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Submission into the National Inquiry into Sexual Harassment in the
Australian Workplace

Submitted by:	Women Lawyers Association New South Wales (WLANSW)
Submitted electronically to:	Australian Human Rights Commission
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About us

Women Lawyers Association NSW (WLANSW) is a voluntary association that promotes and protects the interests of women in the legal profession.

WLANSW has been committed to improving the status and working conditions of women lawyers since 1952. It has members (male, female and corporate) throughout NSW. Our members include solicitors, barristers, judicial officers, academics, corporate counsel, lawyers and law students. Members work in private practice, corporations, the public sector, the community legal sector and at the Bar.

WLANSW provides a network for social interaction and continuing education and reform within the legal profession and broader community. WLANSW has undertaken research into work practices affecting women in the legal profession, including an annual published report on the employment trends in the legal profession titled: *Law Firm Comparison Project*. Details of our publications and submissions are available online at www.womenslawyersnsw.org.au under the 'Workplace Practices' tab.

Sexual harassment is an endemic problem for women in workplaces.

In Australia, only a small percentage of persons who believe that they have been sexually harassed at work report the conduct, either within their workplace or to an external body. This behaviour has shown little change since at least 2002 when the Australian Human Rights Commission (the **AHRC**) commenced its survey. In 2018, the reputed figure for internal reporting was 17 percent¹, a slight reduction from the percent reported in 2012.²

Women make up the overwhelming majority of persons who have been harassed. The most common reason given for not reporting the harassment is fear of retribution or other adverse conduct by the alleged perpetrator or the employer. In 2018, 20 percent of respondents who reported being sexually

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

² Australian Human Rights Commission (2012), *Working without fear: Results of the Sexual Harassment National Telephone Survey 2012*.

harassed said that their complaint had a negative impact on them. In 2012 the figure was 29 percent (22 percent in 2008 and in 2003 it was 16 percent). These statistics are supported by a significant body of work that suggests that placing the burden of complaining and dealing with the complaint making process on the alleged victim is a reason why persons choose not to make complaints.³

Introduction

WLANSW thanks the Australian Human Rights Commission for the opportunity to make submissions on the National Inquiry into Sexual Harassment in the Australian Workplace.

This submission does not necessarily reflect the view or views of all WLANSW members.

This submission focuses on the nature and prevalence of sexual harassment within the legal profession in New South Wales, the drivers of this harassment and proposals to address these issues, including recommendations for legal reform.

In terms of the demographics of the legal profession, according to the Practising Solicitor Statistics published by the Law Society of NSW⁴, as at 31 December 2018, there were 33,245 solicitors practising in NSW, comprising of 51% and 49% females and males respectively. Of the total number of solicitors practising, 48% were under the age of 39 years, 37% were between the ages of 40-59 years and 13% were above the age of 60 years. Relevantly, of the 9,129 solicitors holding a Principal practising certificate, only 30% were females compared to 70% males.

³ McDonald P & Charlesworth (2019) *Academic Evidence on the Causes, Manifestations and Responses to Workplace Sexual Harassment* Initial Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces January 2019

⁴ "Practising Solicitor Statistics" 31 December 2018 *Law Society of NSW*, available online: <https://www.lawsociety.com.au/sites/default/files/2019-01/201812%20Practising%20Solicitor%20Statistics%20-%20Dec%202018.pdf>

By contrast, according to statistics published online⁵, there were 2,400 practising barristers in NSW comprising of 23% females and 76% males. Of the total number of barristers, 47% were aged between 40 - 59 years, 34% were aged 60 years and above, and only 19% were aged below 39 years. Of the 389 senior counsels, 11% were females and 89% males.

Despite the fact that lawyers have a responsibility to act within Conduct Rules and sexual harassment can constitute professional misconduct, there is evidence that lawyers in Australia are expected to 'tolerate sexual harassment or pay the price of complaining'.⁶ Australian lawyers are more likely to have been sexually harassed compared to lawyers in other countries.⁷ The preliminary results indicate that in Australia, 37 percent of practitioners have experienced sexual harassment compared to 25 percent of practitioners from around the world.⁸ They also provide broader insight into sexual harassment within the legal profession and the context in which the key proposed recommendations are made.

However, in response to the survey conducted by WLANSW in 2018, 71% of respondents indicated that they had experienced sexual harassment while employed in the legal profession. The key results of the survey are dealt with in detail below.

Key Recommendations

The WLANSW makes four key recommendations in this submission, which can be summarised as follows:

Recommendation 1: Legal Definition

⁵ Undated, Bar Association Statistics, available online: <https://www.nswbar.asn.au/the-bar-association/statistics>

⁶ Jenkins K (2019) Law Society of New South Wales Journal Issue 52 February 2019, 26

⁷ Carlson M (2008) 'I'd Rather Go Along and Be Considered A Man: Masculinity and Bystander Intervention.' The Journal of Men's Studies 16(1):3-17

⁸ Alltam K (2018) #Timesup for the legal profession Law Society of New South Wales Journal Issue 51 December 2018 pg 33

Recommendation 1.1

WLANSW suggests that the gap between the legal definition and people's perception of the behaviors they reported could be addressed by:

- a. simplifying the definition;
- b. focusing on how the actual recipient feels in all the circumstances;
- c. expanding the definition of "*conduct of a sexual nature*" to include more modern forms of communication and expression; and
- d. adding a note to the definition section containing examples based on the behaviours identified in the AHRC's 2018 National Survey.

Recommendation 2: Bystander Provisions

Recommendation 2.1

WLANSW recommends that that the AHRC publish a guideline that includes steps a person must take to eliminate sexual harassment.

We propose that the guideline include bystander provisions.

WLANSW also proposes that the decision maker can in her or his discretion take the guideline into account in determining whether or not the person has taken reasonable measures to eliminate sexual harassment.

Recommendation 2.2

WLANSW supports the amendments proposed to the victimisation provisions in the *Human Rights and Anti-Discrimination Bill 2012* (Cth) with the proviso that the provision should explicitly extend to persons who act as bystanders and persons who provide assistance, support and advocacy to the person making a complaint.

Recommendation 3: Confidentiality and Reporting

Recommendation 3.1

WLANSW makes the following recommendations as to reporting:

- That criteria 6.3 for the WGEA Employer of Choice for Gender Equality citation be expanded to require de-identified reporting of the incidence of sexual harassment complaints and the outcomes of investigations undertaken in response to such complaints.
- Noting that employers are vicariously liable for their employees/perpetrators employers should not be allowed to negotiate settlement deeds which benefit or protect perpetrators in those complaints which have been investigated and proven on the balance of probabilities. To do so protects the perpetrator.
- Where the conduct alleged against the perpetrator is established on the balance of probabilities it should be illegal for employers or perpetrators to negotiate terms in employment contracts or settlement agreements which prevent complainants from contacting the Police if the alleged conduct is a criminal offence or, in the case of a legal practitioner, preventing the employee from reporting the conduct to the relevant regulator or disciplinary body.
- That there is a mandatory reporting scheme operated by the NSW Law Society and NSW Bar Association which requires principals of legal practices and barristers to provide to the relevant body de-identified notification of complaints of sexual harassment against legal practitioners for the purpose of data collection and reporting.

Recommendation 4: General

Recommendation 4.1

In terms of the functions of the AHRC and the Act generally, WLANSW recommends:

- a. The *Sex Discrimination Act 1984* (Cth) (the **SDA**) should impose a positive obligation on employers to maintain a workplace free of sexual harassment;
- b. The AHRC should have powers similar to those of the Fair Work Ombudsman as to education, investigation and commencement of enforcement proceedings;
- c. The AHRC should publish guidelines setting out best practice as to the positive obligations, dealing with complaints, conducting investigations amongst other relevant topics.
- d. The time limit be increased to 6 years from the last alleged offence;
- e. Introduction of a civil penalty framework. The penalty system needs to demonstrate an appropriate assessment of the seriousness of the offending. Like other employment laws, discrimination laws need to provide a civil penalty framework to deter unlawful conduct. The penalty framework should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like-minded persons or organisations.
- f. there should be an option for the applicant to make a complaint to a Court directly. There should also be an opportunity for an applicant to seek an interim injunction prior to a court application pending the determination of the proceedings, with the usual undertakings as proposed in the *Human Rights and Anti-Discrimination Bill 2012*.

Key Survey Results

Below are the key findings from the survey.

Key demographics of the respondents

Of the 242 responses received in the survey (see below graphs and tables):

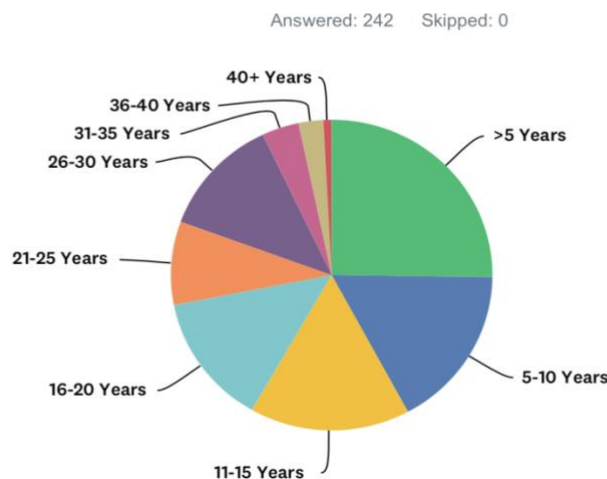
- 96% were females;
- 41% have been in legal professional for less than ten years;
- 60% were under the age of 40 years of age;
- 88% are not from a non-English speaking background; and
- 64% work in private practice and 15% are barristers.

