint has been terminated, the complainant then has the option of pursuing action in either the Federal Court or Federal Circuit Court.[5] Such application must be made within 60 days of the date the complaint is terminated.[6] The Court charges a $55.00 filing fee for such applications.

10. The AHRC does not have a positive obligation to assist complainants, unlike the Western Australian Equal Opportunity Commission (**EOC**) (discussed at paragraphs 21 and 22 below), which does under certain circumstances. Therefore, it is more likely a complainant in the AHRC will require legal representation, and will incur higher costs as a result.

11. However, a complainant may apply to the Attorney-General for assistance, who has discretionary power to offer such assistance.[7]

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[1] *Australian Human Rights Commission Act 1986* (Cth) s 46P.
[2] Ibid s 46PF.
[3] Ibid s 46PH.
[4] Ibid s 46PH(1).
[5] Ibid s 46PO.
[6] Ibid s 46PO(2).
[7] Ibid s 46PU.

12. The Federal Act expressly states that it does not override any State acts, and that where an unlawful act of sexual harassment in the workplace has occurred under State and Commonwealth law, a person may pursue action in either jurisdiction.[8]

13. There is no cap on the amount of damages that a Court may award for a breach of the Federal Act.

Western Australia

14. Subsections 24(1) and (2) of the *Equal Opportunity Act 1984* (WA) (**WA Act**) make it unlawful for a person to harass sexually employees and prospective employees, commission agents and prospective commission agents, and contract workers and prospective contract workers at work. Subsections 24(3) and (4) of the WA Act define sexual harassment for the purposes of the WA Act:

> **24. Sexual harassment in employment**
>
> (3) A person shall, for the purposes of this section, be taken to harass sexually another person if the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person, and —
>
> (a) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way in connection with the other person's employment or work or possible employment or possible work; or
>
> (b) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or possible work.
>
> (4) A reference in subsection (3) to conduct of a sexual nature in relation to a person includes a reference to the making, to or in the presence of, a person, of a statement of a sexual nature concerning that person, whether the statement is made orally or in writing.
>
> [Section 24 amended by No. 74 of 1992 s. 9(1).]

15. Under the WA Act, a complainant may lodge a complaint with the EOC.[9]

16. The complaint must generally be lodged within 12 months of the sexual harassment taking place,[10] although the EOC is able to accept a complaint lodged more than 12 months after the sexual harassment on good cause being shown.[11]

17. The EOC must investigate the complaint, and will attempt to resolve the complaint through conciliation.[12]

18. Where a complaint cannot be resolved through conciliation, or where the EOC is of the opinion that the nature of the complaint is such that it should be referred to the State Administrative Tribunal (**SAT**), the EOC may refer the matter to the SAT.[13]

[8] *Sex Discrimination Act 1984* (Cth), s 5 and *Australian Human Rights Commission Act 1986* (Cth) s 4.
[9] *Equal Opportunity Act 1984* (WA) s 83.
[10] Ibid s 83(4).
[11] Ibid s 83(5).
[12] Ibid s 84.
[13] Ibid s 93(1).

19. Alternatively, where the EOC dismisses a complaint, the complainant may require the EOC to refer the matter to the SAT.[14]

20. There are no fees required either at SAT or with the EOC for equal opportunity matters.

21. Where a matter has been referred to the SAT by the EOC, the EOC *must* assist the complainant in the presentation of the case at the SAT if the complainant requests,[15] and further *may* provide financial support for the calling of witnesses and other expenses as necessary to enable the complainant to call or give evidence.[16]

22. If the EOC has provided support in the form outlined in paragraph 21 above, the EOC may assist a complainant with any appeal to the Supreme Court on such conditions as the EOC thinks appropriate.[17]

23. The maximum amount that may be awarded in damages in a claim made under the WA Act is $40,000.[18]

24. There are generally no fees payable (until any appeal to the Supreme Court).

Comparison of the Commonwealth and State systems for identifying and resolving sexual harassment in Australian workplaces

25. The Federal Act expressly protects partners and prospective partners of a partnership and other workplace participants from workplace sexual harassment – the WA Act does not.

26. Further, whilst the WA Act protects independent contractors and labour hire workers from workplace sexual harassment, it does not appear to protect secondees or volunteers. Neither does the Federal Act.

27. The Federal Act effectively defines sexual harassment as:

    27.1 unwelcome conduct (a subjective test);

    27.2 of a sexual nature (an objective test);

    27.3 that a reasonable person would have anticipated would have the effect of causing the person harassed to feel offence, humiliation or intimidation (an objective test).

28. The WA Act effectively defines sexual harassment as:

    28.1 unwelcome conduct (a subjective test);

    28.2 of a sexual nature (an objective test);

    28.3 where the person harassed has reasonable grounds for believing a rejection, refusal or objection to the conduct would disadvantage them in their employment or prospective employment, or where the person harassed was actually disadvantaged in their employment or prospective employment because of their rejection, refusal or objection to the conduct.