*Question 2: “What Gender do you identify as?” 242 responses

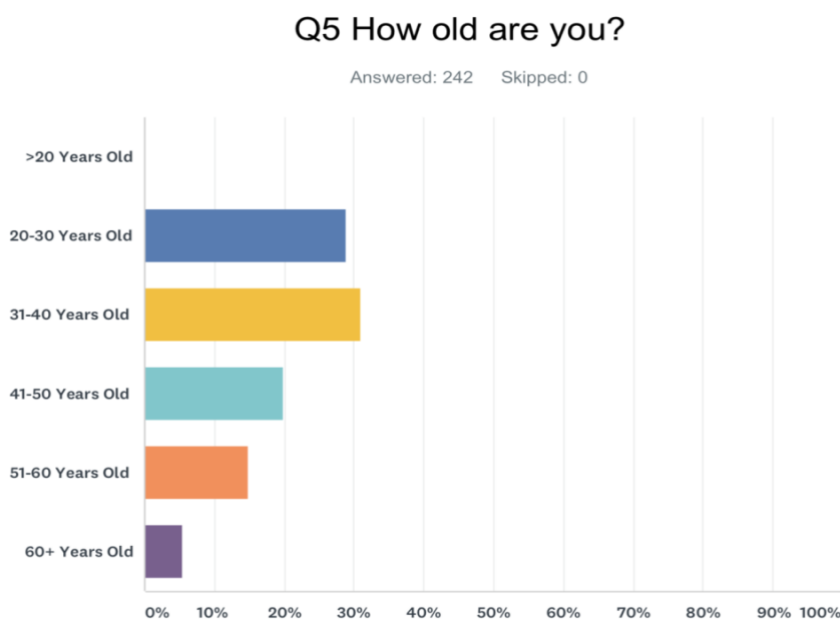
ANSWER CHOICES	RESPONSES	
Female	96.28%	233
Male	3.31%	8
Prefer Not To Answer	0.41%	1
Other (please specify)	0.00%	0
TOTAL		242

*Question: 1: “How long have you worked in the legal profession?” 242 responses

Q1 How long have you worked in the legal profession?



*Question 5: “How old are you?” 242 responses



*Question 6: “Which sector do you work in?” 242 responses

ANSWER CHOICES	RESPONSES	
Private Practice	64.05%	155
Public	2.07%	5
Government	4.13%	10
Academia	0.41%	1
Barrister	15.29%	37
Judiciary	1.65%	4
In-House	3.72%	9
Student	2.07%	5
Other (please specify)	6.61%	16
TOTAL		242

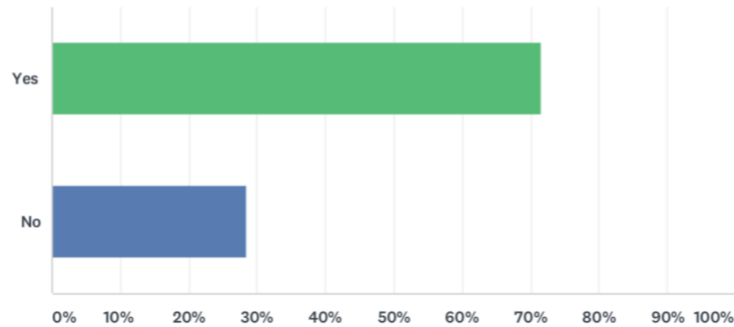
Prevalence and nature of sexual harassment in the Legal Profession

71% of the respondents reported that they have been sexually harassed at work while engaged in the legal profession. However, only 18% has ever made a complaint to their employer.

*Question 8: “Have you ever been sexually harassed at work while engaged in the legal profession?” 242 responses

Q8 Have you ever been sexually harassed at work while engaged in the legal profession?

Answered: 242 Skipped: 0



*Question15: “Have you ever made a complaint of sexual harassment to your employer?” 236 respondents

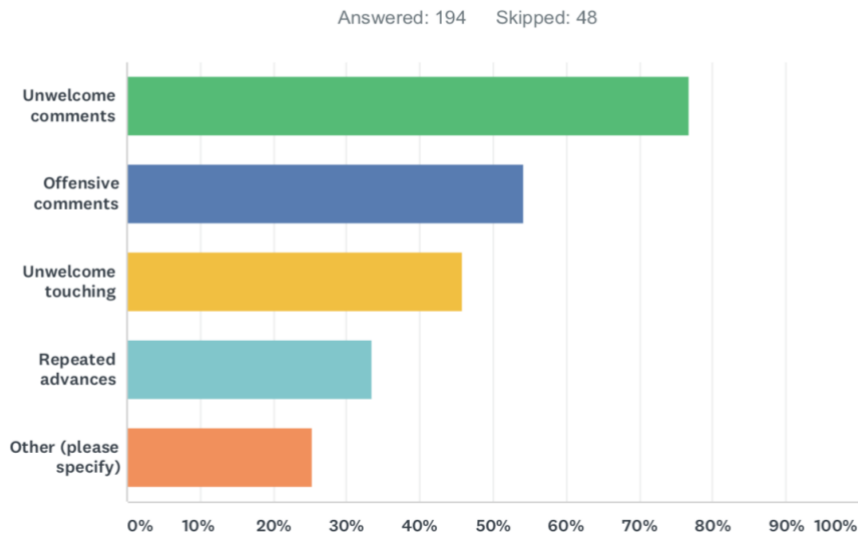
ANSWER CHOICES	RESPONSES	COUNT
Yes	18.22%	43
No	81.78%	193
TOTAL		236

As to the nature of the conduct, a majority of respondents reported unwelcome comments, offensive comments, which mainly occurred at the respondent’s workplace or at a social event. Respondents reported “other” conduct, some of these comments included:

- *“Shown inappropriate photographs and drawings”.*
- *“Objectification; boss implied to others in the profession that we were in a sexual relationship; being referred to as secretary or even "angel" rather than correct professional term”.*
- *“A partner I was working in once criticised me because I wouldn't go with them into a strip club at an after work function. Another partner at another law firm repeatedly tried to "set me up" with a solicitor at the same practice”.*

*Question 9: “What was the nature of the conduct?” 194 responses

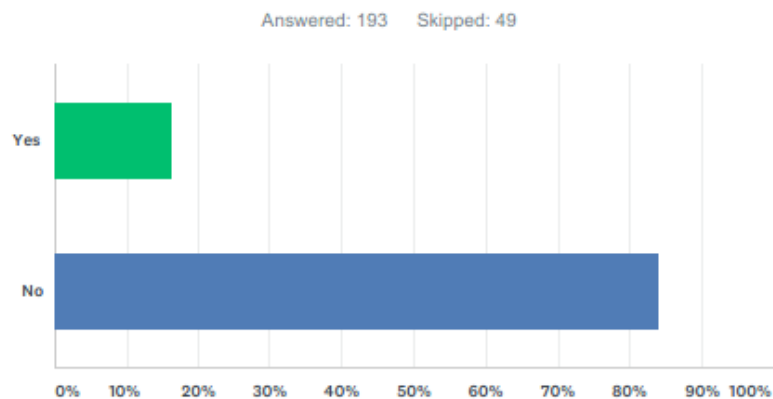
Q9 What was the nature of the conduct? (tick relevant boxes)



The respondents also reported that technology did appear to be relevant as modus operandi in sexual harassment:

*Question 11: “Was technology involved in the sexual harassment experience?” 193 responses

Q11 Was technology involved in the sexual harassment experience?



The harassment occurred mostly at the respondent’s workplace and at social events (68% and 49% respectively). Other recurring work places reported by respondents were “court”, “mediation”, and “volunteer centre”.

*Question 13: “Where did the harassment occur? Tick relevant boxes.” 191 responses

ANSWER CHOICES	RESPONSES	
Your workplace	67.54%	129
At harasser's workplace	14.14%	27
Social event	49.21%	94
Client site	7.33%	14
Other (please specify)	18.85%	36
Total Respondents: 191		

Who was the Harasser?

A majority of the respondents reported that the position of the harasser was a person whom they reported to at their workplace.

*Question 10: “What was the position of the harasser?” 193 responses.

ANSWER CHOICES	RESPONSES	
Someone who reports to me	0.00%	0
Someone I report to	48.19%	93
Someone at my level	6.74%	13
Client	6.74%	13
Other (please specify)	38.34%	74
TOTAL		193

Relevantly, of the 74 respondents who also indicated “other”, some of the harassers identified were also in a senior position:

*Question 10: “Other position of harasser.” 74 Responses.

Harasser	Responses
Barristers / Senior Counsel	17
Partner / Senior member that person did not report to	8
Judges	3

Head of Chambers	2
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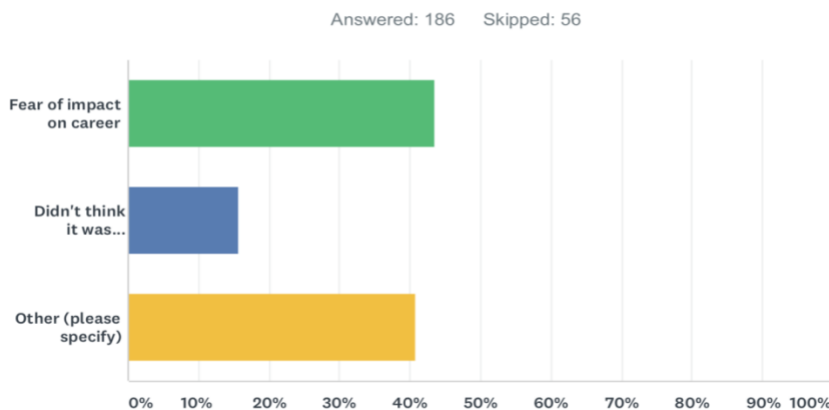
Reporting

82% of respondents have not made a complaint of sexual harassment to their employer and 44% of respondents chose not to make complaint for fear of impact on their career, of the 76 respondents who ticked “other”, some of the reasons why a complaint was not made were:

- Couldn’t report as they were barristers or self-employed.
- Encouragement from HR not to “rock the boat”.
- Occurred twenty years ago and it was just “accepted” as part of male behaviour.
- Didn’t think it would change anything.
- The person was the most senior person in the organization.
- That they may be vilified.

*Question 16: “If no why did you choose not to complaint [sic]?” 186 responses.

Q16 If no, why did you choose not to complaint?



Of those respondents that did make a complaint, the steps taken by employers usually involved personnel within the organization speaking with the parties and some reported counseling provided. When further asked whether they thought the employer's approach was appropriate, some of the responses received included:

- *“The matter was dealt with seriously, and the outcome was that I wouldn't have to interact any more with the person who harassed me - ... However, pressure was put on me not to disclose what had happened to anyone or to take the complaint further (including with comments along the lines of “[this person] has a lot of friends in the legal industry”.) No counseling / support offered”.*
- *“I complained to several partners, including a written complaint to the managing partner who bas[ic]ly informed me that the firm knew the partner had a drinking problem and was inappropriate but he had some personal issues which he was dealj [sic] with.*
- *“Looking back, my employer was very good at appropriately dealing with the two more serious incidents of sexual harassment that involved clients. However, systemic and lower-level harassment committed by other employees or partners in all three firms that I worked at were excused, ignored or minimised.”*

Of those respondents who made a complaint, only 1% resulted in the harasser being warned the outcome of the complaint was unknown or no findings made.⁹ Some of the other outcomes commented included:

- *“Payout”.*
- *“After 2 years investigation the harasser was allowed to resign and the reasons for his resignation and the complaint was kept confidential. I am prevented from publicly speaking about the matter”.*

⁹ There was a glitch in the survey where respondents were unable to skip the question resulting in a large number of “other” with N/A as their answer.

- “Matter settled privately”.

*Question 21 “What was the outcome of the complaint” 176 responses

ANSWER CHOICES	RESPONSES	
I don't know	11.93%	21
No findings	10.23%	18
Harasser warned	1.14%	2
Other (please specify)	76.70%	135
TOTAL		176

Whilst around 61% of respondents knew who was responsible for managing sexual harassment policy at their workplace, around 51% were not confident that their employer would deal with their concern in a thorough, confidential and impartial manner.

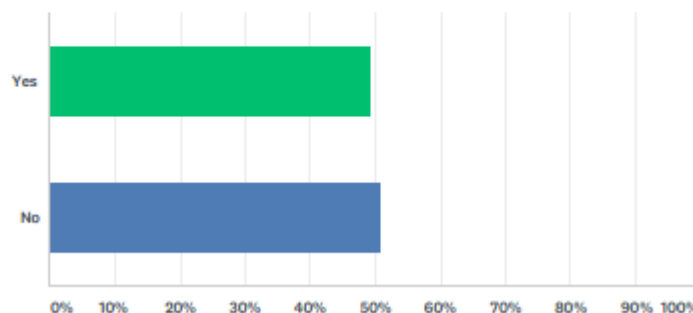
Question 25: “Do you know who is responsible for managing complaints under the sexual harassment policy or policies at your workplace?” 234 responses

ANSWER CHOICES	RESPONSES	
Yes	61.11%	143
No	38.89%	91
TOTAL		234

Question 26: “If yes, are you confident that they would deal with concerns or complaints in a thorough, confidential and impartial manner?” 234 responses

Q26 If yes, are you confident that they would deal with concerns or complaints in a thorough, confidential and impartial manner?

Answered: 214 Skipped: 28



As to external reporting, only 5% of respondents had made a complaint to an external body.

*Question 19: “Have you ever made a complaint of sexual harassment to an external body?” 234 responses

ANSWER CHOICES	RESPONSES	
Yes	4.70%	11
No	95.30%	223
TOTAL		234

The view on reporting may be changing as 47% of respondents said that they would making a complaint if they were harassed, although 40% said “maybe” and 13% said “no”.

*Questions 24: “Would you make a complaint to your employer if you were sexually harassed?” 234 respondents

ANSWER CHOICES	RESPONSES	
Yes	46.58%	109
No	13.25%	31
Maybe	40.17%	94
TOTAL		234

Around 58% of respondents have observed another person being sexually harassed and 47% of respondents agreed that sexual harassment policies should require people who have observed the behaviour to report it.

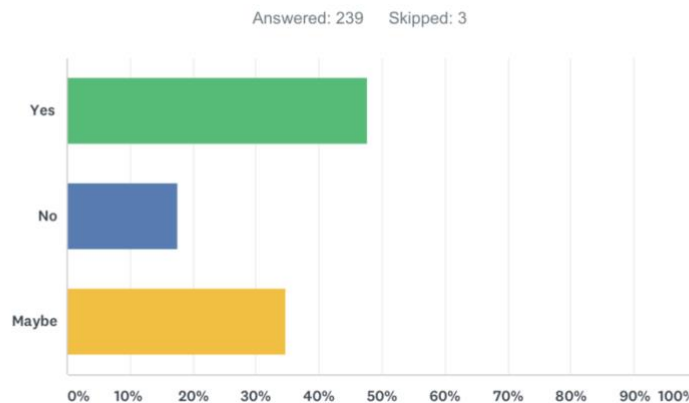
*Question 14: “Have you ever observed another person being sexually harassed while engaged in the legal profession?” 233 responses

ANSWER CHOICES	RESPONSES	
Yes	58.37%	136
No	41.63%	97
TOTAL		233

*Questions 29: “Do you agree that sexual harassment policies should require people who observe sexual harassment (by-stander provisions) to report it?”

239 responses

Q29 Do you agree that sexual harassment policies should require people who observe sexual harassment (by-stander provisions) to report it?



Refer to “Appendix A” below to see the full survey questions.

Drivers of sexual harassment

Women still make up less than 25 percent of law firm partners in Australia.¹⁰ In an environment where the junior roles are dominated by women and the most senior roles are dominated by men there are unequal power relations between women and men. There is a concern that men, particularly men at more junior levels will be unlikely to intervene because it calls into question their masculinity.¹¹

The adversarial law system in Australia has encouraged an idea that lawyers need to be tough, aggressive and correct at all times. Some of these traits or attributes are often positively valued for men and provide implicit support for the rejection of traits often attributed to women such as kindness, cooperation and emotional. This attitude may also be more likely held by individuals who hold traditional views about gender roles and masculinity.

There is some evidence that the legal profession, relative to other professions, is more hostile to women. In a survey conducted in 2018, over 71 percent of respondents reported experiencing sexual harassment while

¹⁰ Price S & Mallon L (2018) *Law Firm Comparison Project Women Lawyers Association of New South Wales* accessed on 12/02/19 1.40pm <https://womenlawyersnsw.org.au/wp-content/uploads/2018/10/WLANSW-2018-Law-Firm-Comparison-Project-Report-Final>

¹¹ <https://www.ibanet.org/LPRU/Women-business-Lawyers-Initiative-Front-page.aspx>

employed in the legal profession.¹² In 2012 the Law Council of Australia commissioned a study that found that 50 percent of female lawyers reported being bullied and intimidated in their current workplace and 25 percent of solicitors had experienced sexual harassment at their workplace. Of particular note was the limitation to the current workplace, being much narrower than employment in the legal profession as a whole. The study also found that 55 percent of barristers experienced sexual harassment, with the youngest women being the largest group making reports of experiencing sexual harassment.¹³

Overview of the current legal framework in respect to sexual harassment

Legal definition of sexual harassment

WLANSW notes that the operation of the SDA has been the subject of many previous reviews, in particular the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating discrimination and Promoting Gender Equality, 12 December 2008¹⁴.

WLANSW supports the recommendations of that inquiry, many of which are still relevant, although it notes that some of the recommendations were introduced¹⁵ in relation to sexual harassment such as the introduction of the concept of anticipating “*the possibility that the person harassed would be offended, humiliated or intimidated*” and the listing of the circumstances to be taken into account in making that assessment.

While these changes were welcome, WLANSW submits that the definition of sexual harassment in section 28A of the SDA is still confusing and that

¹² Allman K (2018) #Timesup for the legal profession Law Society of New South Wales Journal Issue 51 December 2018 pg 33

¹³ Law Council of Australia (2012) *National Attrition and Re-engagement Study (NARS) Report*

¹⁴ Accessed at

https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2008-10/sex_discrim/report/index on 22 February 2019

¹⁵ Amended by the *Sex and Age Discrimination Legislation Amendment Act 2011*

there is gap between what people think is sexual harassment in a legal sense, and the prevalence of behaviours that are experienced.