[14] Ibid s 90.
[15] Ibid s 93(2)(a).
[16] Ibid s 93(2)(b).
[17] Ibid s 93A.
[18] Ibid s 127.

29. The WA Act introduces an element of disadvantage, whether reasonably believed or actual, that is related to the harassed person's employment or prospective employment. This element must be satisfied for the unwelcome sexual conduct to constitute sexual harassment under the legal definition provided in the WA Act. In our view, this suggests that sexual harassment only exists where there is a power imbalance between the perpetrator and the victim, or where the perpetrator has the ability to cause disadvantage to the victim in their employment or prospective employment. This appears to run contrary to the results from the AHRC's survey, "*Everybody's Business: Fourth national survey on sexual harassment in Australian workplaces*", which found that:

    29.1 33% of people had been sexually harassed in the workplace in the preceding 5 years.

    29.2 64% of workplace sexual harassment in the past 5 years was by a single perpetrator.

    29.3 Where there was a single perpetrator, the most common relationship of the perpetrator to the victim was:
    - a co-worker on the same level as the victim (27%);
    - a client (18%);
    - a co-worker who was more senior than the victim (15%); and
    - the victim's direct manager or supervisor (11%).

Recommendations to address sexual harassment in Australian workplaces

30. To ensure all persons who participate in work are fully captured by the protection from sexual harassment in Australian workplaces, we recommend the terms 'employee', 'employment' and the specific categories of workers, such as commission agents and contract workers be replaced with a single term; 'worker', which would be defined to include employees, volunteers, labour hire workers, contractors and secondees.

31. We also recommend the definition of sexual harassment in subsections 24(3) and (4) of the WA Act be amended to be consistent with the definition used in section 28A of the Federal Act, in order to avoid any disparity in the way the two Acts are applied.

32. The AHRC's survey, "*Everybody's Business: Fourth national survey on sexual harassment in Australian workplaces*", also found that:

    32.1 Whilst 33% of people had been sexually harassed in the workplace in the preceding 5 years, only 17% of people who experienced workplace sexual harassment in the last 5 years made a formal report or complaint about it.

    32.2 19% who made a formal complaint were labelled as a "troublemaker", 18% were ostracised, victimised or ignored by colleagues, and 17% resigned from their jobs.

    32.3 The most common reasons for not reporting sexual harassment at work were victim's concerns that people would think it was an overreaction (49%) and it was easier to keep quiet (45%).

    32.4 19% of formal complaints resulted in no consequences for the perpetrator and 45% of victims claim nothing changed at their organisation as a result of their complaint.

32.5 38% of workplace sexual harassment is witnessed by at least one other person – 65% of which did not intervene.

33. In light of the statistics at paragraph 32 above, an effective way to address sexual harassment in Australian workplaces is to:

33.1 Legislate for the reporting of, and dealing with, complaints of sexual harassment – discussed at paragraphs 34 to 43 below.

33.2 Legislate for the active overcoming of the bystander effect (where multiple witnesses don't do anything because each is waiting for someone else to react first) – discussed at paragraphs 44 to 49 below.

34. The lack of appropriate or uniform response to complaints of sexual harassment in the workplace could potentially be overcome by introducing provisions which outline a mechanism for employers to address workplace complaints. A comparable example is the provisions that relate to the requests for flexible working arrangements under the *Fair Work Act 2009* (Cth) (**FW Act**).

35. Section 65 of the FW Act provides a clear statutory mechanism for employers to respond to requests for flexible working arrangements. This is done by outlining who is eligible and ineligible to make a request for flexible working arrangements, including legislative notes providing examples of changes in working arrangements, and outlining the formal requirements for the request (that it be in writing and sets out details of the change sought and the reasons for the change). Finally, the obligations of an employer in responding to the request are also set out (that it be in writing, within 21 days of receiving the request, stating whether the employer grants or refuses the request and stating the reasons for any refusal, subject to there being reasonable business grounds for the refusal).

36. Currently, anti-discrimination legislation does not require an employer to take active steps to address sexual harassment in the workplace. An employer's liability under the anti-discrimination legislation is limited to vicarious liability – that is, an employer can be vicariously liable for acts of sexual harassment that occur in the workplace or in connection with a person's employment if they did not take all reasonable steps to prevent sexual harassment from occurring in their workplace. In our experience, employers often seek to reduce the risk of being found to be vicariously liable for sexual harassment in their workplace by promulgating a policy document outlining that workplace sexual harassment is unlawful and will not be condoned and delivering training on workplace sexual harassment every year or second year. In our experience, such training is often delivered on-line and is generally ineffective in changing workplace behaviours.

37. Whilst workplace safety and health legislation (discussed at paragraphs 45 to 47 below) places a positive obligation on the employer to provide a safe workplace, which would include a workplace free from sexual harassment, it does not provide a mechanism for how an employer would do so, or how an employer should respond to a sexual harassment complaint.