This is highlighted by the AHRC's own 2018 National Survey¹⁶, which instead of asking respondents if they had been sexually harassed, provided a list of behaviours that constitute sexual harassment as:

“Questions that specify the types of behaviours that constitute sexual harassment are less reliant on the respondents’ own understanding of sexual harassment and consequently are likely to identify a more realistic incidence of sexual harassment.”

Obligations of confidentiality in the context of incidents of sexual harassment in the workplace

Introduction

WLANSW submits that the ongoing prevalence of sexual harassment in the workplace may in part be explained by the lack of transparency and secrecy that often surrounds complaints.

A fundamental pillar of our legal system is that justice must not only be done, it must also be seen to be done. Open hearings and the reporting of what happens in courts and tribunals, as well as the consequences of civil, criminal or disciplinary prosecutions shed light on injustices and provide guidance to the community as to how the rule of law applies to particular conduct or circumstances.

Very few parties to a civil dispute want their dispute to be aired in public. There is also a public interest in resolving disputes out of court in order to avoid the uncertainties of litigation, save costs and money and to minimise the use of court time and resources. Parties are encouraged, or may be ordered, to conciliate or mediate their disputes in order to reach settlements.

¹⁶ AHRC “Everyone’s business: Fourth national survey on sexual harassment in Australian workplaces.” Page 12

However when sexual harassment complaints are dealt with in private, there is the risk that perpetrators are not held to account nor prevented from continuing their unlawful conduct.

The use of confidentiality obligations in the sexual harassment context can lead to perpetrators being able to continue their unlawful conduct, and a lack of accountability and protection of employers who do not take adequate steps to prevent sexual harassment in their workplaces.

The AHRC's request in November 2018 to all employers to provide limited waivers of confidentiality obligations in non-disclosure agreements or other agreements for the purpose of allowing people to make confidential submissions to the National Inquiry recognised the role of these agreements in hindering society's and the legal profession's understanding of the systemic nature and prevalence of workplace sexual harassment.

Regrettably, Australian law firms are not immune from complaints of sexual harassment. However, the AHRC's request was met with a very limited response from law firms. Only two law firms agreed to the limited waiver: Clayton Utz and Herbert Smith Freehills. Both of those firms have received WGEA Employer of Choice citations in 2017-18. The 16 other law firms which received citations for 2017-18 did not provide waivers. It is possible, but unlikely, that none of those 16 law firms has any historical complaints of sexual harassment, or if they have, that they did not invoke or impose confidentiality obligations on the complainants.

Suppression of information about complaints of sexual harassment in the legal profession can lead to members of the profession believing that it is not an issue¹⁷.

Suppression of incidence of complaints of sexual harassment and protection of perpetrators in workplaces

WLANSW submits that there are three legal mechanisms which operate to suppress the community's understanding of the prevalence of sexual

¹⁷ "Taking offence" letter to the editor of the Law Society Journal Issue 52 February 2019 at page 12

harassment in the workplace, which protect employers from their legal responsibilities and for sexual harassment in the workplace to continue. These are:

- *Confidentiality clauses in employment contracts and /or directions issued which require confidentiality in connection with investigations of sexual harassment complaints*
- *Confidentiality and non-disparagement clauses in settlement deeds*
- *Release clauses in settlement deeds*

1. Confidentiality clauses in employment contracts and/or directions issued

Confidentiality clauses in employment contracts may be used by employers to prohibit complainants from discussing their complaints of sexual harassment with anyone, whether inside or outside the workplace.

Similarly, employers may direct all persons involved in investigations of sexual harassment complaints to keep complaints and all matters relating to investigations confidential.

To enforce such a prohibition or direction against a complainant cannot be considered a measure that benefits the complainant if the complainant wishes to discuss the issue with colleagues, friends, family or supporters. Rather such clauses operate to prevent or inhibit the disclosure of the conduct and thereby protect the employer and the perpetrator.

That an employer responds to a complaint by invoking a term of an employment agreement against a complainant, or issuing a direction requiring confidentiality, highlights the conflict of interest which can arise by virtue of the employer commonly being the sole investigator and assessor of the complaint.

2. Confidentiality and non-disparagement clauses in settlement deeds

A detailed and comprehensive discussion paper issued by Unions NSW sets out various legal and non-legal issues surrounding confidential settlement agreements in sexual harassment claims¹⁸.

The current legal framework in relation to the “resolution” of complaints of sexual harassment, as between the employer, the employee complainant is complex and one that until recent years has received relatively little exposure in the public domain. However, two Australian cases (involving claims made by Amber Harrison and Amy Taueber against the Seven Network) which were recently the subject of considerable reporting in the media, reveal the range and force of actions which may be taken against complainants by former employers in order to enforce confidentiality and non-disparagement clauses.

When a legal dispute arises between parties, whether or not it is in the sphere of employment and industrial relations, the parties are encouraged to resolve the dispute without resort to litigation, or before the matter goes to trial. Often this involves a court-ordered mediation¹⁹.

If a complaint of sexual harassment by an employee (or former employee) is settled at conciliation, mediation or otherwise out of court, that settlement will be usually be documented in a written agreement or deed, executed by the complainant and the employer, and in some cases the alleged perpetrator.

Settlement agreements are routinely proffered by the defendant/respondent once an in principle agreement has been reached. They are designed to

¹⁸ Discussion paper – *Reforms of Sexual Harassment laws 13 August 2018*-
http://www.asmfnsw.org.au/DISCUSSION_PAPER_Reforms_to_sexual_harassment_laws_Final_13_August_2018.pdf

¹⁹ *Michelle Guthrie, ABC ordered to mediate over dismissal*: <https://www.abc.net.au/news/2019-02-05/michelle-guthrie-and-abc-ordered-into-mediation/10780242>

bring the dispute to a compromised conclusion. They will routinely include the following terms:

- An acknowledgement that the respondent employer does not admit liability;
- A release from further legal action by the employee complainant in favour of the respondent employer;
- A confidentiality clause (which may or may not be mutual); and/or
- A non-disparagement clause (which may or may not be mutual).

In some cases, settlement agreements also provide protections and other benefits to alleged perpetrators.

However it is worthwhile examining the public policy implications of particular clauses in settlement agreements as some may be particularly beneficial to employers and concerningly, to perpetrators, including serial perpetrators.

Whilst confidentiality clauses may well be in the interests of complainants, there is potential for overreach by employers in securing very broad terms which protect them (and the perpetrators) – for example, by prohibiting employee complainants from discussing anything to do with the complaint with anyone other than their lawyers.

Once a settlement agreement or deed of release is entered into, in the absence of evidence to the contrary, the courts will assume that there is a bargain between the parties and each is entitled to enforce the terms, including negative obligations and undertakings. What is not acknowledged is that the bargaining power of the parties in reaching the agreement is rarely equal.

By upholding non-disparagement clauses in settlement deeds, courts have provided greater protection than is allowed under the laws of defamation:

.... this is not a case where anyone seeks to restrain the publication of material simply on the basis that it is or may be defamatory. It may be - I do not know - that some of the material that Ms Harrison seeks to publish could be characterised as defamatory. But Seven's legal right to restrain publication depends not on the proposition that an injunction should go to prevent defamation but, rather, on the proposition that injunctive relief is necessary to protect its legitimate contractual interests under the negative stipulations, on Ms Harrison's part, in the second deed. That is a very different situation indeed. ²⁰

If allegations of sexual harassment are investigated and finalised by way of confidential agreements enforced by an employer, there is no way of knowing whether the employer is taking appropriate steps to protect other employees from potential harm.

Similarly, there is no way of knowing whether perpetrators, including serial perpetrators, will be prevented from continuing their illegal conduct towards others in the workplace.

3. Releases

Confidentiality clauses in settlement agreements and employment contracts are not the only issue. Settlement agreements often include a term that the complainant releases the employer from further suit or claims arising out of the circumstances of the complaint.

Whilst it is important to ensure that a settlement is final and provides certainty to the parties to the settlement, there is potential for overreach by employers who seek to obtain releases for all potential legal actions which the complainant might be otherwise entitled to take, including actions against the alleged perpetrator who may continue to be employed by the employer.

²⁰ *Seven Network (Operations) Limited v Amber Harrison* [2017] NSWSC 129 at [60]

Settlement of a sexual harassment claim made by an employee (or former employee) against an employer is essentially a resolution of a civil claim.

In order to settle such a claim the employer should not prevent the complainant from instigating or withdrawing criminal or disciplinary actions with regulators in relation to the conduct of the perpetrator.

This is of particular concern in the legal profession. Given that legal practitioners (solicitors and barristers) are expressly prohibited by law from engaging in sexual harassment, it is argued that it is against public policy for employers to seek to hinder investigations by the profession's regulator where the perpetrator is a member of the legal profession.

It is also against public policy, and may be unlawful, for employers to restrain complainants from seeking damages from the perpetrator, or victims' compensation, or involving the Police if the sexual harassment could amount to common assault, indecent assault or sexual assault.

Reporting to the Workplace Gender Equality Agency

The WGEA Employer of Choice for Gender Equality citation is highly sought after and those reporting organisations who obtain the citation are rightfully proud to display the citation.

Note the WGEA criteria for employer of Choice number 6.3:

Your organisation must have had no judgment or adverse final order made against it by a court or other tribunal relating to gender-based harassment or discrimination and sexual harassment in the last three years.

This criteria does not address the reality that most complaints of 'gender-based harassment or discrimination and sexual harassment' will be resolved without an order or judgment. The absence of court orders or judgments does not guarantee a workplace free from sexual harassment. It cannot be taken as evidence that the employer is building "a culture where gender-based harassment and discrimination, sexual harassment and bullying are not tolerated." The statistics gathered by the AHRC and other organisations,

including the WLANSW, demonstrate that incidents of sexual harassment rarely result in a judgment or order of the Court against the employer ²¹.

²¹ See above “Key Survey Results”, Question 21.

Recommendations

Law Reform

Recommendation 1 – Legal Definition

Recommendation 1.1

WLANSW suggests that the gap between the legal definition and people’s perception of the behaviors they reported could be addressed by:

- e. simplifying the definition;
- f. focusing on how the actual recipient feels in all the circumstances;
- g. expanding the definition of “*conduct of a sexual nature*” to include more modern forms of communication and expression; and
- h. adding a note to the definition section containing examples based on the behaviours identified in the 2018 National Survey.

Reforming the Legal Definition

Simplified definition

In terms of simplifying the definition, WLANSW suggests that the language of “*sexual advance*” and “*request for sexual favours*” is outdated and does not reflect common usage. When considered with the data on the most prevalent types of sexual harassment, as identified in the 2018 National Survey, it is clear that the most common types of behaviour are sexually suggestive comments or jokes, intrusive questions about your private life or physical appearance and inappropriate staring or leering.

This is consistent with the types of behaviours that the survey identified, with the most common forms of harassment identified as unwelcome comments, offensive comments and unwelcome touching.²²

The general term “unwelcome conduct of a sexual nature” would capture all of the behaviours listed.

Focusing on how the recipient felt

WLANSW also suggests that instead of the enquiry being whether a reasonable person would have anticipated the possibility that the person harassed might have felt offended, harassed or humiliated, the definition contained in section 58 of the SDA should be amended in line with the ACT provisions²³ to reflect what the other person reasonably felt.

For comparison:

SDA section 28A– *“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.”*

ACT section 58 - *“in circumstances in which the other person reasonably feels offended, humiliated or intimidated.”*

This test retains the requirement of what is reasonable in all of the circumstances, but requires the actual recipient to be the focus of the enquiry, not a removed third person.

Definition of “conduct of a sexual nature”

“*Conduct of a sexual nature*” needs to be expanded to reflect more modern ways of communication, like the use of emojis, social media sites, and other technology based platforms.

The current definition of *“includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally*

²² See above, “Key Survey Results”, question 9.

²³ *Discrimination Act 1991* (ACT) section 58 Meaning of sexual harassment

or in writing” is both too vague in terms of what is covered, and too limited in the example that it does provide. While there needs to be some room to allow Courts the ability to keep pace with the times, and the definition should not be exhaustive, more guidance should be given as to what is meant by conduct of a sexual nature, both in the section and in any guidance note or example that is set out in the Act or in any supporting material developed by the AHRC. A suggestion would be to take the most common behaviours from the AHRC 2018 Survey as a starting point, coupled with the means in which they can occur – face to face, or via technology.

The survey asked respondents how they had been harassed, and while technology was not a major method, with 16.6% stating it had been used in the harassment, the forms of that technology were varied, with responses including:²⁴

- text
- telephone
- email
- social media
- other platforms including Skype

Both the content and delivery mechanism of any conduct need to be captured by the definition in order to ensure that the widest range of behaviours are covered.

Providing practical guidance

A note or guide at the end of the definition section that listed examples of what behaviours were covered would also be helpful in illustrating what sexual harassment can look like. This could be based on the common forms of sexual harassment identified by the 2018 National Survey, and be

²⁴ See above, “Key survey results”, Question 12.

updated as technology changes. Who would have thought for example, that the use of an eggplant emoji could constitute sexual harassment?²⁵

Coverage

The SDA makes sexual harassment unlawful only in particular categories of public life. For lawyers in particular that may not cover instances of sexual harassment that occur between:

- Witnesses and lawyers;
- Lawyers and judicial officers or court staff;
- Solicitors and barristers; and
- Or between barristers;

as most of these fall outside the definition of “workplace participant” or the definition of ‘employment’.

In the survey, respondents were asked what was the position of the harasser.²⁶

While the majority of those were “workplace participants” in terms of being someone the person reported to, a significant proportion, 38.3%, listed “other”. The responses to this question revealed that the category included:

- Person in another office and also person on other side of a deal
- External counsel
- Barrister I was instructing
- A more senior barrister
- Counsel and judges

²⁵ A New Valentine’s Day Conundrum for Employers: Could Emoji Messages Amount to Harassment in the #MeToo Era?, February 12, 2018, accessed at <https://www.natlawreview.com/article/new-valentine-s-day-conundrum-employers-could-emoji-messages-amount-to-harassment>

²⁶ See above, “Key survey results”, Question 10.

- Head of chambers
- Barrister at different chambers
- Retired judge

WLANSW submits that it is imperative that all forms of sexual harassment, irrespective of the relationship between the harasser and the harassed, should be covered by the SDA.

WLANSW submits that there should be comprehensive protections against sexual harassment and it should be unlawful *per se*, and not unlawful only in the prescribed categories. In this regard, we repeat specifically the recommendation from the Senate inquiry that:

11.24 The committee recommends that the Act be amended to include a general prohibition against sex discrimination and sexual harassment in any area of public life equivalent to section 9 of the Racial Discrimination Act 1975.

Recommendation 2 – Bystander Provisions

Recommendation 2.1

WLANSW recommends that the AHRC publish a Guideline that includes measures a person must take to eliminate sexual harassment. We propose that the Guideline include bystander provisions. WLANSW also proposes that the decision maker can in her or his discretion take the Guideline into account in determining whether or not the person has taken reasonable measures to eliminate sexual harassment.

Recommendation 2.2

WLANSW supports the amendments proposed to the victimisation provisions in the *Human Rights and Anti-Discrimination Bill 2012* with the proviso that the provision should explicitly extend to persons who act as bystanders and persons who provide assistance, support and advocacy to the person making a complaint.

Bystander provisions

More than half of respondents in the survey reported that they have observed another person being sexually harassed.²⁷

Numerous past reports²⁸ have recommended the promotion of bystander responses, including 47% of the respondents in the survey agree that sexual harassment policies should require people who serve sexual harassment to report it.²⁹

Meaning of the term ‘bystander’.

²⁷ See above, “Key Survey Results”, Question 14.

²⁸ Sara Charlesworth & Paula McDonald (2011) *Sexual Harassment in Australia: Organisational prevention and responses* (Speech delivered at the Anti-Discrimination Seminar Series, Victoria Legal Aid and Victorian Equal Opportunity and Human Rights Commission, Melbourne, February 2011); Australian Human Rights Commission (2012) *Encourage, support, act! Bystander approaches to sexual harassment in the workplace* 16; Victorian Human Rights and Equal Opportunity Commission (2012) *Changing the rules: The experiences of female lawyers in Victoria 2012*: <https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/reports/item/487-changing-the-rules-the-experiences-of-female-lawyers-in-victoria>

²⁹ See above, “Key Survey results”.

This submission adopts the AHRC's term of bystander as someone who had witnessed or heard about another person being sexually harassed at their workplace. This excludes family and friends who may become involved. The 2018 AHRC Report concluded that 37 percent³⁰ of persons were considered to be bystanders because they had witnessed or heard about another person being sexually harassed at their workplace. Only one third³¹ of the bystanders took action in response. This is a significant number of persons who could potentially play a role in assisting to eliminate sexual harassment.

It is also of concern that the percentage of people prepared to take action fell from half in 2012 to only one third in 2018.³² This suggests that individuals are now less likely to act. This may be because there is a perception that they will be met with a negative response. In fact, 34 percent of people who took action said they had experienced positive feedback, about 28 percent reported no impact on them, 10 percent said that they were ostracised, victimised or ignored, while 9 percent were labelled as troublemakers³³. This highlights the need to support and protect bystanders.

The findings of the AHRC 2018 Report were that 41 percent of bystanders didn't act because they thought that another person was assisting or supporting the victim. In about 17 percent of cases people didn't act because they didn't know what to do. A similar percentage didn't act because they did not think it was their responsibility.³⁴ Out of the one third of bystanders that took action, 71 percent talked or listened to the victim and 47 percent reported the conduct to the employer.

Interestingly the data about bystanders has changed significantly between 2012 and 2018. The number of bystanders jumped from 13 percent to 37 percent between 2012 and 2018 but the percentage of bystanders that acted

³⁰ Australian Human Rights Commission (2018) *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces*.

³¹ *ibid* 96

³² *Ibid*

³³ Australian Human Rights Commission (2018) *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces*. 97

³⁴ *Ibid* 98

decreased from 51 percent to 35 percent³⁵. These results suggest that there is a better understanding of what conduct constitutes sexual harassment but that there are significant barriers for bystanders to act on their beliefs.

Powell³⁶ argues that prevention strategies such as bystander provisions, to be effective must apply to individuals, community, peer or workplace level and at societal level.