38. Statutory provisions which outline an employer's obligations in responding to a complaint could be amended to:
    38.1 provide criteria for a more uniform response to complaints of sexual harassment (similar to the criteria currently in place for responding to a request for flexible working arrangements);
    38.2 impose an obligation on an employer to take action following the receipt of the complaint, and

38.3 assist all parties (the victim, the perpetrator, any witnesses, and the employer) to understand the process to be followed in dealing with the complaint.

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

40. A further mechanism that would allow for sexual harassment complaints to be resolved quickly and easily with an emphasis on maintaining the employment relationship would be to enable workers to bring an application related to sexual harassment to the Fair Work Commission, or the applicable State or Territory Industrial Relations Commission, for orders to stop workplace sexual harassment, as is currently available to workers in relation to workplace bullying.

41. Under the FW Act, a worker who reasonably believes he or she has been bullied at work may apply to the Fair Work Commission for an order to stop bullying.[19] The Fair Work Commission is obliged to deal with the application within 14 days and may conduct a conference or hold a hearing.[20]

42. If the Fair Work Commission is satisfied the worker has been bullied at work by an individual or a group of individuals and there is a risk the worker will continue to be bullied, the Commission may make any order it considers appropriate to prevent the worker from being bullied at work (other than an order requiring payment of a pecuniary amount).[21]

43. Further, a person who is subject to an order to stop bullying must not contravene the terms of the order.[22] If they do, they breach a civil remedy provision of the FW Act and are liable to a fine of up to 60 penalty units, or $12,600 for an individual.[23]

44. 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[24] (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 other person through any act or omission.[25]

45. An employee breaches the *Occupational Safety and Health Act 1984* (WA), if they fail to:

45.1 comply with their employer's instructions regarding the safety and health of the employee or other persons;

[19] *Fair Work Act 2009* (Cth) s 789FC.
[20] Ibid s 789FE.
[21] Ibid s 789FF.
[22] Ibid s 789FG.
[23] Ibid s 789FG.
[24] *Occupational Safety and Health Act 1984* (WA) s 19.
[25] Ibid s 18.

45.2 cooperate with their employer in the carrying out of the employer's obligations to provide a safe workplace; or

45.3 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.

46. 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.

47. 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 a company director, manager, secretary or officer.[26] The penalties for a first offence range from a fine of $250,000 to $550,000 and up to five years imprisonment.

48. 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.

49. At present, the anti-discrimination legislation places the onus on the victim to bring a complaint to the EOC or the AHRC, and if the complaint is not resolved, to commence proceedings in the SAT or Federal Court or Federal Circuit Court. This can place a difficult burden on victims. Where sexual harassment occurs and constitutes a failure to provide a safe workplace, the safety regulator should have the capacity to receive the complaint and determine what regulatory action can be taken, including visiting the workplace and taking steps to enforce the law. Regulatory action can also involve issuing verbal directions, improvement notices, prohibition notices or a combination of directions and notices, as well as initiating prosecutions against the company, employees, and company directors, officers and managers.

50. Finally, research has shown that power imbalances between men and women in the workplace influence a range of negative outcomes for women, including sexual harassment.[27] A protective factor against sexual harassment is having more women working in an area. It has been suggested the presence of more women in senior leadership roles can counter the imbalance of power that can lead to sexual harassment.[28]

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[26] Ibid s 55.

[27] Victor Sojo and Robert Wood, *Resilience: Women's Fit, Functioning and Growth at Work: Indicators and Predictors* (July 2012) 8 <https://minerva-access.unimelb.edu.au/bitstream/handle/11343/123773/Resilience%20Women%27s%20Fit%20Functioning%20and%20Growth%20at%20Work_Report.pdf?sequence=1&isAllowed=y>.

[28] Ibid 16 citing Stans de Haas and Greetje Timmerman, 'Sexual Harassment in the Context of Double Male Dominance' (2010) 19(6) *European Journal of Work and Organisational Psychology* 717 <https://www.researchgate.net/publication/233093361_Sexual_harassment_in_the_context_of_double_male_dominance>.

Sexual harassment within the legal profession

51. In the legal profession in Western Australia, sexual harassment is a breach of rule 17 of the *Legal Profession Conduct Rules 2010* (WA) as well as rule 117 of the *Western Australian Barristers' Rules*. However, as at November 2018, no complaints have been prosecuted by the Legal Profession Complaints Committee in Western Australia for sexual harassment.

52. This is, of course, not to suggest there is no sexual harassment in the legal profession in Western Australia, rather no complaints have been lodged.[29]

Hayley Cormann
President

[29] In fact, the Nexus Network survey in 2013 suggested that more than a quarter of survey respondents had experience of inappropriate workplace behaviour with a further 16% having observed it: Nexus Network, *An Analysis of the Work-Related Issues and Conditions of Lawyers in Western Australia: Final Report* (October 2013) 1 <http://www.wlwa.asn.au/images/stories/dmdocuments/Nexus_Network-Ch2FinalReport7Oct13.pdf>.