Why Bystander provisions?

The paramount object of the SDA is to eliminate as far as possible discrimination against persons on the ground of sex and discrimination involving sexual harassment in the workplace. Section 3(d) also requires the Act to promote recognition and acceptance within the community of the principle of the equality of men and women.

In effect the object of the Act is to promote recognition and respect of the principle of equality including both formal and substantive equality or put another way, gender equality and gender equity. Gender equality refers to equal treatment of women and men in laws and policies and gender equity refers to fairness and justice in the distribution of benefits and responsibilities between men and women.

Sexual harassment is conduct involving sexual hostility, that is explicitly sexual verbal and non-verbal behaviour and sexist hostility which is insulting verbal and non-verbal behaviours that are not sexual but are based on gender such as unfair and consistent criticism based on female identified traits such as being emotional, kind, co-operative, weak and indecisive for example.

In light of the known facts in 2019 it is clear that the objects of the Acts are not going to be fulfilled merely by victims making complaints of sexual

³⁵ Ibid 102

³⁶ Powell A (2007) *Preventing Violence Before it Occurs: A Framework and background paper to guide the primary prevention of violence against women in Victoria*. Melbourne, Victorian Health Promotion Foundation.

harassment at work. Placing all the obligation and responsibility on the victim to effect cultural change is ineffectual, unfair and counterproductive. The victim, in most cases a woman, suffering the effects of harassment which may often include a fear of becoming unemployed is required to incur legal costs to commence proceedings in circumstances where it is practically difficult to require bystanders to risk their employment by becoming witnesses in proceedings. It is no surprise that only a minuscule number of persons make complaints of being sexually harassed.

How best to encourage employers to adopt bystander provisions?

While it may be possible to mandate that every workplace promulgate a policy as to bystander provisions in the SDA or have a model bystander term prescribed in similar terms as the ‘model consultation term’ in s 205 of the *Fair Work Act 2009* (Cth), the AHRC could publish a guideline that sets out matters that employers are expected to have in place that will be taken into account by the decision maker in determining the claim before it. The guideline can be developed within a provision imposing a duty to eliminate discrimination, sexual harassment and victimisation along the lines of Part 3 of the *Equal Opportunity Act 2010* (Vic). In practical effect, the questions for a large employer would be: do you have a policy in regards to sexual harassment; does the policy include provisions as to bystanders, and, if not, why not?

There is no general duty imposed on employees to report the misconduct of fellow employees, except in certain circumstances when this is required under a contract of employment, either expressly or impliedly. The exception may arise by implication from the position occupied by the employee in the employer’s organisation. A person in a managerial position, for example, cannot in the usual case stand by and allow fellow employees to be involved in wrongdoing or illegal conduct and do nothing about it, without breaching the duty owed to the mutual employer. By analogy it can be said that a manager cannot stand by and allow an employee to be sexually harassed or discriminated against.

If an employer requires employees to have a positive obligation to report their own or others' misconduct, they need to ensure this is expressly included in the contract of employment or a binding policy, as such an obligation may not be implied at law. Without there being specific provisions requiring employees to report, it is unlikely that there is an obligation on an employee to report the wrongdoing of another employee. However, all employees may in certain circumstances, but leaders in particular have an obligation to report wrongdoing such as violent or illegal conduct.

The second element of bystander provisions is what it is that the bystander is expected to do. A bystander may be expected to take action, to speak out, involve others or report to prevent the behavior continuing or being repeated. Some forms of bystander provisions expect that the person to intervene in the actual incident or action or challenge the perpetrator directly either during or following the incident.

Charlesworth & McDonald³⁷ describe the 'intervention framework' as consisting of high immediacy - low involvement, high immediacy - high involvement, low immediacy - low involvement and low immediacy - high involvement. Their study found that most of the action was in the low involvement and low immediacy such as support and advice for the victim³⁸.

Despite these results, Charlesworth & McDonald conclude that encouraging people to be active bystanders in the workplace is a 'promising approach' to the prevention of sexual harassment. This is consistent with numerous past reports that have recommended the promotion of bystander provisions.³⁹

Apart from bystander provisions being positive because there continues to be persistent victimisation against persons who report complaints and a very low

³⁷ McDonald P, Charlesworth S & Graham T (2015) Action or inaction: bystander intervention in workplace sexual harassment. *The International Journal of Human Resources Management*, 27 (5-6) 548-566

³⁸ Powell A (2011) *Review of Bystander Approaches in Support of Preventing Violence Against Women*. Victoria Promotion Foundation (Vic Health) Publication P-052- V B

³⁹ Sara Charlesworth & Paula McDonald (2011) '*Sexual Harassment in Australia: Organisational prevention and responses*' (Speech delivered at the Anti-Discrimination Seminar Series, Victoria Legal Aid and Victorian Equal Opportunity and Human Rights Commission, Melbourne, February 2011); Australian Human Rights Commission (2012) *Encourage, support, act! Bystander approaches to sexual harassment in the workplace* 16; Victorian Human Rights and Equal Opportunity Commission (2012) *Changing the rules: The experiences of female lawyers in Victoria* 2012: <https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/reports/item/487-changing-the-rules-the-experiences-of-female-lawyers-in-victoria>

level of complaint making by victims, there is also research to demonstrate that bystander provisions are a more useful approach to effectively engage with men to prevent violence against women as opposed to referring to them as potential perpetrators⁴⁰. The words of Chief of the Army, Lieutenant-General David Morrison in 2013 “*The standard you walk past is the standard you accept*”⁴¹ places in stark relief the responsibility of leaders in breaking the culture of silence and normality as to the prevalence of sexual harassment in the Australian Defence Force.

Professor Michael Kimmel who has conducted extensive research as to the role of men in changing workplace culture has said:

*After decades of accepting sexual harassment as the status quo, we have to take some of the weight off women’s shoulders. It’s simply not their responsibility alone to talk about and enforce workplace equality. We must call out the sexist behaviours of other men because it’s wrong and because it undermines women’s confidence and effectiveness in the workplace.*⁴²

Although this a relatively new area of research in employment law, there is evidence, referred to above, to demonstrate, that the insertion of bystander provisions in workplace policies effectively changes workplace behaviour and is also useful in preventing sexual harassment.

Successful Implementation of bystander provisions

In order for the bystander provisions to be successful and effective there is a need to work on effecting change to individual attitudes and beliefs, workplace

⁴⁰ Dyson S & Flood M (2008) *Building Cultures of respect and non-violence. A review of literature concerning adult learning and violence prevention with men*. AFL Respect & Responsibility Program, VicHealth, Carlton, Victoria

⁴¹ <https://www.youtube.com/watch?v=QaqpoeVgr8U>

⁴² Kimmel M (2018) *Getting Men to Speak Up A primer for men who want to be allies* Harvard Business Review 30 January 2018 accessed on 15/02/19 at 11.33 am <https://hbr.org/2018/01/getting-men-to-speak-up>

norms and culture and the broader societal norms. There is also a need to build the individual's capacity to act to prevent violence against women and the intention or direction to behave or act in various ways depending on the situation.

Individual Level

Individual attitudes and norms about gender roles are critical before steps can be taken to change the attitudes as there is a need to understand the prevailing norm. Bystander provisions must be a part of a broader approach of changing workplace behavior and that prior to considering the implementation of bystander provisions there must be analysis of the existing workplace norms and structural issues that may be relevant and specific to the organisation. There must also be consultation and engagement with employees to best determine the model to be adopted. The engagement must disclose the relevant facts as to workplace attitudes and be frank about the current position of women in the workplace including the power imbalances such as the number and percentage of women in senior positions and how that has changed over time, the remuneration differentials between men and women, the percentages of women accessing parental leave and flexible work arrangements as compared to men.

Even where there is individual, workplace and societal norms supporting intervention, the individual may not act if there alternative and powerful other conflicting norms. An alternative norm may be respecting the hierarchical environment and not being critical of a person in a more senior position or the *I should mind my own business* norm in an environment where there is little transparency about workplace practices.

Considering the fact that women do not fully participate in the legal profession in so far as measures such as status and remuneration and taking into account the hierarchical and competitive nature of the profession, there would need to be a substantial stock take of the prevailing workplace norms and beliefs prior to implementing a particular bystander provision. Inserting a provision mandating employees to report conduct without their involvement, participation and education could be counterproductive in that

employees may come to resent this obligation if they do not support it, understand it or feel like it is a burden on them. In addition, it may seem disingenuous if it is not supported by the leadership of the organisation.

Workplace level

Because workplaces are hierarchical organisations where employers have to comply with laws to keep the workplace safe and free of discrimination and harassment, they are an ideal environment to challenge the norms of violence against women. Workplaces have been identified as key settings in which peer cultures and norms can be challenged⁴³. It is the capacity of an employer to create environments through leadership, education and policies and procedures that make them conducive to effect changes to attitudes and behavior.

Workplaces can adopt broad strategies which both promote widespread norms promoting bystander intervention as well as enforcing the appropriate behavior. The development of the program within the broader framework must be comprehensive, involving skilled facilitators conducting face to face skill-based training as opposed to education-based training. Training has been identified as a critical factor in preventing sexual harassment, as opposed to policies on sexual harassment which did not make any difference to the levels of sexual harassment experienced.⁴⁴

Employers are in a unique position to educate people about what constitutes discrimination and sexual harassment, model appropriate behaviors and attitudes, reward appropriate behavior and punish inappropriate behavior. Furthermore, employers benefit from reductions in harassment and discrimination in terms of increased productivity and monetary savings through reduced loss of staff.

⁴³ Powell A (2011) *Review of Bystander Approaches in Support of Preventing Violence Against Women*. Victoria Promotion Foundation (Vic Health) Publication P-052- V B

⁴⁴ International Bar Association (2018) *Bullying and Sexual Harassment Survey 2018 Preliminary results* accessed on 12/2/2019 at 12.24 <https://www.ibanet.org/LPRU/Women-business-Lawyers-Initiative-Front-page.aspx>

Workplaces also provide support for women who experience violence whether at the workplace or externally through support networks, counselling and provision for paid leave.

Peer-based bystander models involve the recruitment and training of peer ‘mentors’ who make a commitment to act as active bystanders. Leader-based bystander models involve the involvement and training of ‘leaders’ who are in senior roles who make a commitment to act as active bystanders and to educate other senior employees.

Group norms have a highly significant influence over individual norms and behavior.⁴⁵ Fundamentally, the employer must convince the employee that sexual harassment is not condoned or tolerated and that active bystander attitudes are supported and rewarded. This must occur through formal policies but more importantly, through informal workplace culture from the top of the hierarchy.

Other innovative measures include:

- Establishment of specialised confidential employment assistance telephone service. Most organisations have a service where an employee can access an “Employee Assistance Service”. These are counsellors that an employer provides as a service. A specialised sexual harassment information service can also be provided. The benefits of this approach is that the employee could rely on the disclosure as a contemporaneous record of the incident and the counsellor can provide information which is consistent across Australia. The information provided is recorded and can be readily evaluated.
- In addition, the presence of trained First Contact Officers who can receive the information on a confidential basis and act as advocates

⁴⁵ Flood M, Fergus L et al (2009) *Respectful Relationships Education: Violence prevention and respectful relationships education in Victoria secondary schools*. Melbourne, Victoria (Department of Education and early Childhood Development)

in the complaint making process if required, could be incorporated into workplace Policy.

It is also important to understand that Human Resources Managers and other professions employed to deal with sexual harassment complaints are not engaged to be advocates for employees who wish to make a complaint. Their role is to make sure the matter proceeds pursuant to the agreed policies and procedures, that there is confidentiality and procedural fairness. This is an area that causes particular concerns and distress for individuals making complaints as once the complaint is made a process commences that excludes the individual from knowing what is occurring and separates the complainant from her support group due to privacy concerns for other staff. Often the complainant is not even informed about the people interviewed or the contents of any investigation or report.

Society/Community level

Professional organisations supporting and representing persons working in the legal profession are also required to demonstrate that sexual harassment is not condoned or tolerated in the profession. The Law Council has taken steps by firstly conducting a comprehensive survey of the profession in 2012.

The Australian Solicitors' Conduct Rules and Legal Profession Uniform Conduct (Barristers') Rules state that a person must not engage in sexual harassment in the course of practice. However, none of the state and territory Bar Association and Law Society policies on sexual harassment make reference to bystanders.

The specific bystander provisions adopted by a particular entity would need to take into account the individual requirements of the company and its employees. Introducing bystander provisions without any training, education, supports or ongoing assessment and analysis is unlikely to lead to long term structural workplace change and may in fact make the situation worse.

The bystander may be educated to interrupt incidents of sexual harassment or the situations that lead to harassment, to challenge perpetrators and potential perpetrators, to provide support to potential perpetrators, to provide

support to potential and actual victims and to speak out against social norms and the inequalities supportive of sexual harassment. There is an obligation on Human Resources Managers and other professions to report conduct they consider to be unlawful regardless of whether there has been a formal complaint. The WGEA in its report noted that the use of bystander provisions is an opportunity to reduce the incidence of sexual harassment where the persons receive educational and skill-based training.⁴⁶

Other Laws as to Positive Obligations

Victorian Law

Part 3 of the *Equal Opportunity Act 2010* (Vic) requires a person to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation. Section 15(6) states:

(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.

International Comparison

WLANSW has only been able to conduct preliminary research of international laws and practices and provides the following information as a starting point for further work that needs to be conducted.

⁴⁶ Workplace Gender Equality Agency Progress Report 2014-16 (2017) Workplace Gender Equality Agency, Australian Government :27
<https://www.wgea.gov.au/sites/default/files/documents/wgea-progress-report-to-minister.pdf>

India

The *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013* provides protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and or matters connected therewith or incidental thereto.

The Act provides for a number of positive duties on employers such as:

Internal complaint committees in organisations that employ 10 or more employees. Failure to comply may result in significant pecuniary penalties, deregistration and revocation of statutory licences.

Canada

The *Labour Code 1985* at Div XV.1 247.4 requires every employer to issue a policy after consulting with staff or their representatives. The Contents of the policy must contain at least the following:

- (a) a definition of sexual harassment that is substantially the same as the definition in section 247.1;
- (b) a statement to the effect that every employee is entitled to employment free of sexual harassment;
- (c) a statement to the effect that the employer will make every reasonable effort to ensure that no employee is subjected to sexual harassment;
- (d) a statement to the effect that the employer will take such disciplinary measures as the employer deems appropriate against any person under the employer's direction who subjects any employee to sexual harassment;
- (e) a statement explaining how complaints of sexual harassment may be brought to the attention of the employer;

(f) a statement to the effect that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purposes of investigating the complaint or taking disciplinary measures in relation thereto; and

(g) a statement informing employees of the discriminatory practices provisions of the Canadian Human Rights Act that pertain to rights of persons to seek redress under that Act in respect of sexual harassment.

United Kingdom

"Equality and Human Rights Commission (EHRC) in its Report Sexual harassment in the workplace: Fifth Report of Session 2017–19⁴⁷ states "*In the absence of comprehensive action by employers and of a stringent regulatory regime, the burden of tackling sexual harassment at work rests with individual workers. The EHRC's proposed solution is that a mandatory duty should be placed on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace.*"

The Report identifies that colleagues and others — ‘bystanders’ — see the behavior but do not step in to support the victim or challenge the perpetrator. A particular issue for both victims and bystanders can be knowing how to challenge unwanted or offensive behaviors in the moment, particularly if they fear being victimised or left unsupported as a result.

Netherlands

The *Arbeidsomstandighedenwet Working Conditions Act of 18 March 1999*, which deals with health and safety, contains provisions to improve working conditions by eliminating employment-related psychosocial pressure: sexual intimidation, aggression and violence, aggravation and pressure of work in

⁴⁷ <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf>
13 & 18

the employment situation that cause stress. At Ch 2, Art 3 there is a requirement that “The employer shall operate a policy aimed at preventing employment-related psychosocial pressure, or limiting it if prevention is not possible, as part of the general working conditions policy.”

Recommendation 3 – Confidentiality and Reporting

Recommendation 3.1

WLANSW suggests that the reforms remove certain barriers created by confidentiality clauses to enhance greater transparency and reporting of sexual harassment in the workplace. Reforms should be aimed at:

- a. preventing victims being silenced for the benefit of employers and perpetrators rather than as part of a respectful resolution of the victims' complaints;
- b. raising awareness of sexual harassment in the legal workplace by collecting de-identified data about complaints of sexual harassment, the investigations of those complaints and the outcomes for complainants and perpetrators.

Recommendation 3.2

WLANSW makes the following recommendations as to reporting:

- That criteria 6.3 for the WGEA Employer of Choice for Gender Equality citation be expanded to require de-identified reporting of the incidence of sexual harassment complaints and the outcomes of investigations undertaken in response to such complaints.
- Noting that employers are vicariously liable for their employees/perpetrators employers should not be allowed to negotiate settlement deeds which benefit or protect perpetrators in those complaints which have been investigated and proven on the balance of probabilities. To do so protects the perpetrator.
- Where the conduct alleged against the perpetrator is established on the balance of probabilities it should be illegal for employers or perpetrators to negotiate terms in employment contracts or settlement agreements which prevent complainants from contacting the Police if the alleged conduct is a criminal offence or, in the case of a legal practitioner, preventing the employee from reporting the conduct to the relevant regulator or disciplinary body.
- that there is a mandatory reporting scheme operated by the NSW Law Society and NSW Bar Association which requires principals of legal practices and barristers to provide to the relevant body de-identified notification of complaints of sexual harassment against legal practitioners for the purpose of data collection and reporting.

Interaction with other agencies like the WGEA

WLANSW submits that changes to the SDA will not of itself be sufficient to drive the cultural change necessary to eliminate all forms of sexual harassment. Even amongst lawyers, who arguably know their rights, the rate of complaint was low. The survey⁴⁸ showed that while prevalence of

⁴⁸ See above, “Key survey results”, Question 15.

sexual harassment in the legal profession was high, less than 19% of respondents made a complaint of sexual harassment to their employer.

The reason for this was mainly for fear of impact on their careers. Other reasons offered in the survey included: ⁴⁹

- Any objection or complaint would not be taken seriously and if an objection or complaint was raised I would have been vilified;
- I didn't think anything would change;
- In some instances fear of impact and encouragement from others (including HR teams) not to rock the boat; and
- I didn't think that either employer would understand the complaint or change their behavior.

In terms of reporting to an external body, the response rates were even lower, with less than 5% reporting the complaint to an external body⁵⁰.

WLANSW submits that a more proactive obligation needs to be placed on employers to ensure harassment free workplaces, instead of relying on individuals who have experienced sexual harassment to raise the issue through individual complaints.

One of the ways that could be done in with the WGEA reporting regime.

WLANSW has previously suggested ways the WGEA can improve the reporting on sexual harassment within its reporting framework to drive a more proactive culture of prevention, and also to recognise those who are Employers of Choice.

Although the 2019 – 2020 Employer of Choice for Gender Equality citation process has been updated, WLANSW notes that it is still a very low bar for

⁴⁹ See above, “Key survey results”, Question 16.

⁵⁰ See above, “Key survey results”, Question 19.

being an employer of choice in terms of action on sexual harassment, namely⁵¹:

- *Your organisation must have a policy on the prevention of gender-based harassment and discrimination, sexual harassment and bullying, with a formal grievance process in place.*
- *All employees must have completed training on the prevention of gender-based harassment and discrimination, sexual harassment and bullying at induction and at least every two years.*
- *Your organisation must have had no judgment or adverse final order made against it by a court or other tribunal relating to gender-based harassment or discrimination and sexual harassment in the last three years.*

The WLANSW recommendations were these:

6.1 Policy and formal grievance procedure in place	With regular de-identified reporting to the Board of incidents that arise under the policy and actions taken in response (similar to WHS reporting)
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⁵¹ EOCGE 2019 – 210 Guide to Citation, accessed at <https://www.wgea.gov.au/sites/default/files/documents/EOCGE-2019-20-Guide-to-Citation.pdf>

<p>6.3 – No judgement or adverse final order made against the organisation by a court or tribunal in relation to sexual harassment, bullying or discrimination in the last three years.</p>	<p>This is too narrow given how few matters will ever proceed to a final court or tribunal hearing.</p> <p>As well as this requirement, we recommend that organisations be asked to report on the number of sexual harassment complaints made (both internally and to any external agency) and what steps were taken to resolve them. Few or no complaints might actually suggest a poor culture of reporting, and while there should be no metric attached to this, over time you would expect to see a possible rise and then decrease in the number of complaints.</p> <p>The WGEA would also get a sense from all of the applicants if there was any particular industry pattern emerging amongst applicants.</p>
<p>6.1 Policy and formal grievance procedure in place</p>	<p>With regular de-identified reporting to the Board of incidents that arise under the policy and actions taken in response (similar to WHS reporting)</p>

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WLANSW recommends that the AHRC work with the WGEA to improve the requirements for qualification as an Employer of Choice of Gender Equality, and to improve disclosure and reporting on sexual harassment for all reporting organisations.


Recommendation 4 – AHRC

Recommendation 4.1

In terms of other procedural issues, WLANSW recommends:

- g. AHRC should have powers similar to those of the FWO as to education, investigation and commencement of enforcement proceedings;
- h. The time limit be increased to 6 years from the last alleged offence;
- i. the penalty system needs to demonstrate an appropriate assessment of the seriousness of the offending. Like other employment laws, discrimination laws need to provide a civil penalty framework to deter unlawful conduct. The penalty framework should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations;
- j. there should be an option for the applicant to make a complaint to a Court directly. There should also be an opportunity for an applicant to seek an interim injunction prior to a court application pending the determination of the proceedings, with the usual undertakings as proposed in the *Human Rights and Anti-Discrimination Bill 2012*.

Appendix A – Member Survey 2018

 <p>Sexual Harassment in the Legal Profession</p> <p>The data collected from this survey is confidential, all answers will be shared in an aggregated way to avoid identification of participants.</p> <p>The following questions will ask whether you have experienced one or more types of sexual harassment. Such conduct can occur in person, through written communications, via telephone or through social media.</p> <p>Australian Human Rights Commission, The Legal Definition of Sexual Harassment: Sexual harassment is an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances.</p> <p>1. How long have you worked in the legal profession?</p> <table><tr><td><input type="radio"/> >5 Years</td><td><input type="radio"/> 26-30 Years</td></tr><tr><td><input type="radio"/> 5-10 Years</td><td><input type="radio"/> 31-35 Years</td></tr><tr><td><input type="radio"/> 11-15 Years</td><td><input type="radio"/> 36-40 Years</td></tr><tr><td><input type="radio"/> 16-20 Years</td><td><input type="radio"/> 40+ Years</td></tr><tr><td><input type="radio"/> 21-25 Years</td><td></td></tr></table> <p>2. What gender do you identify as?</p> <table><tr><td><input type="radio"/> Female</td><td><input type="radio"/> Prefer Not To Answer</td></tr><tr><td><input type="radio"/> Male</td><td></td></tr><tr><td><input type="radio"/> Other (please specify)</td><td></td></tr></table> <div style="border: 1px solid black; height: 20px; width: 400px; margin-top: 5px;"></div> <p>3. Are you from a Non English speaking background?</p> <table><tr><td><input type="radio"/> Yes</td></tr><tr><td><input type="radio"/> No</td></tr><tr><td><input type="radio"/> Prefer not to say</td></tr></table> <p>4. Are you Aboriginal or Torres Strait Islander?</p> <table><tr><td><input type="radio"/> Yes</td></tr><tr><td><input type="radio"/> No</td></tr><tr><td><input type="radio"/> Prefer not to say</td></tr></table>	<input type="radio"/> >5 Years	<input type="radio"/> 26-30 Years	<input type="radio"/> 5-10 Years	<input type="radio"/> 31-35 Years	<input type="radio"/> 11-15 Years	<input type="radio"/> 36-40 Years	<input type="radio"/> 16-20 Years	<input type="radio"/> 40+ Years	<input type="radio"/> 21-25 Years		<input type="radio"/> Female	<input type="radio"/> Prefer Not To Answer	<input type="radio"/> Male		<input type="radio"/> Other (please specify)		<input type="radio"/> Yes	<input type="radio"/> No	<input type="radio"/> Prefer not to say	<input type="radio"/> Yes	<input type="radio"/> No	<input type="radio"/> Prefer not to say
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<input type="radio"/> No																						
<input type="radio"/> Prefer not to say																						
<input type="radio"/> Yes																						
<input type="radio"/> No																						
<input type="radio"/> Prefer not to say																						

5. How old are you?

- >20 Years Old
- 20-30 Years Old
- 31-40 Years Old
- 41-50 Years Old
- 51-60 Years Old
- 60+ Years Old

6. Which sector do you work in?

- Private Practice
- Public
- Government
- Academia
- Other (please specify)
- Barister
- Judiciary
- In-House
- Student

7. Does your workplace have a policy concerning sexual harassment?

- Yes
- No
- I don't know

* 8. Have you ever been sexually harassed at work while engaged in the legal profession?

- Yes
- No

9. What was the nature of the conduct? (tick relevant boxes)

- Unwelcome comments
- Unwelcome touching
- Offensive comments
- Repeated advances
- Other (please specify)

10. What was the position of the harasser?

- Someone who reports to me
- Someone at my level
- Someone I report to
- Client
- Other (please specify)

11. Was technology involved in the sexual harassment experience?

- Yes
- No

12. If so, what means of technology was utilised? tick relevant boxes

Text

Email

Phone

Social Media

Other (please specify)

13. Where did the harassment occur? tick relevant boxes

Your workplace

Social event

At harasser's workplace

Client site

Other (please specify)

14. Have you observed another person being sexually harassed while engaged in the legal profession?

Yes

No

15. Have you ever made a complaint of sexual harassment to your employer?

Yes

No

16. If no, why did you choose not to complain?

Fear of impact on career

Didn't think it was necessary

Other (please specify)

17. If you did make a complaint, what steps did your employer take to investigate your complaint?

18. Did you consider that the approach adopted by your employer and outcome were appropriate?

Yes

No

Please provide reasons (if any)

3

19. Have you ever made a complaint of sexual harassment to an external body?

- Yes
- No

20. What steps did that body take to investigate your complaint?

- I don't know
- Harasser warned
- No findings
- Other (please specify)

21. What was the outcome of your complaint?

- I don't know
- Harasser warned
- No findings
- Other (please specify)

22. Did the complaint have any impact on your employment?

- Positive impact
- No impact
- Negative impact
- I left employment as a result
- Other (please specify)

23. Did you consider that the approach adopted and outcome were appropriate?

- Yes
- No

please provide reasons (if any)

24. Would you make a complaint to your employer if you were sexually harassed?

- Yes
- Maybe
- No

Please provide reasons (if any)

25. Do you know who is responsible for managing complaints under the sexual harassment policy or policies at your workplace?

Yes

No

26. If yes, are you confident that they would deal with concerns or complaints in a thorough, confidential and impartial manner?

Yes

No

Please provide reasons (if any)

27. How would you assess the policy/procedure in your workplace?

Excellent

Insufficient

Good

Negligible

Sufficient

Unsure

28. What steps do you think your employer should take to prevent sexual harassment occurring?

29. Do you agree that sexual harassment policies should require people who observe sexual harassment (by-stander provisions) to report it?

Yes

Maybe

No

Please provide reasons (if any)

30. What changes to the law could be made to minimise sexual harassment occurring at workplaces?

31. What law reform (if any) would you like to see regarding sexual harassment?

32. Are we able to contact you regarding this survey?

Name:

Email:

Contact Number: